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Adult Business Use

Recreational dancing is not a form of expression protected by the federal or state constitutions. Therefore, the local Cabaret Law and attendant zoning regulations are subject to rational basis review and the court found that the legislative purposes are legitimate - to protect the health, safety and general welfare of the public – and bear a rational relation to these governmental objectives. *Festa v. New York City Dept. of Consumer Affairs*, 37 A.D.3d 343, 830 N.Y.S.2d 133 (1st Dept. 2007).

Aesthetics


Affordable Housing

Plaintiff suffers from a disability which impairs her mobility and causes constant pain. As a result, Plaintiff relies primarily on Social Security disability for her income and thus needs housing that is both handicap-accessible and affordable, which is difficult to find in Long Island. Due to the large demand for affordable housing, units are generally awarded to qualified applicants through the use of a lottery. Plaintiff applied to participate in two lotteries. She received notification that she was selected to purchase a home in one of the two projects. Plaintiff notified the Long Island Housing Partnership (LIHP), Inc. that she would need a unit which was handicap-accessible and learned that none of the units were designed as such. The LIHP notified the Plaintiff that the changes that would need to be made to one of the units would not be feasible since the homes were designed to be townhouses and not ranch style homes. After negotiations failed, LIHP notified Plaintiff that the unit was going to be offered to the next qualified applicant. Plaintiff claims that the Rehabilitation Act requires “that 5% of units be set aside for home buyers with mobility impairments or 2% of units for home buyers with visual or auditory impairments. The Court held that the relevant statutes and regulations which the Plaintiff put forth did not use the term “multifamily housing project” in the manner in which it would be connected to the type of affordable housing sold by LIHP. The type of affordable housing sold by LIHP is generally referred to as “Homeownership” or “Single Family”. Therefore, the defendants are under no obligation to offer affordable housing which sets aside 5% of the units for buyers with mobility impairments or 2% of the units for buyers with visual or auditory impairments. *Telesca v. Long Island Housing Partnership, Inc.* 443 F.Supp.2d 397 2006 WL 2334980 (E.D.N.Y. 2006).

The Town failed to comply with the requirements outlined in *Berenson v Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (1975) which requires that local governments give proper regard to local and regional housing needs. Once an
exclusionary effect coupled with a failure to balance the local desires with housing needs has been proven, the burden of proof shifts to the local government. After revising the town comprehensive plan, the town forwarded the draft document to the county planning department for review pursuant to GML §239-m. The county planning department noted the decline of affordable housing the town, and criticized the plan for, among other things, removal of "density bonuses" for sewer/water services and the imposition of special use permits which ran contrary to the primary goal of promoting options for affordable housing. The planning department noted that the added administrative and permit procedures add time to permit reviews and costs to housing. Following the subsequent adoption of the plan by the Town, the town enacted a local rezoning law to implement the plan. The County planning department expressly disapproved the proposed local law, stating, among other things, that it would effectively eliminate multi-family homes in the Town, which would significantly impact the Town’s ability to address affordable housing needs. The Town adopted the local law despite the county’s concerns. Another local law was adopted granting approval authority of any new or expanded water treatment facility to the Town Board. Prior to the adoption of this law, the Town established an Affordable Housing Committee, which found that there had been no permits for multifamily housing issued in the Town since before 1999 and that the cost of single family housing has increased dramatically. The Court noted that “the operative test becomes whether or not the zoning ordinances constitute a balanced and well-ordered plan for the community which adequately considers the acknowledged regional needs and requirements for affordable housing.” The court found the zoning scheme exclusionary on its face and said that the Town has not adequately done their share to accommodate the affordable housing need of the community within its jurisdiction nor within the region. Land Master Montg I, LLC v Town of Montgomery, 13 Misc.3d 870, 821 N.Y.S.2d 432 (Sup. Ct. Orange Co. 2006).

Although multi-family housing in and of itself does not necessarily equal affordable housing, the presence or potential for multi-family housing has historically been recognized as a barometer in assessing exclusionary zoning challenges. Where the enactment of zoning laws severely impact the availability of multifamily housing, the burden shifts to the municipality to explain. Land Master Montg I, LLC v Town of Montgomery, 13 Misc.3d 870, 821 N.Y.S.2d 432 (Sup. Ct. Orange Co. 2006).

The Court found that a zoning scheme allowing for “affordable housing” through: lot clustering by permit; relaxation of subdivision lot requirements where permit provisions are made for affordable housing; incentive zoning measures; inter-municipal agreement programs (none existed); and through the authorization for motor court homes and planned adult communities, did nothing more than create an “illusion of affordable housing availability” since the total discretion for each of these programs rested with Town officials and affected very limited segments of

**Building Permits**

The Board of Standards and Appeals acted in an arbitrary and capricious manner by denying an application for a building permit to construct a proposed dormitory where the applicant failed to submit requested evidence of university or college control over the building/leases. The Board's denial of the building permit constituted an impermissible administrative anticipatory punishment. Since the deed restricted the use of the property to "community facilities," which under the zoning resolution includes dormitories, should the owner fail to use the property in accordance with the deed restriction, the proper remedy would be to deny or revoke a certificate of occupancy at the appropriate time. In re 9th and 10th street, *L.L.C. v Board of Standards and Appeals of the City of New York*, 837 N.Y.S.2d 626 (A.D. 2nd Dept. 2007).

The denial of a building permit by the Zoning Board of Appeals was not arbitrary or capricious because the record failed to establish that the proposed propane filling station was an accessory use to the nursery/garden center. *DeCaro Capital Investment Group, LLC v. Voekler*, 32 A.D.3d 852, 821 N.Y.S.2d 610 (2d Dept. 2006).

Petitioners own different parcels of property located near one another. Respondents' piece of property is located in the same area as that of petitioners, which is an area zoned for residential uses and permits for the construction of single family dwellings. Respondents filed an application to build a single family home on their property and at the same time filed an application to improve a private, dirt road that served as a right of way for the properties. Each owner had a deeded easement over the right of way and without use of the road, their properties would become landlocked. Petitioners argued that improvement of the road would limit access to their property. This court held that the respondents have the right to improve the road for reasonable use and that the petitioners' allegations were unsubstantiated. It appears that the petitioners were upset because the respondents did not offer to undertake the cost to improve the entire road. The unhappiness of the petitioners is not grounds for them to win since respondents are making a reasonable use of the road. *In re Griffin v. Town of Somers*, 13 Misc. 3d 1205(A), 824 N.Y.S.2d 754 (N.Y. Sup. Ct. Westchester Co. 2006).

The Board of Standards and Appeals of the City of New York refused to remove the "hold" status on petitioner's building permit, which it placed there after the Department of Buildings determined that petitioner should have applied for a new building permit rather than an alteration permit for the work it was doing on its residence. This court held that the Board's determination was not justified and was arbitrary and capricious. A new building permit did not need to be filed
because the renovations that petitioner made to the property were not misrepresentations by petitioner in its application for an alteration permit. Petitioner’s application clearly stated that the construction would “replace and relocate the existing square footage.” In re Mainstreet Makeover 2, Inc. v. Srinivasan, 13 Misc. 3d 1240(A), 831 N.Y.S.2d 354 (N.Y Sup. Ct. Richmond Co. 2006).

After construction began pursuant to a building permit to build a new roof, the Code Enforcement Officer revoked the permit and issued a stop work order because the construction violated setback requirements. Contrary to the building permit application, petitioner removed a fence at his property line, built a wall in its place, and then extended the roof from the existing structure to the new wall. The Court held that the Zoning Board of Appeals’ refusal to reinstate the building permit was not arbitrary or capricious and was rational because petitioner violated setback requirements of the town zoning law and there was no building permit or variance granted. In re Bartoszewski v. Town of Hannibal Zoning Bd. of Appeals, 35 A.D.3d 1291, 827 N.Y.S.2d 806 (4th Dept 2006).

In order to extend a variance’s time limit, petitioner and respondent stipulated that the Zoning Board would have to approve the time extension. The Zoning Board’s decision to revoke petitioner’s building permit after she failed to request a building permit within the permitted period from the issuance of the variance was rational and not arbitrary and capricious. The purpose for imposing a time limitation when granting a special permit or variance is to insure that when conditions have changed at the expiration of the prescribed period, the board has an opportunity to reappraise the proposal. In re Haberman v. Zoning Bd. of Appeals of City of Long Beach, 35 A.D.3d 465, 827 N.Y.S.2d 176 (2d Dept. 2006).

Petitioner sought to vacate the determination of the Building Commissioner that granted a building permit for the construction of an 8 story, 36 unit residential apartment complex, alleging that the permit was issued without the requisite site plan approval mandated by the Code, and that the area variance relieved the respondents from having to comply with height, lot area, building area, front, side and rear yard zoning code requirements. In dismissing the petition, the Court noted that the Code of Ordinances grants the Building Commissioner the power to issue building permits, and that the permit was not in violation of the Code because the City had abolished its planning board and the requirement for site plan approval is no longer a prerequisite for the issuance of a building permit. 420 Tenants Corp. v. EBM Long Beach, LLC, 14 Misc.3d 224, 823 N.Y.S.2d 863 (N.Y. Sup. Ct. Nassau Co. 2006).

**Cellular Towers/Wireless Communication Facilities**

Plaintiff-property owner entered into a lease with plaintiff Cellular One to construct a telecommunications tower on the property provided the necessary
permit be obtained. After a town meeting where the tower’s construction was protested, plaintiff withdrew and submitted another application to have the tower constructed on a different part of the property. Subsequently, the Town enacted a six month moratorium on all applications for telecommunications towers. After a study was conducted, the Town passed a new ordinance that led Cellular One to conclude they could not construct the tower and they sued the Town for tortious interference of contract. Tortious interference of a contract is not established by conduct that is “merely negligent or incidental to some other, lawful, purpose urging a governmental entity to take a particular action on a permit application is manifestly a lawful purpose.” Therefore, plaintiffs are not entitled to damages for losing a potentially lucrative lease. *Harris v. Town of Fort Ann*, 35 A.D.3d 928, 825 N.Y.S.2d 804 (3rd Dept. 2006).

**Coastal Zone Management**

A town has the jurisdiction, power and authority to regulate, control, restrict or otherwise issue a building permit for a floating boathouse because it is a building that is subject to the State Uniform Fire Prevention and Building Code (see Executive Law § 372[3]) and the municipality is obligated to enforce that code. So where a person constructed a "floating boathouse" off the shore of his property without applying for a building permit, variance or any other form of permission from the Town prior to construction, the town had authority to compel its removal and to enjoin its use *Beneke v. Town of Santa Clara*, 36 A.D.3d 1195, 828 N.Y.S.2d 692 (3rd Dept. 2007).

**Comprehensive Plan**

Where the comprehensive plan (and implementing zoning laws) failed to take into account community and regional needs for affordable housing, the Court determined that it was unconstitutional and void. Since a town is not statutorily obligated to adopt a comprehensive plan pursuant to Town Law §272-a, the Court declined to order the preparation and adoption of a new plan and zoning scheme. Rather the Court stated that should the Town decide to do so, it must comply with SEQRA and the laws governing exclusionary zoning. *Land Master Montg I, LLC v Town of Montgomery*, 13 Misc.3d 870, 821 N.Y.S.2d 432 (Sup. Ct. Orange Co. 2006).

Petitioners argued that the rezoning by the Town amounted to spot zoning, intended simply to keep Wal-Mart from building on the property. When the Town developed their comprehensive plan, the Town Board "accepted" the plan rather than "adopting" the plan. As a result, the Court determined that the Town Board had wider latitude in its development decision. The court found that “the two year old Comprehensive Plan herein functioned as the *de facto* Comprehensive Plan previously defined and embraced by the courts..." and therefore the re-zoning was completed in accordance with, and in furtherance of the plan. As a result, an intent to prevent Wal-Mart from building a store on the subject parcel(s) is
irrelevant. The Court further found that the re-zoning was a legitimate exercise of the legislative power of the town board and that it was not done in bad faith. *Cimato & Sons v Town of Amherst, ____N.Y.S.2d____ (Sup. Ct. Erie Co. 2007).

