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**THE NO VESTING OF PROPERTY RIGHTS  
WHERE MUNICIPAL DISCRETION REMAINS**

**JANUARY/FEBRUARY 2005**



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# **THE NO VESTING OF PROPERTY RIGHTS WHERE MUNICIPAL DISCRETION REMAINS**

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## The No Vesting of Property Rights Where Municipal Discretion Remains

Patricia E. Salkin and Andrew Poplinger<sup>1</sup>

### I. Introduction

Applicants who believe they have been wrongfully denied development permits may try to seek relief under 42 U.S.C. 1983, which provides a vehicle for recovering monetary damages where a plaintiff can demonstrate that a constitutionally protected right has been violated. In many instances plaintiffs will proceed on the theory of a violation of substantive due process in the form of an unlawful abrogation of a property interest in a development permit. To successfully prove this claim, plaintiffs must generally show that (1) they had a vested property interest in the development permit and (2) that they were denied the permit unlawfully.<sup>2</sup> It was the first prong of this analysis that was the subject of a recent ruling by the New York Court of Appeals.

In *Bower Associates v. Town of Pleasant Valley*,<sup>3</sup> the Court had an opportunity to revisit the eight-year-old case *Town of Orangetown v. Magee*.<sup>4</sup> The Court distinguished the two opinions, finding that in *Magee* a property interest in a development permit existed where the issuing authority had essentially removed their own discretion through assurances that future permits would be issued, and then not only denied the issuance of requested permits, but changed the local zoning laws to support their decision. In *Bower Associates* the Court found no property interest since the decision to grant or deny the requested permit was still within the discretion of the board. Through an examination of these cases, along with a review of opinions from the Second Circuit Court of Appeals, this article explores the narrow set of circumstances under which practitioners might demonstrate a vested property interest in land use permits for a successful Section 1983

claim in New York; and how the requirements for a Section 1983 claim differs from the requirements in an Article 78 proceeding.<sup>5</sup>

## II. Vested Property Interests In Land Use Permits Under New York Law

Although New York has no state statute on the vesting of a property interest in land development permits, determining the point in time when property interests vest in the discretionary land use approval process is a critical component to a successful Section 1983 claim.<sup>6</sup> To establish a Section 1983 claim a plaintiff must first demonstrate that they had a vested property interest, and second, that the government, without legal justification, interfered with the plaintiff's enjoyment of that property interest.<sup>7</sup> To successfully claim a vested property interest under Section 1983 a plaintiff must demonstrate "more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to state or local law they had a legitimate claim of entitlement to continue construction."<sup>8</sup> It is critical then to determine what constitutes a legitimate claim of entitlement. This is where the *Bower Associates* and *Magee* decisions, read together, provide some guidance. Key to their holding in *Bower Associates* is that the Court makes it clear that the establishment of a vested property interest for purposes of an Article 78 claim does not amount to the establishment of a vested property interest for a claim brought pursuant to Section 1983.<sup>9</sup>

### A. Bower Associates v. Town of Pleasant Valley

In *Bower Associates*, a housing developer sought approval of a subdivision that included land physically located in two municipalities.<sup>10</sup> The bulk of the land upon which the subdivision was proposed to be built was located in the Town of Poughkeepsie, but three acres of the subdivision and an access road were located in the neighboring Town of Pleasant Valley.<sup>11</sup> The Poughkeepsie planning board conditioned its approval upon approval by Pleasant Valley's planning board, with regard to the access road and three acres.<sup>12</sup>

Bower's application to Pleasant Valley was subsequently denied, resulting in Poughkeepsie's denial of Bower's application due to the failure to satisfy the condition of Pleasant Valley's approval.<sup>13</sup> Pleasant Valley's proffered reason for their denial was a concern about the environmental impact of the development of the subdivision.<sup>14</sup>