All town land use regulations must be in accordance with a comprehensive plan adopted pursuant to Town Law § 272-a [11] [a]. Where the challenging party fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld. Here, although the March 2005 Town Zoning Law eliminates the PURD designation, it nevertheless provides for a clustered housing zoning classification that is not in “clear conflict” with the Town’s Master Plan and therefore that zoning classification must be upheld. *Matter of Meteor Enterprises, LLC v. Bylewski*, 38 A.D.3d 1356, 831 N.Y.S.2d 787 (4th Dept. 2007)

**Due Process**

Plaintiffs allege 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 now commence this action 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. 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 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. *Petruso v. Schlaefer*, 474 F. Supp. 2d 430 (E.D.N.Y. 2007).

There can be no deprivation of due process unless there is a deprivation of a federally protectable property interest. In the Second Circuit, the test is whether
the applicant has a “clear entitlement” under state law to the approval sought. To meet this burden, a plaintiff may demonstrate that “absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.” (quoting Yale Auto Parts, Inc. v Johnson, 758 F.2d 54, 59 (2nd Cir. 1985)) The plaintiff cannot meet this burden of proving this entitlement where, as here, the Village Code vests the Board with considerable discretion to revoke a berthing permit and/or to deny individuals access to a recreational facility. Datri v Incorporated Village of Bellport, 2006 WL 2385429 (E.D.N.Y. 2006).

**Due Process – Substantive**

For a substantive due process claim to survive summary judgment, the plaintiff must show “(1) that he had a valid property interest in [using Village recreational facilities], and (2) that the defendants infringed that property interest in an arbitrary or irrational manner.” (quoting Harlen Associates v Incorporated Village of Mineola, 273 F.3d 494, 503 (2nd Cir. 2001)) Because the plaintiff could not show that he had a clear entitlement to use the Village recreational facilities, and because he could not show that the Village deprived him of any right in an arbitrary manner by enacting a definition of resident in the zoning code for the rationally related purpose of conserving resources for Village residents, the Village’s actions are not arbitrary. Datri v Incorporated Village of Bellport, 2006 WL 2385429 (E.D.N.Y. 2006).

In order to establish a federally protected property interest in a variance, a plaintiff must show that, at the time the variance was denied, there was no uncertainty regarding plaintiff’s entitlement to it under applicable state or local law, and that the ZBA had no discretion to withhold it in his particular case. Since the ZBA had the discretion to deny plaintiff's application for a variance, the plaintiff has not, and cannot, allege that it had a protected property interest in the granting of a variance. R & V Dev., LLC v. Town of Islip, Zoning Bd. of Appeals, 2007 NY Slip Op 313, 36 A.D.3d 707, 826 N.Y.S.2d 579 (2d Dept. Jan. 3, 2007).

Where plaintiffs alleged that part of the backyard of a house they bought on a ridge was carried away with a mudslide, rendering the house unsaleable, and that such was the result of the municipality's failure to comply with its zoning standards, the Court dismissed the plaintiff's due process claims because even if they could allege a deprivation of a property right, the municipality's decision not to enforce its own zoning law does not “shock the conscience” of the Court. Andabaker v Town of Manlius, 2007 WL 201117, 214 Fed. Appx. 93 (2nd Cir. 2007).

Plaintiffs alleged substantive due process violations because the Town widened the road adjacent to plaintiffs' property in a manner resulting in the road encroaching on the property and the town snow plow uses part of property when turning around. To succeed on a constitutional action against the Town for
damages under 42 USC § 1983, plaintiffs must show that (1) their "harm was caused by a constitutional violation, and, if it was, (2) that the Town was responsible for that violation." To establish that the Town violated substantive due process rights, the court first inquires "whether a constitutionally cognizable property interest is at stake" and then if Town's alleged acts against their land were "arbitrary,' 'conscience-shocking,' or 'oppressive in the constitutional sense,' not merely 'incorrect or ill-advised.'" The court held that the Town's act constituted, at most, occasional unlawful encroachments on the "Reserved for Parking" parcel necessitated by the Town's performance of its municipal duties. Thus, plaintiffs' due process rights were not violated: Ferran v. Town of Nassau, 471 F.3d 363 (2d Cir. 2006).

After the town board refused to extend a sewer district to cover the developer's proposed 202-unit condominium project, which included 64 units exclusively for senior citizens, the developer successfully sued in state court with the trial and appeals courts finding no basis in the record for the board's conclusion that the requested extension was not in the public interest. The state court directed the board to extend the sewer district. Following the rulings, the developer brought a civil rights action in federal court alleging that the board's failure to extend the sewer district violated its substantive due process rights and equal protection.

To be successful, the applicant must show that it had a valid property interest in the granting of the petition and that the defendants infringed on that property interest in an arbitrary way. To establish a federally protectable property interest in a permit, the applicant must show that at the time the permit was denied, there was no uncertainty regarding its entitlement to the permit, meaning that the issuing authority had no discretion to withhold it. In essence, determining whether a landowner has a protectable property interest focuses on the degree of official discretion to issue or deny the permit, not on the probability of the favorable exercise of board discretion. To evaluate the existence of a property interest the court looked to state and local law to determine whether the law unambiguously limited the board's discretion to deny the requested sewer extension.

Town Law §194 sets forth the criteria by which towns may establish and extend sewer districts. Town boards are given the discretion pursuant to this statute to make a finding "whether it is in the public interest to grant in whole or in part the relief sought." While the Court noted that while recent state court decisions have held that a town board's discretion to consider the public interest does not extend to questions of wisdom or desirability of a proposed land use, the cases do not limit the board's discretion so narrowly that approval of a proper application would be virtually assured. As a result, the Second Circuit held that the developer did not have a protectable property interest in the sewer extension permit, and therefore there was no substantive due process violation. The Court reiterated its precedent that in the context of land-use benefits, "the fact that an Article 78 court has ordered a town board to grant a particular application after it concluded that the board acted arbitrarily in denying the applicant does not necessarily mean that the applicant had a property interest in the permit..."
Court noted that "Neither the Supreme Court nor the Appellate Division discussed whether the Board’s decision could have been justified on other grounds...but only determined that the grounds it relied upon were unsupported by the record. Thus, the possibility that the permit could have been denied on non-arbitrary grounds defeats the federal due process claim." The Court also noted that the plaintiff did not argue on appeal that the state court judgment, by itself, created a constitutionally protected entitlement to a permit even if such entitlement previously did not exist, and the Court expressed no opinion "as to whether a state court judgment in an applicant’s favor may of itself create a due process right where none already exists." Clubside, Inc. v Valentin, 468 F. 3d 144 (2d Cir. 2006).

After a wind developer identified suitable locations in two adjacent municipalities for the siting of wind farms and the construction of an electrical substation to support the operation of the wind production, one of the two municipalities enacted a moratorium on the construction of wind turbine towers, relay stations and other support facilities so that they could undergo a comprehensive planning and zoning process to address the location of wind farms in their communities. In addition to the prohibition on the construction of these facilities, the moratorium also prohibited the filing of building permits during the pendency of the moratorium. The municipality, which did not have a zoning ordinance in effect, initially adopted the moratorium for a six month duration, and then subsequently renewed the moratorium several times, leaving it in effect, at the time of the lawsuit, for approximately two years. Adopted for the stated reasons of the need to preserve the value, use and enjoyment of property in the Town, including protection of aesthetics. The moratorium contained a provision for "alleviation of extraordinary hardship," which authorized the town board to grant exceptions to the moratorium where the application of the local law would impose an extraordinary hardship on a landowner or applicant. To apply for the exception, an applicant must pay a fee of $500 and submit a recitation of the relevant facts and supporting documentation showing the hardship. The town board is then required to hold a public hearing within forty-five days after the completed application has been filed with the clerk. The law does not provide a timeframe for when a final decision must be rendered.

While acknowledging that the Town of Italy was not welcoming to the possibility of a wind farm within its jurisdiction, the developer claimed that the moratorium was holding up the wind farm project in the Town of Prattsburgh, the adjacent municipality who desired the project, because the developer needed to construct a modest substation in the Town of Italy to service the Prattsburgh project. This substation was covered under the language in the moratorium, making the projects impossible. The developer alleged that the moratorium violated it due process rights.

In evaluating the claims, the Court treated the challenge as both a facial challenge and an as-applied challenge. In reviewing the facial claim first, the Court noted at the outset that such challenges are difficult to mount successfully as "Generally a municipal zoning ordinance is presumed to be valid, and will not
be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective.” Citing to Greene v Town of Blooming Grove, 879 F.2d 1061, 1063 (2d Cir. 1989). The Court noted that the Town’s subjective motivation in enacting the moratorium is irrelevant, and that while a court may consider whether the moratorium is rationally related to its stated purpose, that is not determinative. The Court concluded that the developer failed to state a valid claim that the moratorium was invalid on its face finding that the local law was not so arbitrary or irrational to violate due process rights. The Court found that “Assuming the Town has a legitimate concern in restricting the construction of wind towers, the Moratorium is not completely irrational.” The Court noted that the Second Circuit has explained that, “Substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.” Citing, Natale v Town of Ridgefield, 170 F.3d 258 (2d Cir. 1999).

Moving to an examination of the challenge as an “as-applied” claim, the Court determined that the claim was not yet ripe since the developer failed to apply for the hardship exception contained in the moratorium. The Court did not agree that such an application would produce futile results, and noted that, “Even if defendants are antipathetic to the project, it is not so clear that they would never grant a hardship exception to allow Ecogen to at least build a substation in Italy to service the Prattsburgh project...” Ecogen, LLC v Town of Italy, 438 F. Supp. 2d 149 (W.D.N.Y. 2006).

Failure to renew a building permit that was illegally revoked based upon an erroneous interpretation of the zoning code deprived the petitioner of substantive due process where the petitioner had a protectible property interest in the permit since it was legally issued and the petitioner made substantial improvements and incurred substantial expenses in reliance on the issued permit. Vecce v Town of Babylon, 32 A.D.3d 1038, 822 N.Y.S.2d 94 (2nd Dept. 2006).

The court determined that the plaintiff sufficiently plead the requirements necessary for a Section 1983 due process claim to survive a motion to dismiss where the plaintiff claimed that the town had a policy that allowed its Supervisor to illegally revoke certificates of compliance, and thus building permits, without due process of law. This was enough to suggest that plaintiff may have had a protectible property interest in the permit (assuming it was obtained properly), that she was deprived of that interest under color of law, and that the deprivation occurred without due process. Bain v Town of Argyle, 2006 WL 2516497 (N.D.N.Y. 2006).

To prevail on a Section 1983, the plaintiffs must show that the Town acted under the color of state law and that they suffered a denial of their constitutional rights. The Town does not dispute that it acted under color of state law in denying a certificate of occupancy. To prove that their right to substantive due process was violated the plaintiffs must show 1) that they had a valid property interest in the certificate of occupancy; and 2) that the Town infringed that interest in an
arbitrary or irrational manner. The Court determined that the plaintiffs cannot show that they had a "clear entitlement" to a certificate of occupancy because the law is uncertain in the underlying claim. Therefore they had no cognizable property interest that would support a violation of their right to substantive due process. *O'Mara v. Town of Wappinger*, 458 F.3d 693 (2d Cir. 2007).

In April 2001, the Town amended its zoning laws, and prohibited the use of large freestanding "pole signs" in certain areas of the Town, including the area in which the plaintiff's car dealership is located. Plaintiff had two such pole signs on its property, and pursuant to the amended zoning law, was required to remove the signs within three years. Plaintiff did not remove the signs or request a variance. In April, 2004, the town enforcement officer notified the plaintiff in writing that its signs were not in compliance with the new zoning regulations, and that the signs would have to be removed. Thereafter, the plaintiff applied for and was denied a variance. Plaintiff appealed the denial to the ZBA which affirmed the denial, but granted him an additional grace period until March 2005 in which to remove the signs. Plaintiff did not appeal the ZBA's determination, but as of March 2005, still did not remove the signs and a few months later a violation was issued. Following notice of violation, plaintiff filed a second application for a variance for its continued use of its pole signs and he was refused on the grounds that the ZBA would not consider plaintiffs' request because it was previously considered and denied. Plaintiffs claimed that that their constitutional rights have been violated.

An unauthorized intentional deprivation of property by a state actor does not constitute a violation of due process if a meaningful post-deprivation remedy for the loss is available. The court found that plaintiffs were not denied procedural due process because plaintiffs could have brought a CPLR Article 78 proceeding to compel the Town to consider the second application for a variance, and plaintiffs also could have appealed the denial of the first application for a variance to a New York State Court. Since plaintiffs did not avail themselves of any of the remedies afforded to them under New York State law, plaintiffs have failed to state a cause of action for a violation of their rights to procedural due process.

Plaintiffs contend that their rights to substantive due process and property rights have been violated by operation of the 2001 Zoning Law Amendments which converted their signs to a nonconforming use, by the failure of the Town to grant a variance, and by the refusal of the Town to consider plaintiffs' second application for a variance. Here plaintiffs failed to establish that defendants acted arbitrarily or irrationally with respect to the enactment and enforcement of the Town zoning law, or with respect to plaintiffs' request for a variance because the Town afforded plaintiffs ample opportunity to comply with the law, challenge the law, or request an exemption from the new zoning requirements.

Plaintiffs contend that the enactment and enforcement of the 2001 zoning ordinance had the effect of a taking of their property. Plaintiffs allege that the ordinance deprives them of the use of their pole signs, and because they were not compensated for the derivation, their rights have been violated. To establish
a claim for a deprivation of property without just compensation, a plaintiff must demonstrate that he or she was deprived of a property interest under color of law without just compensation. Where a plaintiff contends that a state actor has deprived the plaintiff of a property interest, the plaintiff must further establish exhaustion of state procedures for obtaining just compensation. Here it is clear that plaintiffs failed to exhaust their remedies under state law.

Plaintiffs seek a declaration that their signs are legal; or, in the alternative, that they are entitled to have their appeal heard by the ZBA or that the ordinance is unconstitutional. Plaintiffs are not entitled to such declaratory relief because there is no suggestion that the zoning ordinance lacks any rational relationship to a legitimate government interest. *Fox Auto Group, Inc. v. Town of Erwin*, 2007 WL 738788 (W.D.N.Y. 2007).

**Educational Uses**

A charter school’s request for a use variance, area variance and a parking lot permit to return a former public school, most recently used for commercial purposes, to an educational use as a private school, was denied by the board of zoning appeals on the grounds that the School failed to demonstrate either need or hardship which was not self-created. The property in dispute is located half in a C-1 neighborhood commercial zone and half in a C-2 highway commercial zone. The Court noted a string of cases that hold that because of their inherently beneficial nature, educational institutions enjoy special treatment under the law in New York, and are allowed to expand into residential neighborhoods where nonconforming uses would otherwise not be allowed. And where here, an ordinance excludes educational uses from a zone, it “deprives an applicant of any opportunity to demonstrate that its proposed educational use is consistent with the public good.” The Court disagreed with the Supreme Court that the Charter School is automatically entitled to the issuance of a special permit, however, because so ordering strips the zoning board “of its ability to engage in the deliberative process and to evaluate the proposed educational use against other legitimate interests which impact the public welfare.” Therefore, the Appellate Division, Third Department, held that a special permit application should be submitted to the zoning board to enable the board to balance the various factors and determine whether the educational institution would violate welfare and safety standards of those in the neighborhoods. The concurring opinion cautioned that the existing precedent may only apply to educational uses in residential zones and that proposed educational uses in non-residential zones may not necessarily be afforded the same deference. *Albany Preparatory Charter School v. City of Albany*, 31 A.D.3d 870, 818 N.Y.S.2d 651 (3d Dept. 2006).

**Eminent Domain**

In challenging the exercise of eminent domain to expand an access road to enlarge a school district campus, the petitioner argued that the taking bisects
other adjacent parcels owned by them, limiting their ability to develop the property. The court rejected petitioner’s arguments as unpersuasive noting the “scope of review is limited to whether the proceeding was constitutional, whether the acquisition was within the condemnor’s statutory authority, whether the determination was made in accordance with the statutory procedures and whether a public use, benefit or purpose will be served by the proposed acquisition.” The record showed that the safety concern precluded petitioner’s proposed alternate sites. Also, the court points out that while “the condemnor cannot take, by use of the power of eminent domain, property not necessary to fulfill the public purpose, it is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill that purpose.” *Doyle v. Schuylerville Cent. School Dist.*, 35 A.D.3d 1058, 826 N.Y.S.2d 797 (3d Dept. 2006).

Petitioner brought an action pursuant to EDPL 207 and CPLR article 78 to review a determination of the Town Board made after a public hearing, after which it issued a negative declaration under SEQRA in connection with the proposed condemnation and acquisition of parcels owned by petitioners, for the purpose of a roadway drainage project. The court found that the notices for the public hearing sufficiently described the location of the proposed project in compliance with EDPL 202(A) and that the project will not impact farming activities, and hence the Town Board did not violate Agriculture and Markets Law § 305. Pursuant to SEQRA, a proposed condemnor may issue a negative declaration, obviating the need to prepare and circulate an EIS, but only after it has identified the relevant areas of environmental concern, taken a "hard look" at them, and made a "reasoned elaboration of the basis for its determination." The court found that respondent failed its SEQRA obligations. Here petitioners submitted to the Town, a report and testimony from an engineer, that the improved hydro-capacity of the new drainage system will result in increased volume that in turn, will cause increased erosion and sedimentation of the reservoir. Proof demonstrating that the proposed ditching alongside the roadway will fatally harm the root systems of the trees lining the roadway’s edge along the petitioners’ property was also submitted. In contrast, the Town made its declaration without referring to any empirical or experimental data, scientific authorities, or any explanatory information, and consisted of conclusory statements. Accordingly, the Town failed to fulfill its obligations under SEQRA, hence its determination is annulled. *Serdarevic v. Town of Goshen*, 39 A.D.3d 552, 834 N.Y.S.2d 233 (2d Dept. 2007).

Claimants own approximately six acres of property on which they had proposed to build 50 affordable townhouses but the City delayed their approval and later came in and took the property by eminent domain to provide additional recreational facilities for the community. Claimants filed an answer to the City’s condemnation petition claiming that the propriety of the City’s process in acquiring the land under the Uniform Land Use Review Procedure Act was not proper. The court held that the City satisfied its burden of showing that the
property was going to be used for a public use, by asserting that it intended to acquire the property for use as a park and by describing the land to be taken. The court also held that the proceedings followed by the City establish that the City satisfied its statutory burden by demonstrating, pursuant to Eminent Domain Procedure Law (EDPL) 206(A), that it was exempt from the public hearing and determination requirements of EDPL Article 2. Finally, the court held that the claimants should have raised their claims challenging the City's process in a CPLR Article 78 proceeding rather than in the answer to the City's condemnation petition. In re City of New York, 14 Misc.3d 258, 828 N.Y.S.2d 756 (N.Y. Sup. Ct. Kings Co. 2006).

Where respondent sought "just compensation" for the taking of his vacant property by the Village for use as a sand and salt supply storage facility, the court noted that the property owner is to be compensated for the market value of the property at its highest and best use, and that the highest and best use for the property "would be for commercial and/or industrial development or development with an industrial facility or a use consistent with the current Village Zoning Ordinance." In determining the value of property, the court looks at many factors including the topography of the land, available frontage, access (while the property was accessible via a right of way, the right of way did not satisfy the requirements of the Village Law, which states that "no permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan.")., the availability of utilities (the property had water, electricity, telephone and storm sewer but it did not have a sanitary sewer connection) and comparable sales in the area which are similar in size, zoning and use. After making all the proper calculations, the court determined that respondent's property, at the time of the taking, had a higher value than originally calculated. Village of Irvington v. Sokolik, 13 Misc.3d 1220(A), 831 N.Y.S.2d 351 (Table) (N.Y. Sup. Ct. Westchester Co. 2006).

The town highway superintendent may not condemn private property to lay out a new highway from an existing town road to state owned woodlands based upon a finding that increased access to the state property for recreational uses (e.g., vehicles, hikers, horseback riders, bicyclists and snowmobilers) will enhance tourism in the town. The court determined that although the town highway superintendent does possess the authority to condemn land for certain purposes, in this case he exceeded the jurisdiction set forth in Highway Law sec. 140 which provides no authority for the superintendent to determine that a highway for recreational users would enhance the economy of the town. Hargett v Town of Ticonderoga, 35 A.D.3d 1122, 826 N.Y.S.2d 819 (3rd Dept. 2006).


**Energy**

Public Service Law Article X which regulates the siting of electric generation facilities (ed. note: this law has since sunset), grants power to the state Siting Board to preempt local zoning laws to the extent it finds them violative of the thrust of *Article X. Nash Metalware Co., Inc. v Council of the city of New York*, 14 Misc.3d 1211(A), 836 N.Y.S.2d 487 (Table)(Sup. Ct. NY Co. 2006).

Wind Powering America, a U.S. Department of Energy program, has published a wind energy guide for local government officials. The publication contains 13 chapters including information on: the development process, development benefits, siting issues, permitting, zoning and the siting process, as well as case studies. The guide can be downloaded at: http://www.nrel.gov/docs/fy07osti/40403.pdf

**Enforcement**

When presiding over zoning violations, Justice courts must enforce the state statutes that specifically address the zoning appeals process (e.g. in the instant case, Town Law §267-a and §267-b) and must not apply the criminal procedure law alone. Therefore, the defendant should have sought zoning board of appeals review of the Order to Remedy pursuant to town Law §267-a(5)(b) and the town zoning code. Failure to do so prevents the defendant from attacking the validity of the Order in a criminal proceeding. *People v Martin*, 13 Misc.3d 1231, 831 N.Y.S.2d 355 (Table)(Jst. Ct. Town of Hyde Park 2006).

Where the code enforcement officer determined that a proposed parking lot was a permitted use, the proper way to challenge such determination is to make an application to the zoning board of appeals. *Swantz v Planning Board of the Village of Cobleskill*, 34 A.D.3d 1159, 824 N.Y.S.2d 781 (3rd Dept. 2006).

Even if a wetlands application is complete, the DEC may still request additional information, including an on-site inspection, during a post-completion review. “A request by the DEC for an on-site inspection of the wetlands and adjacent areas on [plaintiffs] property, in order to review the accuracy and impact of the petitioners permit application, fell within the special needs exception to the

Defendants, who had two mobile homes on their 4.3-acre property, were found to be in violation of a town code provision prohibiting more than one mobile home on any given parcel of land. They applied for a variance, which was denied by plaintiff’s Zoning Board of Appeals on May 5, 2004 and never sought review of that determination. Defendants failed to remove one of the mobile homes from their property and in August 2005 an order was issued that enjoined defendants from continued use of the property in violation of the code and directed them to remove one mobile home within a specified period of time. The Supreme Court gave plaintiff permission to make an application to remove the home if defendants failed to do so. Plaintiff did apply to remove the home when defendants failed to. The court found that defendants are precluded from attacking the denial of the variance because they failed to seek review of it and to appeal from the order finding them to be in violation of the town code and directing removal of a mobile home from their property. The court also found that given defendants’ repeated failures to comply with the removal order, the order given to plaintiff to remove the home was affirmed. Town of New Baltimore v. Winslow, 39 A.D.3d 1074, 832 N.Y.S.2d 459 (3d Dept. 2007).

In determining the use of the property, it was permissible for the zoning board of appeals to rely on aerial photographs since the board provided clear notice at the public hearing of its intention to review the photographs and the petitioner neither objected to the review nor submitted further evidence in rebuttal. McDonald v Zoning Board of Appeals of the Town of Islip, 31 A.D.3d 642, 819 N.Y.S.2d 533 (2nd Dept. 2006).