Bower brought an initial Article 78 proceeding, alleging that the Town of Pleasant Valley acted in an arbitrary and capricious manner in denying the issuance of the permits, and seeking a court order directing the issuance of the permit. The Supreme Court (Dutchess County) ordered the Town of Pleasant Valley to issue the permit finding that the cited environmental concerns were not in fact the reason for the denial of the permit.<sup>15</sup> Rather, the court found that the permit was denied because of community pressure stemming from the lack of tax benefits that the Town of Pleasant Valley would receive from the project.<sup>16</sup> The Appellate Division agreed, noting that Bower "met the conditions needed for approval of its subdivision application..."<sup>17</sup> Subsequent to their Successful Article 78 claim, Bower Associates filed a claim seeking pecuniary relief under Section 1983. This time, the Appellate Division, Second Department, parted with the trial court, finding no cognizable property interest both because the Board had discretion in granting the subdivision approval and because the Town had not violated any rights protected by the U.S. Constitution.<sup>18</sup>

The Court of Appeals joined their decision in *Bower Associates* with *Home Depot v. Dunn*.<sup>19</sup> In *Home Depot*, although the home improvement chain obtained the necessary permits to open a store in the Village of Port Chester, the City of Rye intervened as an interested agency during environmental review, and requested certain procedures be undertaken to mitigate adverse effects on traffic conditions.<sup>20</sup> Consequently, Port Chester made satisfaction of Rye's demand, that Home Depot widen a local road, a condition upon the issuance of the permit.<sup>21</sup> Since the road was a County road, approval from the County to make the requested improvements required the City of Rye's approval, even without the condition Port

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Chester placed on issuance of the permit.<sup>22</sup> After extensive negotiations between Home Depot and Rye, they apparently reached a settlement agreement but then amidst community pressure, Rye withdrew from the settlement and refused to approve the widening of the road, which consequently lead to the denial of the conditional permit issued by Port Chester.<sup>23</sup> Home Depot then filed Article 78 and Section 1983 claims against the City of Rye.<sup>24</sup> The Appellate Division upheld the trial court's holding, regarding the Article 78 proceeding, finding that the decision of Rye's planning board was arbitrary and capricious. However, the appellate court reversed the trial court's granting of Home Depot's motion for summary judgment award on the Section 1983 claim, and dismissed the claim on the grounds that Home Depot failed to raise a triable issue of fact.<sup>25</sup>

The question before the Court of Appeals in both matters was whether either Bower or Home Depot was entitled to Section 1983 relief as result of arbitrary and capricious denial of their respective permit applications. In holding that neither plaintiff could sustain a Section 1983 challenge, the Court of Appeals determined that neither complainant had a cognizable property interest in the requested approvals since the issuing authority in both cases still retained discretion regarding the ultimate issuance of the permits.<sup>26</sup> The argument in *Bower Associates* focused on the appellate court's finding that Bower Associates had met all the necessary requirements for approval of the permit application,<sup>27</sup> that the issuing authority had acted outside its discretion, and that these facts were demonstrative of their vested interest in the permits. In short, because their application was in compliance with the requirements of the relevant law and they were granted a favorable ruling in a related litigation, Bower Associates argued that approval in the related litigation gave them a vested property interest.

The Court of Appeals distinguished the Article 78 proceeding from the present Section 1983 claim, emphasizing that the purpose of a Section 1983 claim is not to provide an avenue of appeal from municipal action, and that therefore establishment of a vested property interest in an Article 78 proceeding does not establish a property interest for Section 1983 purposes.<sup>28</sup> The Court stated that a municipal reservation of discretion generally precludes the vesting of a property interest.<sup>29</sup> While it was noted that the "existence of discretion in a municipal actor does not alone defeat the existence of a property interest in a permit applicant...",<sup>30</sup> the Court provided little guidance by way of an explanation of when the reservation of

discretionary authority may be defeated en route to establishing a property interest. Rather, the Court comments that the "discretion must be so narrowly circumscribed that approval is virtually assured."<sup>31</sup> Elaborating on this point, the Court rejected the notion of an objective standard, holding that evidence that an objective third party would find that the plaintiff had a clear claim of entitlement is not enough to establish a property interest in a development permit.<sup>32</sup> The Court's latest ruling suggests that it is exceedingly difficult for property owners to demonstrate a vested property interest for purposes of Section 1983 when a land use application is denied.