Section 150.40(2) of the Criminal Procedure Law authorizes service of appearance tickets for the violation of a local zoning law or ordinance to be served under any manner authorized for service in CPLR §308. Prior to a change in the statute in 2004, all service of process had to be done personally. The Court noted that violations of local zoning and building codes are key to quality of life in municipalities, and that effective service of process will bring alleged violators into court at the appropriate time to timely resolve these issues of local concern. The Court further noted that “This law was enacted because of certain situations where service could not have been effectively made and, therefore, the individuals were not properly notified, if at all, of the cases that were pending before a local court.” The Court found that this change in the law was constitutional and did not violate due process concerns. People v. Braun Bros. Brushes, 15 Misc.3d 1030(N.Y. Just. Ct. Valley Stream 2007).

Petitioners commenced an Article 78 proceeding to annul the decision of the Zoning Board of Appeals granting the respondents a special use permit after a two year hearing process. The property in dispute is located on two different parcels, one of which is used as a parking lot and the other which is used as a
place of prayer for the Jewish faith and also is the home of the Rabbi and his family. Petitioner sought an injunction to restrain the implementation of the special use permit and the use of the Chabad House. The Court was without the authority to mandate the Building Inspector to prohibit the religious use of the property without all the required permits and approvals, and therefore that portion of the petitioner’s injunction request is denied. The request for an order staying the processing of any applications was also denied because even if the process were stayed, there would still be a continued use of the property as the Chabad House. This court held that the Board failed to follow the appropriate legal standard in evaluating the Chabad permit request. The zoning code sets forth minimal conditions for a place of worship but the Chabad House fails to satisfy a single condition. However, this court held that while the petitioners had offered sufficient proof that they would likely succeed on the merits, there was not enough evidence to demonstrate that the petitioners had suffered irreparable harm. The petitioners did not offer credible evidence that the continued use of the property as the Chabad House substantially impaired the privacy, enjoyment, and use of the neighboring residential properties. Therefore, petitioners request for a preliminary injunction was denied. *Lafiteau v. Guzewicz*, 13 Misc. 3d 1228A, 831 N.Y.S.2d 354 (N.Y. Sup. Ct. Suffolk Co. 2006).

Where the code enforcement officer walked around the perimeter of the plaintiff’s front yard and walked up the driveway to the front door of the dwelling and looked through the window into the home, such actions did not constitute a warrantless search of the premises. The code enforcement officer never entered the home nor the fenced back yard. Because such inspection was limited to a route that any visitor to the residence would use, it was beyond the ambit of the Fourth Amendment. Furthermore, a mere “visual observation” does not constitute a search under the Fourth Amendment. *Beganskas v Town of Babylon*, 2006 WL 2689611 (E.D.N.Y. 2006).

Where the Village sought to compel the defendants to correct Code violations on their premises, the defendants counterclaimed that they had vested rights in the alteration because the renovation was substantially completed before the Village issued a stop-work order. The defendants raised the issue of vested rights in an administrative appeal to the Zoning Board of Appeals, in which they challenged the stop-work order and contended that their renovations complied with the building permit and the Village Code. However while that appeal was pending, the defendants completed the work, claiming further proceedings against them were stayed pursuant to Village Law § 7-712-a(6), and withdrew its appeal once the work was completed. The court found that by withdrawing their administrative appeal, defendants relinquished any rights to administrative review of the stop-work order, their claims that the renovations complied with the terms of the building permit and the Village Code, and their claim of vested rights. By doing so, defendants failed to exhaust their administrative remedies.

The court also found that the Village demonstrated a likelihood of success on the merits and is thus entitled to injunctive relief, but the court below properly
denied plaintiff's motion for a preliminary injunction compelling the defendants to remove additions to their premises because mandatory injunctive relief should not be granted pendente lite without a showing of extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action. Here, directing the defendants to comply with the Village Code before a determination is made may cause the defendants to do unnecessary or inadequate work that later would have to be redone, and would deprive the plaintiff of an incentive to prosecute this action to its conclusion. *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 835 N.Y.S.2d 582 (2nd Dept. 2007)

**Equal Protection**

Plaintiff sought a declaration that a zoning ordinance that requires ferry operators to obtain a special permit before using a ferry terminal within the Town and restricts the types of ferries that may use local terminals, is an unconstitutional violation of the dormant Commerce Clause and Equal Protection Clause of the US Constitution, as well as the Equal Protection Clause of the NY State Constitution, and that the law constitutes an improper and abusive exercise of the Town's police power under the laws and Constitution of New York. In 1995, the Town imposed a moratorium on new ferry service until a comprehensive transportation plan could be completed and thereafter commissioned a transportation study. Following two public hearings, the Town adopted the study as the Transportation Element of its Comprehensive Plan. The Town found that the study confirmed that summertime road traffic was so heavy, created inconvenience, and diminished quality of life. The court found that NY Town Law § 130(17) and Town Law § 263 authorized the Town to regulate vessel size and speed, and congestion in the streets. Hence the law clearly bears a substantial relation to public safety. Accordingly, the court concluded that the zoning law is a proper exercise of the Town's police power. The law did not violate the Commerce Clause because it does not facially discriminate against interstate commerce since it is indifferent as to the point of origin, destination, and ownership of the restricted types of ferries and it applies equally to in-state and out-of-state ferry operators. Furthermore, there was no evidence to suggest that the law was enacted for the purpose of discriminating against out-of-state interests, and the law is not discriminatory in its effect. The law does not violate the Equal Protection Clause just because it may make travel less direct for some passengers. *Town of Southold v. Town of East Hampton*, 477 F.3d 38 (2d Cir. 2007).

To establish an equal protection claim in the land use context, the plaintiff must show treatment different than other similarly situated individuals, and that the disparate treatment was either based upon impermissible considerations (including malicious or bad faith intent to injure) or that it was wholly irrational or arbitrary. In the zoning context, a decision is irrational only when the board acts
"with no legitimate reason for its decision." (citations omitted) Where the plaintiffs' complaint alleged selective enforcement based upon malicious and arbitrary treatment, and as evidence they pointed to emails sent which suggest an improper purpose of rendering a neighbor's appeal timely, the plaintiffs have satisfied the pleading requirement. *Petruso v Schlaefer*, 474 F.Supp.2d 430 (E.D.N.Y. 2007).

The applicant's equal protection claim fails where they are unable to demonstrate that they were intentionally singled out by the board for arbitrary treatment. The Court determined that the two projects the developer pointed to in an attempt to show that they were similarly situated, as those projects received prompt approval for sewer extensions, were not so similar that a rational fact finder could not regard the circumstances as sufficiently different to justify differential treatment. *Clubside, Inc. v Valentin*, 468 F. 3d 144 (2d Cir. 2006).

In the Second Circuit, "an Article 78 proceeding does not necessarily bar a subsequent civil rights proceeding." Where the underlying Article 78 did not address any of the alleged civil rights violations, the prior state action will not render the federal case moot. *Petruso v Schlaefer*, 474.Supp.2d 430(E.D.N.Y. 2007).

Plaintiff was able to state a claim for selective enforcement where she alleged that defendants' institution and prosecution of her on criminal charges for alleged failure to obtain a building permit and certificate of occupancy violated her civil rights. Specifically, she claims that she was prosecuted for alleged violations of the Town Code when in at least 16 other cases, property owners in town were not prosecuted for similar violations, and that she was selectively prosecuted because she exercised her First Amendment rights by criticizing a government official. *Burns v Cirearella*, 443 F. Supp. 2d 464 (S.D.N.Y. 2006).

Plaintiffs brought an action pursuant to 42 U.S.C. § 1983 against the Town and its Planning Board, alleging that defendants infringed their rights to freedom of speech, assembly and association, as guaranteed by the First Amendment to the United States Constitution, as well as their Fourteenth Amendment right to due process of law and equal protection of the laws by imposing restrictions on plaintiffs' ability to hold a large public gathering and outdoor camping event commemorating the 1969 Woodstock festival. Plaintiffs own more than 100 acres of real property located in an area classified under the Town Code as an agricultural district. In 1996, plaintiffs held a three-day outdoor music festival attended by thousands, many of whom camped on plaintiffs' property. The Town Code permits such uses of agricultural property upon grant of a special use permit and site plan approval by the Planning Board, but plaintiffs did not obtain a special use permit before holding the event. The following year the Town sued successfully to prevent plaintiffs from holding a similar event, obtaining a permanent injunction in 1998 preventing plaintiffs from holding festivals without approval. In December of 2003, plaintiffs applied for a special use permit to hold
an event in August 2004 but did not request permission to allow camping. The application was granted on the condition that they prohibit camping and lighting of open fires, but plaintiffs permitted attendees to camp, as well as light and maintain open fires. The following year, plaintiffs again sought a permit, this time with a provision for camping, which was denied due to non-compliance with the Town Code and plaintiffs’ failure to pay consultant fees to evaluate the application on public health, safety and transportation criteria. Plaintiffs nonetheless held their gathering, but ostensibly did not charge admission instead collecting “suggested donations” of $35 from attendees.

The court found that the Town’s imposition of consultant fees in evaluating their special use permits does not offend due process because State law authorizes the Town of Bethel to collect such fees. The court found that the fee collection process was not improper because even though the Board failed to follow its own regulations by conferring with applicants regarding the fees, that does not rise to the level of a due process violation because plaintiffs had the opportunity to audit the fees and verbally address them with the Planning Board.

Next the court found that plaintiffs claim that their application for a special use permit constituted disparate treatment in violation of the Fourteenth Amendment’s Equal Protection Clause must fail because plaintiffs provided the court with absolutely no information permitting comparison with themselves, despite the fact that they have had more than a year to conduct discovery.


Ethics

A Zoning Board of Appeals determination must be supported by substantial evidence. In this case, the court found substantial evidence to suggest that the permit issued by the Town Enforcement Officer did not violate the zoning code’s grandfather clause.

A zoning board determination does not need to be annulled simply because a member was employed by a real estate firm that had business with one of the parties. Since the member in question had “no ownership interest in the real estate agency, receives no salary or employee benefits from it and has had no direct dealings with either petitioner or” the owner of the subject property, there was no conflict of interest requiring recusal pursuant to General Municipal Law §809[2]. Schupak v. Zoning Board of Appeals of Marbletown, 31 A.D.3d 1018, 819 N.Y.S.2d 335 (3d Dept. 2006).

Six years after the plaintiff allegedly violated the building code, and just months after the plaintiff publically criticized the defendant building inspector for allegedly exercising preferential treatment in the issuance of certain building permits, the defendant issued an appearance ticket to the plaintiff and filed a criminal information against her. The plaintiff also maintained that the town had a well-established policy of not prosecuting code violators and that at least 16 other situations existed in which the building inspector did not enforce the code against
those people. As a result of the defendant’s actions, she is not entitled to assert qualified immunity. *Burns v. Citarella*, 443 F. Supp. 2d 464 (S.D.N.Y. 2006).

**Fair Housing Act**

In a proceeding alleging that a county, village and city engaged in exclusionary zoning that prevented affordable multi housing from being built that would have enabled African-American and Hispanic persons to live in predominantly white communities, the Court first had to address the issue of standing in federal cases. After determining that neither *Warth v. Seldin*, 422 U.S. 490 (1975) nor *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) were directly on point, the Court looked to each of the named plaintiffs for standing. As to the developer - who alleged that it seeks to build housing on a specific site, that it had developed and submitted a plan to lease the property from the county and that they had discussed this with the county, it had developed specific proposals to build multi-family low-income housing that would conform to the proposed zoning, it had expended significant financial resources to develop the plans for the specific site and it was prepared to move forward to develop the property if the defendants didn’t discriminate against it by rejecting the proposed zoning in favor of the special zoning – the court determined that they successfully pled a particularized injury, that if addressed by the court would bring redress to it. The court said that the instant case is distinguishable from *Warth* because there is a specific site and the plaintiff here is the developer, and not a plaintiff who would be relying on a third party developer. While the defendants argued that the developer had no property interest in the site (they did not own it nor did they have a lease for it) and that they never attempted in any way to secure a permit for the site, the Court did not find this controlling citing to *Warth* which noted that “particularized personal interest may be shown in various ways.” Defendants also counter that the developer never submitted a response to the RFP for development of the site. The developer, however, maintained that submitting an already non-compliant proposal would have been futile. The Court concluded that because the developer had expended significant resources and took substantial steps to prepare the plan, that it met the particularized injury requirement. The Court granted standing, acknowledging that there was a chance that even if the plaintiffs are granted the requested relief, the developer still may not build at the site.

With respect to the second plaintiff, an advocacy group that endeavors to fight discriminatory state and local government decisions and to promote more affordable housing and racially integrated housing opportunities on Long Island, the Court noted that its claims were brought on behalf of its members. The court found that the association members have stated an injury in fact in that the defendants have changed the proposed zoning thereby preventing the developer from building low income multi-family housing on the site, and that they therefore have standing. The Court also granted standing to the individual plaintiffs, who, the court said, are in a different position than plaintiffs in cases where there is no developer or specific project. Of those individual plaintiffs who did not live in the
city where the subject site is located, they indicated that if the housing were built, they had the resources and the desire to move there. One of the plaintiffs lives two miles from the site and indicated a desire to move to the location to live in a more integrated environment. Based upon these representations, the Court found that the individual plaintiffs had standing. *ACORN v County of Nassau*, 2006 WL 2053732 (E.D.N.Y. 2006).

The Court determined that the plaintiffs sufficiently pled intentional discrimination where the defendants adopted a new special zoning applicable to the site where plaintiffs had desired to develop affordable housing that would produce opportunities for racial integration. The plaintiffs need only allege that animus against them was a significant factor in the position taken by the defendants. The burden then shifts to the defendants to show a legitimate governmental interest. *ACORN v County of Nassau*, 2006 WL 2053732 (E.D.N.Y. 2006).

**First Amendment**

Although the Village’s ordinance prohibited the erection of any unattended privately owned displays within a Village Park, during the holiday season the Village placed a menorah in the park next to a natural evergreen tree that was adorned with lights visible only in the evening. A community member desired to place a crèche next to the menorah and was denied a permit based upon the ordinance prohibiting such privately owned displays. The prohibition of all privately owned displays from Village property does not violate the Free Speech Clause of the First Amendment as it serves the legitimate public purpose of avoiding clutter with all manner of signs and displays in a content neutral manner. Turning to the issue of whether the Village’s display of a purely religious symbol of one faith (the menorah), without permitting a privately sponsored symbol of another faith (the crèche) violates the Establishment Clause, the Court, in applying the “reasonable observer” standard observed that when government places holiday decorations in municipal parks, it is almost always to create a festive atmosphere and not to promote religion. However, in this case, the Court noted that in observing the Village’s display in daylight, when only the menorah is prominent and not the decorated evergreen tree (which was a naturally growing, permanent fixture in the park, and lighted only at night), it conveys a message of selective endorsement of one religion over another (in this case, Judaism). Such activity, however, did not rise to the level of excessive government entanglement with religion. The Court concluded that the Village’s practice did in fact violate the Establishment Clause. *Ritell v Village of Briarcliff Manor*, 466 F. Supp. 2d 514 (S.D.N.Y. 2006).

**FOIL**

Public Officers Law section 89 (3) has been amended by adding a new section (b) to read: “All entities shall, provided such entity has reasonable means
available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail, using forms, to the extent practicable, consistent with the form or forms developed by the committee on open government pursuant to subdivision one of this section and provided that the written requests do not seek a response in some other form.” Section 89(1) was also amended to require development of forms for e-mail requests. The new law took effect on August 14, 2006. Chapter 182 of the Laws of 2006. [ALSO: N.Y. PUB. OFF. LAW § 89(3)(b).]

On August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney’s fees when government agencies fail to comply with the Freedom of Information Law. According to the Committee on Open Government, while the law has generally been properly implemented, situations arose in which denials of access to records were unreasonable or in which those seeking records faced inordinate delays. The problem was that, if a lawsuit was initiated, a condition precedent to the award of attorney’s fees involved the need for a court to find that the records sought were of clearly significant interest to the general public. Often, however, the records at issue might have affected one or perhaps few members of the public, and in those cases, there was no possibility that those persons could recover the cost of going to court, even if an agency failed to comply with law. Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney’s fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request. Chapter 492 of the Laws of 2006. [ALSO: N.Y. PUB. OFF. LAW § 89(4).]

Highway Access

Petitioner owns a landlocked 17 acre lot in respondent Town of Lloyd that is accessible from a public highway only by means of a deeded right of way that is 15 feet wide by approximately 800 feet long. Petitioner was denied a building permit to construct a single family residence on the lot because it did not have the minimum 25 feet of road frontage specified by the Town’s zoning ordinance. The ZBA denied a request for a variance determining that it had no authority to accept the right of way in lieu of direct highway access. The Court concluded that the ZBA lacked authority to grant petitioner an exception from the requirement in Town Law § 280-a for public highway access. Indelicato v. Town of Lloyd, 34 A.D.3d 1056, 826 N.Y.S.2d 445 (3rd Dept. 2006).

The zoning board of appeals denied petitioner’s application for certain area variances as a prerequisite to the subdivision of the subject real property or, in the alternative, for relief under Town Law § 280-a excepting the subject real property from the requirement that a street or highway giving access to the proposed structures must be duly placed on the official map or plan of the Town.
The court upheld the ZBA's denial since it was rational since as the record demonstrated, the proposed subdivision would result in a development in substantial nonconformity with the neighborhood. For the same reason, the ZBA had a rational basis for denying the petitioner's alternative application for relief from the requirements of Town Law § 280-a(1), which generally prohibit the issuance of a building permit unless a street or highway giving access to the relevant structure is duly placed on the Town's official map or plan, and thus generally prohibit the issuance of building permits for structures on private roads. *Sheibani v Zoning Board of Appeals of Town of Huntington*, 40 A.D.3d 768, 835 N.Y.S.2d 448 (2nd Dept. 2007).

**Historic Preservation**

Petitioners, four residents of Greenwich Village, alleged that the City unlawfully failed to disclose material information to Community Board 2, the Landmarks Preservation Commission and the Art Commission concerning its proposed plan to renovate Washington Square Park, including renovation and relocation of the fountain. The Appellate Division held that the City did make proper disclosure because the record shows that there were many discussions both at the park and community forums and respondent made a detailed presentation of the renovation plan to Community Board 2 and the Landmarks Commission, supported by photographs and schematic drawings of the proposed changes to the fountain and plaza. There is no evidence in the record to suggest that any material information was concealed. *Matter of Greenberg v. City of New York*, 38 A.D.3d 245, 832 N.Y.S.2d 16 (1st Dept. 2007).

**Home Occupation**

The Town's zoning law defines a "home occupation" as any business "that results in a product or service, that is conducted in whole or in part in a dwelling or residential accessory building ... and that is clearly subordinate in space utilization and intensity to the residential use of the lot" (Chatham Town Code § 180-4). The court found that record established that petitioner conducts a majority of his business off premises and uses an office inside his home for paperwork. Petitioner's lawn care business was deemed not a home occupation. Additionally, most of petitioner's property is unusable wetland and that the small useable portion contains his small, single-family home, a garage and over a dozen pieces of equipment and machinery pertaining to his business, evidence relied on that that it is not a home occupation. Hence, the conclusion that petitioner's lawn care business does not fall under the category of home occupation is neither unreasonable nor irrational. *Palladino v. Zoning Bd. of Appeals of Chatham*, 39 A.D.3d 1004, 834 N.Y.S.2d 351 (3d Dept. 2007).

Where the town zoning law defined a "home occupation" in part as "An occupation or profession conducted in any zone subject to the limitation which follow and which: a) Is customarily carried on within the finished living area of a
singly family residential dwelling or its accessory building...c) Is clearly incidental and secondary to the use of the dwelling unit for residential purpose, and d) Which conforms to the following conditions: 1. The occupation or profession shall be carried on wholly within the principal building or its accessory building," the court found that the evidence before the ZBA clearly supports its interpretation and application of the "home occupation" definition because the glass-blowing business will be conducted entirely within the accessory building to be constructed adjacent to the residence, and the accessory building, although barn-like in appearance, will be painted and trimmed to match the residence. The equipment associated with the glass-blowing business, a furnace and an annealing oven, are not so dissimilar to equipment normally found in a residential home as to require a contrary determination. It was also determined that the proposed use will be harmonious with the general residential character of the neighborhood because the proposed accessory building will be the same color as the main residence and, except for a small identifying sign, no external features will suggest to an onlooker that the property is anything other than residential in nature. Hence the ZBA's determination is neither irrational nor lacking the required support of substantial evidence. *Ohrenstein v. Zoning Bd. of Appeals of Canaan*, 39 A.D.3d 1041, 833 N.Y.S.2d 763 (3d Dept. 2007).

**Housing – Disabled**

The federal Rehabilitation Act is narrower than the Americans with Disabilities Act (ADA), and it applies only to programs that receive federal financial assistance. Like the ADA, the Rehabilitation Act requires that qualified disabled individuals receive reasonable accommodations in public services and accommodations (housing). To prove a violation of the Rehabilitation Act, the plaintiff must make a four-part showing: 1) a qualifying disability under the Act; 2) that the individual is qualified for the benefit they have been denied; 3) that the benefit has been denied solely based on the disability; and 4) that the benefit is part of a program that receives federal financial assistance. Consistent with the Third Circuit, the Court noted that an individual has the right under a Rehabilitation Act challenge to compel compliance with HUD regulations. *Telesca v. Long Island Housing Partnership, Inc.* 443 F.Supp.2d 397 (E.D.N.Y. 2006).

Regulations promulgated by HUD do not require the recipients of CDBG funds to require sellers of affordable housing to affirmatively market their programs to the disabled community. *Telesca v. Long Island Housing Partnership, Inc.* 443 F.Supp.2d 397 (E.D.N.Y. 2006).

**Injunctions**

Plaintiff sought an injunction after the defendant was found guilty of constructing a residence without a permit as required by local law. Although a permit had initially been issued in 1998 for the construction of the residence the permit was
later revoked on August 26, 1999 on the ground that the construction did not conform to the approved plan. Defendant did not contest the revocation, but simply continued construction. The construction has since been completed, and defendant presently resides in the premises without a certificate of occupancy, also in violation of local law. The Court said that a town is entitled to a permanent injunction to enforce its building and zoning laws upon demonstrating that the party sought to be enjoined is acting in violation of the applicable provisions of local law (see Town Law §§ 135, 268). The court found that plaintiff established its prima facie entitlement to judgment as a matter of law by demonstrating, that defendant constructed the residence and were residing in it in violation of local law. Defendant failed to raise a triable issue of fact and made no such showing that summary judgment should be denied. The court also found that defendant’s argument that there were insufficient grounds to revoke his permit is barred, because he failed to challenge the revocation in a timely manner. Plaintiff’s action is not barred by reason of defendant’s prior criminal conviction on the basis of double jeopardy since plaintiff seeks civil, rather than criminal, relief. Defendant’s remaining constitutional claims were raised more than three years after the revocation of the building permit, and are barred by the applicable statute of limitations. *Town of Brookhaven v. Mascia*, 38 A.D.3d 758, 833 N.Y.S.2d 519 (2nd Dept. 2007)

Supreme Court properly denied the application of plaintiff pursuant to Village Law § 7-714 seeking a preliminary and permanent injunction enjoining defendant from continuing to use his land in violation of plaintiff’s Zoning Code. Although “[a] municipality has authority to obtain a ... preliminary injunction strictly enforcing its zoning [code] without application of the three-pronged test for injunctive relief,” here plaintiff failed to establish a violation of its Zoning Code. *Village of Fayetteville v. Shaheen*, 38 A.D.3d 1251, 834 N.Y.S.2d 893 (4th Dept. 2007)

**Intergovernmental Issues**

Plaintiff, Town of Riverhead, sought to enjoin the defendant, County of Suffolk, from constructing and using a fueling facility located on property inside the Indian Island County Park in Riverhead. The new facility was intended to replace an older facility in the park. The Town alleged that the County commenced construction of the new facility without securing the necessary Town and State legislative approvals and permits, that the project violated the Riverhead Town Code, and that construction was continued in violation of a stop work order. As to the Town’s cause of action based on the County’s violation of the Riverhead Town Code and failure to procure the requisite Town approvals and permits, there is a conflict between the Town’s regulations and the County’s statutory authority to construct and utilize the fueling facility. This conflict must be resolved with a "balancing of public interests" analytic approach. However, based on the conflicting evidence in the record, it cannot be established that, under the "balancing of public interests test," the County was entitled to construct and utilize the new fueling facility. Hence Supreme Court’s dismissal of plaintiff’s
cause of actions is reversed and the causes of actions are reinstated. Plaintiff’s application for preliminary injunction is unwarranted as the Town failed to demonstrate that the equities are balanced in its favor. *Town of Riverhead v. County of Suffolk*, 39 A.D.3d 537, 834 N.Y.S.2d 219 (2d Dept. 2007).