### III. Reconciling *Bower* and *Orangetown v. Magee*

In both *Magee* and *Bower Associates*, the plaintiffs were successful in their claims for injunctive relief under Article 78.<sup>33</sup> To demonstrate a vested property interest under an Article 78 proceeding, a plaintiff must show first, that a land use permit was legally issued, and second, that substantial expenditures were incurred in the course of committing the land to the use authorized by the permit.<sup>34</sup> The key to the first prong is a demonstration of the legality of the issuance. A vested property interest cannot rest on the issuance of a permit issued without the color of law.<sup>35</sup> The second question is one of fact, and so long as there is support in the record for a factual determination of the issue, it must be upheld.<sup>36</sup>

The cases differ in that the plaintiffs in *Magee* were successful in their Section 1983 claim. *Magee* involved an application for a permit to construct an industrial building estimated to cost about three million dollars.<sup>37</sup> The developer, hereinafter Bradley,<sup>38</sup> provided specifications to the planning board for the development of their thirty four acre plat, including specifications for the building to be constructed on the plat.<sup>39</sup> Subsequently, the building inspector issued a permit, but it was restricted to "land clearings, footings and foundations."<sup>40</sup> However, the planning board also assured Bradley that permits required in the future would be issued if the specifications for the building remained the same.<sup>41</sup> Bradley complied with numerous additional requests thereafter, including an arrangement to use a railroad crossing as an alternative route to the construction site, which cost an additional \$250,000, and the construction of sewer and pipe lines to run under the railroad crossing to serve the site, in excess of \$100,000.<sup>42</sup> Following completion of these projects, and amidst complaints from members of the community, a building permit extension was issued for further construction.<sup>43</sup>

Then, following a series of town meetings, to which Bradley was not invited, the Town issued a criminal summons for the violation of a stop work order that was apparently never issued prior to the criminal summons for its violation.<sup>44</sup> Bradley then filed a counterclaim, seeking injunctive relief under CPLR Article 78, and seeking pecuniary damages under 42 USC Section 1983.<sup>45</sup>

The Court of Appeals' decision to grant relief under Section 1983 in *Magee* was primarily based on the local board's removal of their own discretion. Although Bradley was still required to apply for the permits not contemporaneously issued with those already obtained, the board had given them pre-approval, which the Court found to have "engendered a clear expectation of continued enjoyment."<sup>46</sup> In *Bower Associates*, however, the board never relinquished or suggested that they had relinquished their discretionary authority. The fact that that discretion remained is what defeated the Section 1983 claim.

In *Bower Associates*, the Court of Appeals relied heavily on the holdings of the Second Circuit Court of Appeals in determining that no property interest can vest under Section 1983 if the issuing authority maintains any degree of discretion regarding the issuance of a permit.<sup>47</sup> The Court recognized that in limited circumstances a plaintiff might succeed on a Section 1983 claim, notwithstanding the issuing authority's reservation of discretion. However, this is limited to instances in which the issuing authority has "engendered a clear expectation of continued enjoyment."<sup>48</sup> This engenderment is established when the claimant "unquestionably would have received the limited future authorizations necessary to complete the project...."<sup>49</sup>

If both Article 78 and Section 1983 require the establishment of a property interest that has vested under state law, how are the different standards imposed by each claim justified? One reason why article 78 success is not tantamount to Section 1983 claim may be that the former is intended to provide relief from arbitrary and capricious government action, while the latter is intended to protect the rights of the individual. Although this difference may seem semantic, it is this distinction that leads to different analyses under each claim. The policy behind an Article 78 claim is to discourage, and when necessary, remedy the harmful effects of illegitimate governmental actions.<sup>50</sup> The policy behind a Section 1983 claim is to compensate individuals for their losses.<sup>51</sup> Accordingly, one explanation may be that the former is focused more heavily on the arbitrary actions of government than the compensatory interests of the claimant. Conversely,

the latter is generally focused more on the claimant, and thus places a greater burden on the claimant to demonstrate a cognizable interest.