**Mandamus**

Petitioner, owner of a parcel of unimproved land in a district zoned for planned residential development, submitted an application to the Planning Board to subdivide the property into single-family residential lots. The Board refused to hear the application due to its erroneous belief that the property had been previously subdivided illegally. Petitioner brought an Art 78 mandamus to compel review, after which the Planning Board agreed to hear the application. Thereafter, the Town Board enacted an eight-month moratorium on Planning Board review of certain subdivision applications, including petitioner's application. Citing the moratorium, the Planning Board refused to continue reviewing the petitioner's subdivision application. The applicability of the moratorium to petitioner's subdivision application did not violate the so-ordered stipulation of settlement in the previous Article 78 proceeding since the moratorium prevented the Planning Board from continuing to hear petitioner's application during its effective dates, and the petitioner did not have a "clear legal right" to the relief requested in the first cause of action, seeking mandamus to compel the Planning Board to hear and determine its application for subdivision approval. *Laurel Realty, LLC v Planning Board of Town of Kent*, 40 A.D.3d 857, 836 N.Y.S.2d 248 (2nd Dept. 2007)

**Mootness**

Although there may have been substantial completion of construction work, this is not sufficient to render a challenge to the erroneous issuance of a building permit moot since the petitioners applied for injunctive relief and moved for a stay pending appeal, placing the developer on notice that its labor in digging a foundation and erecting walls was undertaken at its own risk. *Schupak v Zoning Board of Appeals of the Town of Marbletown*, 31 A.D.3d 1018, 819 N.Y.S.2d 335 (3rd Dept. 2006).

**Moratorium**

Although in the present case the challenge to the local moratoria was deemed moot, in dicta the Court noted that it was disturbing that a moratorium was in effect for a period of two and half years, and cautioned that such measures may not be used in bad faith to delay a landowner's application. *Land Master Montg I, LLC v Town of Montgomery*, 13 Misc.3d 870, 821 N.Y.S.2d 432 (Sup. Ct. Orange Co. 2006).
In commenting on the two year duration of a moratorium on the construction of windmills, the Court noted that following the U.S. Supreme Court decision in *Tahoe-Sierra Pres. Council, Inc. v Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), there is no bright-line rule as to how long a moratorium may remain in effect without treading on constitutional rights. The Court stated that there, “it does seem curious and suspicious that a two-year period is needed to adopt a zoning plan for wind turbines.” As a result, while denying the developer’s request for a preliminary injunction, the Court ordered the Town to: “(1) enact a comprehensive zoning plan within ninety days of the date of issuance of this Decision and Order, or (2) render a decision on the plaintiff’s application for a hardship exception within ninety days of its filing.” The Court invited the plaintiff to seek injunctive relief if the Town fails to take either of these actions. *Ecogen, LLC v Town of Italy*, 438 F. Supp. 2d 149 (W.D.N.Y. 2006).

An eight-month moratorium, which was extended twice for short periods of time, is a valid stopgap or interim measure, reasonably designed to temporarily halt development while the Town considered updates to its master plan and comprehensive changes to its Zoning Ordinance. The moratorium and extensions were enacted for a reasonable period of time. The court noted, however, that an unreasonable delay by the Town in completing the zoning changes may render subsequent extensions of the moratorium unconstitutional. *Laurel Realty, LLC v Planning Board of Town of Kent*, 40 A.D.3d 857, 836 N.Y.S.2d 248 (2nd Dept. 2007).

**Non-Conforming Uses**

Owner purchased a parcel of land which prior to the purchase had been used for various commercial uses, including the placement and storage of materials and furniture. Since the purchase, the owner has been using the land on a regular basis for his home and the creation of art. Neighbors complained that the “art” and “materials” were cluttering the surrounding property and took action seeking a permanent injunction that the use of the land was in violation of the local zoning ordinance. In finding that the owner was in violation of the zoning ordinance, the Court noted that the current zoning ordinance places the owner’s land in a residential-agricultural district where storage of materials would be prohibited unless an exception applied. This court rejected the owner’s assertion that the current use qualifies as a preexisting nonconforming use, holding that “nonconforming uses of property are tolerated but the overriding policy of zoning is aimed at their eventual elimination.” Even though the owner’s claim of a continued use of the property is relevant, the owner did not provide enough proof from anyone with personal knowledge of how the property was actually used prior to the 1973 zoning ordinance and prior to the owner’s purchase of the land in 1980. Without that information, there is no viable claim that there is was a preexisting use under the 1973 zoning ordinance *Town of Canaan v. S.C.L. Form Company, Inc.*, 32 A.D.3d 619, 820 N.Y.S.2d 356 (3d Dept. 2006).
The decision of the zoning board of appeals that a landscaping and excavation business operating as a nonconforming use had impermissibly expanded its operation to include a "mulching and/or recycling" processing facility, including the outdoor storage of certain materials was upheld since the denial for expansion of the nonconforming use was neither illegal, arbitrary or capricious nor an abuse of discretion. *McDonald v. Zoning Board of Appeals of Islip*, 31 A.D.3d 642, 819 N.Y.S.2d 533 (2d Dept. 2006).

Defendants owned three adjoining lots of property which were used as a general construction yard. The Town sought to enjoin the defendants from continuing or expanding their nonconforming use of the property as a general construction yard, alleging that the defendants' use of Lot A violates the Certificate of Occupancy because parking was expanded (as they leased the lot to a bus company), screening trees were removed, a retaining wall was built without a permit and open storage containers were placed within a buffer zone. The Court held that the defendants had a vested right in its mixed use of Lot A and that the use of Lot B as a general construction yard was a legal nonconforming use and the defendants did not need site plan approval to use the lots as a general construction yard. The Court found that the defendants did not alter nor increase their nonconforming use of lot B as a general construction yard and the lot has been used as such since 1930, which predates the Town's zoning code by 9 years. The defendants have continually used the lot as a general construction yard since it was purchased in 1995. Even though there was an increase in volume of the nonconforming use, it was of the same type that had been used for over 60 years on the land and an increase in volume does not constitute a per se impermissible expansion of the nonconforming use. *Town of Clarkstown v. M.R.O. Pump & Tank, Inc.*, 32 A.D.3d 925, 822 N.Y.S.2d 576 (2d Dept. 2006).

Defendant challenged citation by Information for changing the permitted nonconforming use of a building without a permit and occupying a building without a valid certificate of occupancy, arguing the City failed to establish its "prima facie requirement." Defendant also challenged the citation on constitutional grounds. The court held in favor of the City finding that each of the informations is sufficient. Furthermore, defendant's constitutional claims were without merit because individuals' religious beliefs do not excuse them from compliance with otherwise valid laws prohibiting conduct that a municipality is free to regulate. *City of Albany v. Trinity Church*, 14 Misc. 3d 1205(A), 831 N.Y.S.2d 358 (City Ct. Albany 2006).

Petitioner sought review of the Board of Standards and Appeals determination that modified a certificate of occupancy to provide that a nonconforming retail use cannot be maintained on the first floor of the subject premises because the nonconforming use had been discontinued for over 2 years. The Court held that the Board's determination had a rational basis and was not capricious or arbitrary. *In re 1491 Richmond Road, LLC v. New York City Bd. of Standards and Appeals*, 35 A.D.3d 614, 824 N.Y.S.2d 745 (2d Dept. 2006).
Where the town zoning code states that a nonconforming use may be changed only to a use that conforms to the substantive provisions of the zoning code, the zoning board of appeals determined that the Petitioner's use of certain real property was not a continuation of a preexisting nonconforming use. "The determination of a zoning board regarding the continuation of a preexisting nonconforming use must be sustained if it is rational and is not illegal or an abuse of discretion, even if the reviewing court would have reached a different result." The court found that the evidence established the current use of the property as offices for two separate businesses: a construction company and a real estate company, and for the regular, if infrequent, delivery, storage, and distribution of kitchen cabinets, was not substantially the same as its prior use by one business for the sale of office equipment and supplies. Therefore, the determination of the Zoning Board was rational and was not illegal or an abuse of discretion. In re RJA Holding Inc. v. Town of Wappingers Zoning Bd. of Appeals, 37 A.D.3d 724, 830 N.Y.S.2d 321 (2d Dept. 2007).

After being charged with two violations of the Village Code for (1) no certificate of occupancy for business and (2) no permit to run a business from the premises, the defendants moved to dismiss on the grounds that the current use of the premises is a non conforming use established before the relevant zoning code was in effect. The defendants own property which consists of a residential house and a garage used for the storage and assembling of brushes for sale to various businesses. The use of the property appeared to begin April 7, 1942 where it was originally used as a chicken coop. Thereafter the brush business commenced and has been in continuous use since then. The defendant showed, by substantial evidence, that a non-conforming use existed on the property prior to the enactment of the zoning code by submitting affidavits that the property has been used as a brush business since the 1940's (before the 1952 enactment of the zoning code). The court dismissed the summons and information as a matter of law. People v. Braun Bros. Brushes, 15 Misc.3d 1030 (N.Y. Just. Ct. Valley Stream 2007).

The Village commenced an action to enjoin and restrain the defendants from violating its zoning law by keeping horses and more than two dogs on their property. The defendants brought a combined CPLR article 78 proceeding/declaratory judgment action seeking to annul the determination of the ZBA denying their application for a use variance and seeking a declaration that they have a valid nonconforming use of the property. The Court determined that there are triable issues of facts, including whether Hotis improperly expanded his preexisting nonconforming use by keeping six horses on the property, and whether he has a preexisting nonconforming use to operate a kennel on the property, and therefore found that the Court below should have held a trial. Village of Gainesville v. Hotis, 39 A.D.3d 1167, 833 N.Y.S.2d 826 (4th Dept. 2007).
Respondent proposed to develop two (2) parcels for both commercial and residential use, including a space for various marine-oriented retail and office uses. The zoning board determined that the use of the property was a pre-existing non-conforming use because the marine related commercial use predated the adoption of the zoning code. Furthermore, the marine use had continued from 1971 until respondent's acquisition without any significant lapse in time and without a significant change in use. Petitioners, a membership organization of more than 50 households who neighbor the subject property, commenced this proceeding alleging that respondent Zoning Board's determination was not valid. The Court noted that "By design, zoning ordinances operate by setting forth allowed uses, and prohibiting anything not so explicitly permitted. In the absence of a zoning code, there exists no prohibition against uses of property, and therefore, prior to the enactment of such a code, all uses would therefore be legal." In re Sterling Basin Neighborhood v. Zoning Board of Appeals of the Village of Greenport, 13 Misc. 3d 1219(A), 831 N.Y.S.2d 350 (N.Y. Sup. Ct. Suffolk Co. 2006).

Since petitioner could not show that a wall and roof existed on the property when the zoning law went into effect in 1999, the petitioner could not demonstrate a preexisting nonconforming structure on the property so that the zoning law's setback requirements would not apply. The zoning board of appeals properly determined that concrete footers, steel posts and a fence did not constitute a wall of the existing structure. Bartoszewski v Town of Hannibal Zoning Board of Appeals, 35 A.D.3d 1291, 827 N.Y.S.2d 806 (4th Dept. 2006).

Where a boundary line modification agreement was entered into subsequent to changes in the zoning law, the court determined that the zoning board of appeals properly concluded that such agreement did not alter the non-conforming status of the property since the record demonstrated that the agreement merely clarified the common boundary of the property as it had always existed and that the $35,000 paid was reimbursement solely for incurred expenses and personal damages, and not for the land itself. Therefore, no land transfer took place that would have changed the grandfathered status of the parcel. Schupak v Zoning Board of Appeals of the Town of Marbletown, 31 A.D.3d 1018, 819 N.Y.S.2d 335 (3rd Dept. 2006).

The determination of the ZBA approving the establishment of nonconforming uses of the subject property for a restaurant and bar with outside service, a marina, and a ferry landing, with outside entertainment, was irrational and not based upon evidence in the record because all of the nonconforming uses were substantially discontinued for a period of more than one year within the meaning of the Town Code which provides, in part, that the "substantial discontinuance of any nonconforming use for a period of one year or more terminates such nonconforming use of a structure or premises." While an "abandonment" of a legal nonconforming use requires "a complete cessation" of the nonconforming use, a "substantial discontinuance" of a legal nonconforming use requires...
something less than a complete cessation of that use. The certificate of occupancy clearly stated that the restaurant and bar that had been operated on the premises were closed in excess of 1 year. The premises were also used solely as a restaurant and bar during a three-year period, without outside service or entertainment, and that no marina or ferry terminal was in operation during that period. This evidence conclusively proved that the nonconforming uses were substantially discontinued for a period of more than one year, hence the determination of the ZBA that the nonconforming uses did not run afoul of the Town Code was irrational and not based on the evidence in the record. Additionally, granting the application to establish the use of a ferry terminal as a nonconforming use was irrational because the ZBA specifically found that the premises were never used as a ferry terminal. *Eccleston, et al. v Town of Islip Zoning Board of Appeals, et al.*, 40 A.D.3d 854, 836 N.Y.S.2d 637 (2nd Dept. 2007).

A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use, but the right to maintain a nonconforming use does not include the right to extend or enlarge that use. The record showed that the parcel not designated for construction of the building was devoted to use for the hauling and transfer of solid waste when the zoning ordinance was enacted, in December 1978. The court concluded that the ZBA’s determination that the parcel upon which the building was constructed was then so used, lacked a rational basis and was not supported by substantial evidence. The court also noted that the predecessor owner did not purchase that parcel until 1986 and that the building does not meet the definition of a “Non-Conforming Building” under the zoning ordinance, which requires that the building have “lawfully existed at the time [of the] enactment of this ordinance.” Also under common-law principles, the construction of a building to enclose even a valid nonconforming use previously conducted outdoors would result in an unlawful expansion or intensification of such use. *Matter of Bohner v. Casatelli*, 38 A.D.3d 1230, 831 N.Y.S.2d 790 (4th Dept. 2007)

Petitioner owns an inn in the Village of East Hampton located in an area zoned for residences, but since the property was used as an inn before the zoning ordinance was enacted, the inn is a lawful non-conforming use. However neighbors complained about two features of the inn: a former barn that is used as a staff dormitory, and an awning over the patio, and the ZBA found that these features were unlawful because both have not been shown to pre-date the existing zoning and because they were abandoned for a period of more than one year after the zoning was in force. However, certificates of occupancy issued in 1989 and 1993 approved the dormitory and the awning. In 2003 a new certificate of occupancy was issued which was unchanged, but described the awning and dorm in more detail. Within sixty days of the public filing of the 2003 certificate, neighbors appealed to the ZBA, which granted the appeal and annulled several portions of that certificate, including those relating to the dormitory and the awning, and thereafter petitioner brings this CPLR article 78 proceeding to annul
the ZBA’s determination. The court found that even though the neighbors’ appeal was timely within 60 days after the 2003 certificate was issued, the mere repetition, in words or substance, of an authorization contained in the old certificate of occupancy should not be treated as a newly appealable “order, requirement, decision, interpretation or determination” because the village official who issued the new certificate of occupancy in 2003 did not decide or determine anything about the dormitory or the awning, except that they had already been approved years before. The mere issuance of a new, substantially identical, certificate should not permit a new challenge to an owner’s use of its property when, as the parties here do not dispute, no such challenge was permissible before the new certificate was issued. Matter of Palm Management Corp. v. Goldstein, 8 N.Y.3d 337, 865 N.E.2d 840, 833 N.Y.S.2d 423 (2007).

Notice

The planning board granted an application for the construction of five additional vehicle paint spraying booths and seven work bays in the Retail Business District without conditioning such approval upon a special exception or use variance granted by the Board of Appeals. However, the Village Code states that the construction of the booths without a use variance or special exception from the Board is unlawful and beyond the scope of the authority of the Planning Board. The notice sent to nearby property owners did not state that the expansion would triple the size of the building, that the building addition would house 5 booths instead of one, that the discharge from the vents would be 5 feet from petitioner’s property or that the interior of the building would be renovated to accommodate the additional bays. This Court granted petitioners’ petition to annul the determination, holding that the language of the Village Code clearly states that an application had to be made to the Board of Appeals and that adequate notice was not given to nearby property owners due to the vagueness of the notice. Hejna v. Planning Bd. of Amityville, 2006 N.Y. Slip Op. 51703(U), 13 Misc.3d 1206(A), 824 N.Y.S.2d 754 (Table) (N.Y. Sup. Ct. Suffolk Co. Sept. 11, 2006).

Nuisance

Local governments have the power to summarily abate a nuisance without a warrant, therefore the fact that the code enforcement officer observed in public view the waste and junk on the plaintiff’s property, and that there was a threat (not acted upon) to have the town clean up the property, does not constitute a civil rights violation under Section 1983. Beganskas v Town of Babylon, 2006 WL 2689611 (E.D.N.Y. 2006).

Open Meetings Law

Where a newly designated town planning board gathers to engage in board training, if the sole purpose of the gathering is to be educated, it is unlikely that the Open Meetings Law would apply. Insofar as a board discusses matters of
public business, however, that falls within the scope of its duties or jurisdiction that gathering would constitute a meeting subject to the Open Meetings Law. *N.Y. Comm. On Open Gov't, OML Op. No. 4241 (2007)*.

**Planning Boards**

"Planning boards are without power to interpret the local zoning law, as that power is vested exclusively in local code enforcement officials and the zoning board of appeals." Therefore, the planning board had no authority to deny an application based on zoning grounds. *Swantz v Planning Board of the Village of Cobleskill*, 34 A.D.3d 1159, 824 N.Y.S.2d 781 (3rd Dept. 2006).

The Attorney General has opined that Village boards can limit the number of terms that members of the planning board and zoning board of appeals may serve. *Inf. Op. N.Y. Att'y Gen. 2007-1 (2/21/07)*.

Pursuant to General Municipal Law Article 15 which requires that urban renewal plans be submitted to the planning commission or other analogous body, the City properly designated the City Council to act as the planning board for the limited purpose of urban renewal. *420 Tenant Corp. v EBM Long Beach, LLC*, 14 Misc.3d 224, 823 N.Y.S.2d 863 (Sup. Ct. Nassau Co. 2006).

In reviewing the petitioners' applications to construct a single family residence on their property, improve a private and unimproved dirt and gravel common driveway with an existing 50-foot-right-of-way, to obtain needed steep slope protection permits and tree removal permits, as well as a waiver of road specifications to improve the property to comply with the town's frontage requirements and emergency access required pursuant to Town Law sec. 280-a, following site inspections, involvement of the town conservation board, public hearings, and the submission of revised plans, the planning board conditionally approved the applications upon compliance with 26 conditions. In challenging a number of the conditions, the Court determined that the approval of the application was not arbitrary or capricious or irrational and the decisions of the planning board and the conservation board were sustained. *Griffin v Town of Somers*, 13 Misc.3d 1205 (A), 824 N.Y.S.2d 754 (Sup. Ct. Westchester Co. 2006).


**Preemption**

New York State has preempted the field of regulating the sale of alcoholic beverages, therefore it is improper for a municipality to condition the granting of a

**Public Trust Doctrine**


**Religious Uses**

Although a religious institution does not enjoy a conclusive presumption of an entitlement to a granting of a variance, where the zoning board of appeals makes findings against the variance request with respect to the five statutory factors requires to be balanced, wherever possible, the board must make every effort to accommodate the religious use by imposition of conditions. Since the Board failed to discuss the statutory factors, the Court remanded the matter back to the Board so that it may issue a new decision with factual findings in the proper form. *Lafiteau v. Guzewicz*, 13 Misc. 3d 1228(A), 831 N.Y.S.2d 354 (N.Y. Sup. Ct. Suffolk Co. Oct. 10, 2006).


**Restrictive Covenants**

The issue before the Court was whether land use restrictions as set forth in article 16 of the General Municipal Law and referenced in the recitals of a deed to real property can be enforced against a successor grantee. The court held that under the circumstances presented in this case, they can. The subject property, came into municipal ownership through tax foreclosure proceeding and consisted of a five-story townhouse, and serves as an eight unit multiple dwelling. The City, through Department of Housing Preservation and Development (HPD), determined that the status of the building tended to impair and arrest the growth and development of the municipality, and placed it for disposition as an Urban Development Action Area Project (UDAAP) as governed by the Urban Development Action Area Act (UDAAA), article 16 of the General Municipal Law. The appellants bought the building subject to removing all city code violations and hazardous conditions, and maintaining the existing tenants’ rent at its current amount for two years. The deed conveying the property includes several recitals, a granting and a habendum clause, and referencing in the deed a description of the disposition area, the City Council Resolution approving the UDAAP and the Mayoral approval. The deed, in its entirety,
contains numerous references in the recitals to the property's UDAAP designation, and to the parties' required compliance with the UDAAA's requirements. The appellants never corrected the code violations and sold the premises to respondents. The new owner planned to demolish the building and develop a high-rise "sliver" apartment building in its place. The owners of an adjacent building which shares a party wall, filed a summons and complaint challenging the pending conveyance, as well as filing a lis pendens against the property.

Even when a deed declares that a restrictive covenant runs with the land as indicated here, it must still comply with certain legal requisites to be enforceable against successors in interest. Three conditions must be met in order for a covenant to run with the land: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or the land with which it runs; (3) it must appear that there is "privity of estate" between the party claiming the benefit of the covenant and the right to enforce it, and the party who rests under the burden of the covenant.

First, the parties' intent to restrict the use of the property is clear from the multiple references in the deed to the UDAAP requirements and the habendum clause, and the explicit provision that agreements and covenants will run with the land. Intent can also be shown by the low appraisal value and exemption from both competitive bidding and a time-consuming land use review; in fact the purchase price alone is indicative of the parties' intent because the potential income stream for a possible use of the land with a high-rise building is not reflected by the purchase price. Second, the covenant touches and concerns the land because although the requirements of offering renewal leases and correcting code violations are finite in nature, they also are relevant to the economic development of the property and not meant to restrain the ongoing duty to conserve, rehabilitate or reconstruct within the constraints of the deed and UDAAA. The new owner was on notice of this responsibility prior to taking title, from the clear language of the deed and from the filed lawsuit and lis pendens.

The court held that the land use restrictions included in the language of the deed and mandated by statute run with the land. Certainly, this need not be in perpetuity if the deed recitals are accomplished, and that the current or any future owner may seek extinguishment of the land use restrictions under RPAPL 1951 to the extent it desires to make different use of the property. As for the City's request to limit the property use to conservation purposes only, the court found that references in the deed to article 16 of the General Municipal Law, do not make such a limiting distinction. 328 Owners Corp. v. 330 West 86 Oaks Corp., 8 N.Y.3d 372, 865 N.E.2d 1228, 834 N.Y.S.2d 62 (2007).

As part of a 1975 rezoning, the then owners of the subject properties sold them to IBM subject to a restrictive declaration providing that the properties could only be used as an "accessory parking lot" for the "IBM plant." The declaration provided that it could be cancelled "only with the approval of the City Planning
Commission and the Board of Estimate or the agencies succeeding to their jurisdiction..." The City council succeeded the Board of Estimate. Following a public hearing and a report on the cancellation of the restrictive declaration, the City Planning Commission recommended cancellation. The City Council, however, denied the request for cancellation and the requested rezoning. The fact that the City Council disagreed with the City Planning Commission is not itself a basis to overrule the legislative decision. The Court noted that municipalities may restrict the uses of property, but may not place restraints on the users or owners of that property, and here the restrictive declaration was clearly tied to IBM, thus placing restraints on the users and owners. Because the plain language of the declaration is that the lot is restricted to use as a parking lot for an IBM facility, the court determined that this was not only merely descriptive, but it was also substantive and therefore not valid. *Middleland, Inc. v City Council of the City of New York*, 14 Misc.3d 1223(a), 836 N.Y.S.2d 486 (Table) (Sup. Ct. Kings Co. 2006).