Another justification for the different standards may be an attempt by the Court to avoid the potentially devastating financial implications for municipalities.<sup>52</sup> As was demonstrated by the damages prayed for in *Bower Associates*, a liberal standard in Section 1983 claims would expose municipalities to great liabilities, many times because of the imprudent conduct of local elected officials with little or no knowledge of the magnitude of the consequences of their actions. Whichever the reason, this ruling makes clear that a successful Article 78 proceeding will not automatically trigger a successful Section 1983 action.<sup>53</sup>

As discussed below, the Court of Appeals' decision in *Bower Associates* is consistent with numerous Second Circuit Court of Appeals decisions that routinely deny relief on Section 1983 claims in land use cases on grounds that no vested property interest can exist when discretion remains with the permitting authority. Similarly, this can be reconciled with *Magee* because the Court's holding was dependant upon the action of the issuing authority itself, which has been the dispositive factor in many of the Second Circuit decisions that have granted relief.

#### IV. Vested Property Interests In Development Permits In The Second Circuit

With respect to land use matters, the Second Circuit has set forth a strict standard for recovery under Section 1983. The rigidity of this standard is likely an outgrowth of the Second Circuit's concern that developers will turn to the federal courts to serve as an avenue of review of municipal action.<sup>54</sup> In particular, the Second Circuit has made it clear that the standard for Section 1983 is higher than the standard under Article 78, finding that the first prong of the inquiry for determinations with respect to Section 1983 relief, requiring a demonstration of legitimate claim of entitlement, should be applied "with considerable rigor."<sup>55</sup> Specifically, what is required is a "certainty or very strong likelihood" that approval of an application would have been granted.<sup>56</sup> When any discretion is left with the issuing authority the Second Circuit has been reluctant to find a vested property interest, thus defeating Section 1983 claims based on permit denials and revocations. The courts' reasoning is that one cannot have a legitimate claim of entitlement when another has the discretion to deny that claim.<sup>57</sup>

The Second Circuit's focus on discretion and the nature of the property interest, rather than the egregious conduct of the government agency or actor handing down the decision is based upon the United States Supreme Court's decision in *Board of Regents v. Roth*.<sup>58</sup> It has been held that any unconstitutional action taken by the government agency or actor is irrelevant to a constitutional inquiry if there is no vested property interest to be protected against such action.<sup>59</sup> In *Roth*, the Court first set forth the legitimate claim of entitlement standard and required that such a claim exist before any relief could be granted for unconstitutional government action abrogating an interest.<sup>60</sup> Although the issue in *Roth* was whether a property interest existed in continued employment, the Second Circuit has found that the standard is applicable to all property interests under the Fifth and Fourteenth amendments.<sup>61</sup>

This standard has been dogmatically adhered to throughout the Second Circuit, which has led to some seemingly harsh results. For example, in *RRI Realty Corp. v. Incorporated Village of South Hampton*, the court denied the claimant Section 1983 relief, notwithstanding the fact that the applicable statute required a permit to be issued upon the expiration of a sixty day period, within which the local board was required to take action.<sup>62</sup> The court concluded that the existence of discretion at any point in time throughout the application process would defeat a claim because it precluded the vesting of a property interest in that permit.<sup>63</sup>

The one exception is where the discretion is "so narrowly circumscribed"<sup>64</sup> that the claimant can have a legitimate claim of entitlement because the discretion maintained by the reviewing authority does not apply to their permit application. This was the case in *Sullivan v. Town of Salem*.<sup>65</sup> There the relevant municipal code only provided discretion to the planning board in the case of an application that either omitted required information or did not meet the specifications requirements provided for in the code.<sup>66</sup> Therefore, when all these requirements were met the municipality's discretion was never invoked, and the court accordingly found that the plaintiff's property interest had vested.<sup>67</sup>

## V. Conclusion

For the applicant seeking compensation for the wrongful denial of a permit, there are few options. After *Bower Associates*, the Court of Appeals jurisprudence is clearly in line with the Second Circuit, making claims for compensation for wrongful denial of land use permits seemingly doomed from commencement. The Second Circuit and the

Court of Appeals have made it clear that any discretion in the hands of an issuing authority will defeat a Section 1983 claim. The only exception to this rule appears to be when the affirmative acts of the issuing authority limit that discretionary power, as in *Magee*, or where the relevant statute or municipal code renders municipal discretion inapplicable to the case at bar, as in *Sullivan*.

## NOTES

1. Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. Andrew Poplinger is a student at Albany Law School, Class of 2006 and a research assistant at the Government Law Center.
2. *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617 (2004).
3. *Id.*
4. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).
5. In the case of the denial of land use permits Article 78 proceedings are generally brought under N.Y.C.P.L.R. § 7803, which provides for relief from arbitrary and capricious actions by government authorities by giving courts the power to enjoin such action and order the issuance of the requested permit.
6. For a discussion of state statutes that codify the vesting of rights see Delaney & Vaia, Recognizing Vested development Rights And Protected Property In Fifth Amendment and Due Process And Taking Claims, SJ052 ALI-ABA 753 (2004).
7. *Bower Associates*, 2 N.Y.3d 617 citing *Magee*, 88 N.Y.2d 41; see also 42 U.S.C. § 1983
8. *Bower Associates*, 2 N.Y.3d at 627 quoting *Magee*, N.Y.2d at 52.
9. *Id.* (finding that "even an arbitrary denial redressable by an article 78 or other state law proceeding – is not tantamount to a constitutional violation under 42 U.S.C. § 1983...")
10. *Bower Associates v. Town of Pleasant Valley*, 304 A.D.2d 259 (2d Dep't 2003).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Bower Associates*, 2 N.Y.3d 617.
17. *Bower Associates v. Town of Pleasant Valley*, 289 A.D.2d 575, 735 N.Y.S.2d 806 (2d Dept. 2001).
18. *Bower Associates*, 2 N.Y.3d 617 citing 304 A.D.2d 259, 761 N.Y.S.2d 64 (2d Dept. 2003).
19. *Bower Associates*, 2 N.Y.3d 617.
20. *Id.*
21. *City of Rye v. Korff*, 249 A.D.2d 470 (2d Dep't 1998)
22. *Bower Associates*, 2 N.Y.3d 617.
23. *Id.*
24. *Id.*
25. *Home Depot v. Dunn*, 259 A.D.2d 547 (2d Dep't 1999) (the appellate court also rested their decision upon a determination that the city of Rye was protected by a qualified immunity. The court of appeals never addressed this issue because their affirmation of the appellate courts finding of a failure to raise a triable issue of fact rendered the immunity determination a moot point.)
26. *Id.*
27. *Id.*
28. *Bower Associates*, 2 N.Y.3d 617.

29. *Id.*
30. *Bower Associates*, 2 N.Y.3d at 629.
31. *Id.* citing *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999).
32. *Bower Associates*, 2 N.Y.3d at 628. (making it clear that a high probability of approval, or a strong argument for approval is not enough without some action on the part of the municipality that comports with the likelihood of approval.)
33. The specific section is N.Y.C.P.L.R. § 7803. In *Bower Associates* the article 78 rulings of the lower courts were not appealed.
34. *Magee*, 88 N.Y.2d 41.
35. *Id.*
36. *Id.*
37. *Magee*, 88 N.Y.2d 41.
38. This is how the defendants were referred to in the initial Supreme Court cases. The Section 1983 and article 78 proceedings were brought on counterclaim, explaining the developer's status as defendants. *Magee v. Town of Orangetown*, 156 Misc. 2d 881 (Sup. Ct. Rockland Co. 1992).
39. *Magee*, 88 N.Y.2d 41
40. *Town of Orangetown v. Magee*, 156 Misc. 2d 881. It should be noted that at the time the application was filed there was no requirement to submit anything to the town planning board pursuant to the building regulations in effect at the time of the application.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 52.
47. *Bower Associates*, 2 N.Y.3d at citing *Villager Pond, Inc. v. Town of Darien*, 170 F.3d 258, 263 (2d Cir. 1995).
48. *Bower Associates*, 2 N.Y.3d at 628, citing *Magee*, 88 N.Y.2d at 52-53.
49. *Id.*
50. see, CPLR 7308, C7308:1 ("the purpose of Article 78 was to achieve procedural, not substantive, reform in the law of prerogative writs.")
51. 42 U.S.C. § 1983; see also 1 Cook, J.B. & Sobrieski, Jr., J.C., *Civil Rights Actions* § 1.27 (documenting the legislative history of Section 1983 and its focus on protecting the rights of individuals.)
52. see, Siegel, *Get a Federal Civil Rights Claim for Money Damages Against a Municipality Just by Defeating it in an Article 78 Proceeding? Not in This World!*, No. 536 *New York State Law Digest*, August 2004 (noting the extent of the potential financial liability for municipalities if an Article 78 victory entitled a claimant to damages under Section 1983). See also, Rice, T., *Zoning and Land Use*, 47 *Syracuse L. Rev.* 883, 911 (1997).
53. See, Henry H. Hocherman, "Through the Looking Glass: *Bower Associates v. Town of Pleasant Valley and Home Depot U.S.A., Inc. v. Dunn*," 18 *Municipal Lawyer* No. 4 at 14 (Fall 2004). The author asserts, "It may be argued, however, that in seeking to protect municipalities under those circumstances, and in using these cases as a vehicle, the Court established a standard which few plaintiffs will ever be able to meet." *Id.* at 18. The author further comments, "While the Court of Appeals was clearly correct in seeking to protect the public purse in a manner that prevents every successful Article 78 petitioner from collecting money damages as well, the delicate balance between protecting the environment and stated municipal values on the one hand, and protecting property rights on the other, is not served when the only redress to an applicant whose land-use permit has been denied is an Article 78 proceeding..." *Id.*
54. *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986) ("federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations by the circuit's many local legislative and administrative agencies.")
55. *RRI Realty Corp. v. Incorporated Village of South Hampton*, 870 F.2d 911 (2d Cir. 1989).
56. *Harlen Assoc. v. Incorporated Village of Minneola*, 273 F.3d 494, 504 (2d Cir. 2001). But see, See, Henry H. Hocherman, "Through the Looking Glass: *Bower Associates v. Town of Pleasant Valley and Home Depot U.S.A., Inc. v. Dunn*," 18 *Municipal Lawyer* No. 4 at 14 (Fall 2004) where the author argues that, "There is a significant difference between *Harlen*, and the underlying cases on which it relies, and the circumstances in *Bower/Home Dept.* In *Bower and Home Depot* an independent court had already determined that the denial of the application in question was in fact, based solely upon grounds which as a matter of law may not control. Those determinations had been upheld on appeal. The Court was not being asked (as was the Court in *Harlen*) to review a board decision. That had already been done."
57. *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).
58. *Id.* citing *Board of Regents v. Roth*, 408 U.S. 564 (1972).
59. *RRI Realty Corp.*, 870 F.2d 911; *Yale Auto Parts, Inc.*, 758 F.2d 54.
60. *Roth*, 408 U.S. 564.
61. See, *RRI Realty Corp.*, 870 F.2d 911; *Yale Auto Parts, Inc.*, 758 F.2d 54.
62. *RRI Realty Corp.*, 870 F.2d 911.
63. *Id.*
64. *Bower Associates*, 2 N.Y.3d at 229, (although the language itself is from a New York Court of Appeals decision, the concept is taken from the decisions of the second Circuit.)
65. *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986); see also, *Town of Smithtown v. Waltz* (where the applicable statute required certain information to be included in the application, and if such information was included, and the specifications met the requirements of the statute, there was no authority for the planning board to exercise discretion.)
66. *Sullivan v. Town of Salem*, 805 F.2d 81.
67. *Id.*

## Cases in Brief

In 2004, the New York Court of Appeals handed down an unusually large number of land use cases. In addition to the case discussed in the lead article, the other decisions are reviewed below.

### Doctrine of mootness applies after substantial completion of the project and petitioners' failure to seek preliminary injunctive relief.

After a two and one-half year review, in June of 2002 the NY Landmarks Preservation Commission issued a Certificate of Appropriateness for the construction of an eight-story building with a

one-story penthouse atop an existing one-story building located within the Carnegie Hill Historic District. The total projected cost of the work approved was approximately \$36.7 million. In July 2002, Petitioners commenced an Article 78 proceeding to annul the Certificate of Appropriateness, but they did not apply for a temporary restraining order or for a preliminary injunction to halt the highly visible construction work. In determining how the doctrine of mootness will apply to a construction project, the Court must consider how far the work has progressed towards completion, and other factors including the challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo. Here, the Court found that the construction project was substantially complete, and that after more than a year of construction, the steel and concrete structure including support columns and floors were complete, the brick façade was complete, and 90% of the window frames had been installed. Roughly \$25.7 million had been spent on the project. Further, the Court noted that neither the property owner nor the developer had engaged in an "unseemly race to completion intended to moot the petitioner's lawsuit" and that they simply had every business incentive to begin and complete the project as quickly as possible to avoid paying interest on construction loans. The fact that the petitioners did not try to enjoin construction during the pendency of the litigation was a critical factor in the Court's determination that the matter was now moot. *Citineighbors v. NYC Landmarks Pres. Commission*, 2 N.Y.3d 737, 778 N.Y.S.2d 740 (2004).

**In two cases, the Court upholds due deference to zoning boards of appeals in the granting of variances where there is substantial evidence to support the decisions.**

In the first case, the Court held that the denial of an application for an area variance by a zoning board of appeals will not be disturbed where the decision had a rational basis and was supported by substantial evidence in the record. The Court of Appeals noted that the record supported the Board's findings that the granting of the variance would have an adverse effect on the neighborhood and that the difficulty was self-created. *Inlet Homes, Corp. v Zoning Board of Appeals of the Town of Hempstead*, 2 N.Y.3d 769, 780 N.Y.S.2d 298 (2004).

In the second case, a zoning board of appeals also denied a request for an area variance. During the hearing the applicant provided expert testimony that "the proposed development was in

character with the neighborhood and would not negatively affect community values." Additionally it was revealed that four parcels in close proximity did not meet the town's frontage requirements and it was asserted by the applicant that "that the proposed development would not disturb the physical or environmental characteristics of the surrounding area." However, over 200 members of the community signed a petition stating that the development would have a negative effect on the "character of the neighborhood." In denying the application, the zoning board of appeals stated that the neighboring properties "overwhelmingly" conformed to the zoning requirements and that granting the variance "would have an adverse effect on the character of the neighborhood." In an article 78 proceeding the Supreme Court annulled and remanded the Board's decision for further proceedings stating that the request was denied based on "generalized community objections," and that the board's denial of an identical request made by previous owners in 1969 did not foreclose the current petitioner's request. The Appellate Division granted the permit believing that there was no evidence presented during the hearing for "the Board to conclude that granting the area variance would adversely effect the character of the neighborhood," and that no evidence was offered "to refute the evidence presented by [the] petitioner." Finding that both the Supreme Court and Appellate Division improperly supplanted their reasoning for that of the zoning board of appeals, the Court of Appeals reversed the decisions below. The Court of Appeals noted that Town Law sec. 267-b requires the zoning board of appeals to weigh a series of factors in determining whether to grant a requested variance and that the board must weigh the benefit to the applicant against the detriment to the community if the variance is granted. In further noting that the Court has long held that local zoning boards have broad discretion in determining whether to grant a variance, and that the decisions of zoning boards should be upheld where they have a rational basis and are supported by substantial evidence. Here, the Court determined that the Board properly "weighed the petitioner's interest against the interest of the neighborhood." Finding substantial evidence in the record to support the board's finding, the Court disagreed that the Board based their determination on generalized community objections. Sufficient evidence in the record indicated that neighboring properties "overwhelming" conform to zoning requirements, that the variance sought by the petitioner would have been substantial in light of the current zoning requirements, and "given the

character of the neighborhood and the substantiality of the deficiencies requested, the detriment to the community in granting the variance outweighed the benefit that would accrue to petitioner.” Further, the Court noted that the Board was entitled to consider that granting the requested variance could set a precedent within the neighborhood. The court noted that it was within the discretion of the board “to deny a variance that would have allowed an owner to take advantage of an illegally non-conforming parcel by erecting a dwelling upon it.” *Pecoraro v BZA of Town of Hempstead*, 2 N.Y.3d 608, 814 N.E.2d 404, 781 N.Y.S.2d 234 (2004).

**Where a recommendation of the county planning commission is advisory only to the town, in pursuing legal review of further action by the town, the county planning commission is not a necessary party.**

Petitioner’s request for a special use permit was referred by the town board to the county planning commission as the property was located adjacent to a county road. The county planning commission recommended that the permit be denied; and as such the town board would need a supermajority vote to override the recommendation. The town board vote was 3-2 in favor of granting the permit, but since this did not meet the statutory supermajority requirement, the permit request was denied. The petitioner initiated an article 78 proceeding alleging that the town board’s actions were arbitrary and capricious since every requirement in the Town Code had been met. The town subsequently moved to dismiss the complaint since the Petitioner failed to include the county planning commission as a necessary party. The Court of Appeals held that since the planning commission’s decision was advisory only, and the town board’s action was the final agency action reviewable in an article 78 proceeding, only the town board is required to be a named party in the lawsuit. *Headriver LLC v. Town of Riverhead*, 2 N.Y.3d 766, 780 N.Y.S.2d 505 (2004).

**The Telecommunications Act of 1996 does not trump a restrictive covenant that limits the use of property for residential purposes.**

In 1998 the defendant leased property to New York SMSA Limited Partnership d/b/a/ Verizon Wireless, to construct a telecommunications antenna and equipment storage shed on land that contained a restrictive covenant limiting development to single-family homes. After the town board approved a permit to allow the siting of telecommunications equipment, plaintiff commenced an action to enforce the covenant and have the portions of the facility that had already been completed removed. The Supreme Court granted the injunction and ordered the removal and the Appellate Division affirmed. At the Court of Appeals, the town argued that the restrictive covenants offend public policy as established by the Telecommunications Act of 1996, and that the hardship to the defendants outweigh[s] the benefit to the plaintiffs, requiring the Court to extinguish the restrictive covenants pursuant to RPAPL sec. 1951. Addressing the public policy argument first, the Court of Appeals held that enforcing the covenant on one piece of property does not prohibit wireless telecommunication services in the town (there are alternative sites available), and therefore does not offend the Telecommunications Act. Furthermore, the Court held that the granting of a special permit by the town board is separate and distinct from the plaintiffs’ right to enforce a restrictive covenant, which is a right only the plaintiffs can enforce. The Court reiterated that even though zoning might allow for a particular land use, such a use may be enjoined where it violates a restrictive covenant. In rejecting the Town’s argument that the restrictive covenant should be extinguished, the Court found that the Town failed to meet its burden of showing that the plaintiffs did not derive any benefit from the covenant and, and the defendant’s alleged hardships failed to tip the balance of equities towards extinguishing a property right (specifically, the Court noted that SMSA knew of the restriction before building and thus the difficulty was self-created.) *Chambers v. Old Stone Hill Road Associates*, 1 N.Y.3d 424, 774 N.Y.S.2d 866 (2004)

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