**Rezoning**

Town Law sec. 265(1) provides that zoning regulations may be amended by a simple majority vote of the town board, except in certain cases such as here, where the change is the subject of a written protest presented to the Board and signed by "the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom." Citing Town Law sec. 265(1)(b). In a case of first impression, the Court of Appeals held that the "one hundred feet" is to be measured from the boundary of the rezoned area, and not from the parcel of which the rezoned area is a part. The Court found nothing wrong with the petitioners assertion that this interpretation "allows landowners who obtain rezoning to insulate themselves against protest petitions by 'buffer zoning'—i.e., leaving the zoning of a strip of property unchanged..." The Court noted that their interpretation makes the operation of the statute more predictable. *Edie v. Town Bd. of North Greenbush*, 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006).

The Court upheld the city council's decision not to rezone the property where the basis for their decision was the need to create jobs in the area. The issue of whether the need to create housing is more pressing that the need to create jobs is a political one and one that the Court will not second guess the city council on. Great deference is afforded to a legislative act such as a rezoning, and the Court did not find, as alleged by the petitioners, that the council acted in an arbitrary and unreasonable manner. Discriminatory comments made by a few at a public hearing, without more, do not automatically infer capriciousness and arbitrariness. *Middleland, Inc. v City Council of New York*, 14 Misc. 3d 1223(A), 836 N.Y.S.2d 488 (Table) (Sup. Ct. Kings Co. 2006).

**Ripeness**
Where the plaintiffs alleged that the Town violated their constitutional rights by (1) refusing to issue a new wetlands map in accordance with the 1990 decision of the state court in an Article 78 proceeding and (2) denying their applications for a wetlands permit, because the claims rested on the alleged denial of their right to develop the property and they do not set forth any immediate injury they suffered as a result of the Town's failure to issue a new wetlands map, the alleged failure is not a final decision that renders their equal protection and procedural due process claims ripe for review. The court determined that the plaintiffs' application was not ignored because the application for site plan approval of the development was withdrawn before the Town Planning Board's final vote; hence the Town never had an opportunity to make a decision on the wetlands permit application. Accordingly, there was never a final decision concerning the extent to which plaintiffs could develop the wetlands portion of their property. Adrian v Town of Yorktown, 2007 U.S. Dist. LEXIS 36448 (S.D.N.Y. 2007)

Plaintiffs alleged that in 1988, the Town rezoned its land which prevented any commercial development of their properties. In May 1989, plaintiffs filed an Article 78 proceeding claiming the rezoning to be unlawful and, thereafter, the Town's effort to rezone the property was rescinded. Plaintiffs were successful and, in June 1993 the Town Board rezoned that portion of the property to "C-3, Highway Commercial." Thus, the court held that it appears that the Town never rezoned any portion of Plaintiffs' property, other than in accordance with their wishes. Hence, in the absence of any proof that the Town rezoned plaintiffs' property, it cannot conclude that there was ever a final decision concerning the alleged rezoning on which plaintiffs base their constitutional claims. Adrian v Town of Yorktown, 2007 U.S. Dist. LEXIS 36448 (S.D.N.Y. 2007)

The Second Circuit has not yet decided under what circumstances, if any, the second prong of Williamson County applies to equal protection and procedural due process claims. With the exception of plaintiff's allegation of selective prosecution under the Freshwater Wetlands Law, plaintiffs' procedural due process and equal protection claims are based on alleged acts that they claim resulted in the loss of their ability to develop their property. Thus, the remedy sought by plaintiffs, just compensation, should have been sought in state court through an inverse condemnation or de facto condemnation proceeding. Adrian v Town of Yorktown, 2007 U.S. Dist. LEXIS 36448 (S.D.N.Y. 2007)

Where the town revoked two building permits authorizing the replacement of two mobile homes with new ones after the plaintiff made improvements to the property and incurred substantial expense in reliance on the issued permits, and where the plaintiffs alleged that the revocation was made for purely political reasons after residents complained, the Court held that the plaintiffs' takings claim is ripe for review and that they need not seek further administrative review before bringing a claim in federal court. The defendant's assertion that the plaintiffs should have applied for a variance or pursued relief under state law first was without merit since a validly obtained permit was revoked without due
process, resulting in injury to the plaintiff. Since the complaint sufficiently states a justiciable injury, the issue is ripe for reform. Bain v Town of Argyle, 2006 WL 2516497 (N.D.N.Y. 2006).

SEQRA

Petitioners commenced this CPLR article 78 proceeding to annul its determination granting a zoning variance to Benmar Properties in 2006, when in 1991 the respondents refused to grant the same variance to the previous owners on very similar facts, on the same land, and without any change in the neighborhood since 1991. Petitioners argued that the respondents' determination was arbitrary and capricious since it did not follow the 1991 determination. The court, in a footnote, mentioned that petitioners did submit before the ZBA that the ZBA was required to take the requisite hard look at the environmental impacts of this project pursuant to SEQRA because the Benmar property was located near a historical landmark. However the court noted that petitioners chose not to pursue this issue in the proceeding. The court noted that the ZBA ruled that the application was a Type II action (thereby outside SEQRA's purview) based on its interpretation of the application as an area variance and lot line change to construct one single family residence (6 NYCRR 617.5[c][12], [13]). If the application was listed as Type I or unlisted, then it would be under SEQRA to determine whether the action may have a significant effect on the environment such as "the impairment of the character or quality of important historical ... resources ...." (6 NYCRR 464.15[a][5]). Lucas v Board of Appeals of Mamaroneck, 2007 N.Y. Slip Op. 50032(U), 14 Misc. 3d 1214(A), 836 N.Y.S.2d 486 (Table) (N.Y. Sup. Ct. Westchester Co. Jan. 9, 2007).

An Article 78 challenge to a rezoning was properly brought within four months of the rezoning, despite the fact that the challenge alleging SEQRA violations was brought more than four months after the SEQRA findings were adopted. The Court of Appeals found that the challenge to rezoning was timely and that the Town Board complied with SEQRA requirements. In holding that the Article 78 four-month statute of limitations began to run when the rezoning was enacted, the court noted that previous cases held the period begins when the petitioner has suffered injury not amenable to further review and corrective action. Since the Court found the petitioner in this case suffered no concrete injury until the Town Board approved the rezoning, petitioner had until four months from the date the new zoning was enacted to commence his action. Despite language apparently indicating a bright-line rule as to the statute of limitations issue, the court then went on to note: "[T]his does not mean that, in every case where a SEQRA process precedes a rezoning, the statute of limitations runs from the latter event, for in some cases it may be the SEQRA process, not the rezoning, that inflicts the injury of which the petitioner complains." The Court gave as an example the possibility that certain mitigation measures adopted in SEQRA findings might burden those challenging the rezoning. In such a case the Court noted the injury and therefore the time to bring a challenge would run from the
adoption of the SEQRA findings, not the enactment of the legislation. Thus the four month statute of limitations does not always begin to run at the enactment of the ordinance, but may begin to run at another point in time. This ruling should generate some interesting decisions in the future. *Eadie v. Town Bd. of North Greenbush*, 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006).

Municipalities are required to take a hard look at the impact on affordable housing when conducting a review under SEQRA of the effects of proposed comprehensive land use plan and related zoning laws, all of which are Type I actions. “Environmental concerns” include not only impacts upon the physical environment “but also impacts on population patterns, neighborhood character and the community in general.” *Land Master Montg I, LLC v Town of Montgomery*, 13 Misc.3d 870, 821 N.Y.S.2d 432 (Sup. Co. Orange Co. 2006).

It was proper for the planning board to be the designated lead agency for SEQRA review of specific impacts of the proposed project as well as for the more general impacts of the zoning amendments under consideration by the City Council. Had the City Council conducted its own environmental review of the proposed zoning amendments, it would have amounted to improper segmentation. *Citizens Against Sprawl-Mart v City of Niagara Falls*, 35 A.D.3d 1190, 827 N.Y.S.2d 803 (4th Dept. 2006).

**Site Plan Review**

It was illegal, arbitrary and irrational for the planning commission to deny the petitioners’ second set of applications for site plan approval and for resubdivision of the property for use of the property as a school building since the Commission improperly based its denial on certain design features of the proposed building or associated activities that are intrinsic to the school or educational use of the property. The Court found that citing to the inherent design features was tantamount to objecting to the nature of the use itself, and such a use is specifically allowed under the zoning law. *Southside Academy Charter School v City of Syracuse*, 32 A.D.3d 1295, 821 N.Y.S.2d 738 (4th Dept. 2006).

Plaintiff owned property that was zoned “J Business 2” (J-2) which permits retail stores. Before that the property was used for non conforming recreational uses. In February of 2000, the Town on its own motion decided to rezone Plaintiff’s property to Commercial Recreation (CR). Plaintiff wanted to build a Lowe’s Store on his property and submitted in March of 2000 a site plan, and was told that he needed a use variance because he cannot build the retail store as of right. Plaintiff challenged the Town’s rezoning of his property arguing that his site plan application was subject to review under J-2 zoning and not CR zoning, and that the Town intentionally delayed the processing of his site plan application and the SEQRA review. The court found that Supreme Court erred in granting summary judgment to defendants because there remained issues of triable facts as to defendants’ “malice, oppression, manipulation or corruption” in the delay of
processing Plaintiff’s site plan and the SEQRA review and whether the
defendants acted in bad faith. *Rocky Point Drive-In, L.P. v. Town of Brookhaven*,
37 A.D.3d 805, 831 N.Y.S.2d 456 (2nd Dept. 2007).

Where the City abolished its planning board when it created a Department of City
Planning and Development, making it impossible to comply with a requirement to
obtain site plan approval from a non-existent planning board, it was the implied
intent of the City Council to repeal the requirement for site plan approval from the
planning board. *420 Tenants Corp. v EBM Long Beach, LLC*, 14 Misc.3d 224,

To build a two-story dwelling on a substandard lot, petitioners applied for and
received from the zoning board of appeals the needed area variance. Petitioners
then applied to the village site plan review board, which, following a hearing
granted the site plan approval subject to 14 conditions. The Court determined
that two of the 14 conditions were improper as they had the effect of overruling
the previously granted area variance. Although the court acknowledged that the
site plan review board had authority under the zoning code to make a
determination on the application regarding sufficient off-street parking (which
necessitated the conditions at issue), the Court found that the exercise of such
authority was arbitrary and capricious because there was no factual basis for the
findings, just generalized community opposition. *Richter v Delmond*, 33 A.D.3d
1008, 824 N.Y.S.2d 327 (2nd Dept. 2006).

The court found that petitioners, although lacking standing to challenge the
Special Permit Resolution because none of them live closer than one-half mile,
are not within the required notification area for Special Permit application,
pursuant to the Town Code, and they did not demonstrate they are within the
zone of interest, nor that they would suffer an injury different than the public at
large, they do have standing to challenge the manner of adoption of the SEQRA
Resolution as determined in a prior hearing. The Court stated that their success
in challenging the adoption of the SEQRA Resolution serves to annul the Special
Permit Resolution, as it cannot stand without a properly adopted SEQRA
Resolution. Their right to challenge pursuant to SEQRA, and the resultant
nullification of Town Board action, deprives the Planning Board of the ability to
approve the site plan, for lack of a properly adopted Special Permit renders the
actions of the Planning Board a nullity, void and of no force and effect. *East End
Property Company No. 1 LLC, et al v The Town Board of the Town of
Brookhaven*, 15 Misc. 3d 1138 (A) (Sup. Ct. Suffolk Co. 2007).

**Special Use Permits**

The zoning board's ability to impose conditions on the granting of a special use
permit is not unlimited, as they may not impose conditions where the State has
preempted the field, such as with respect to the sale of alcoholic beverages.

Courts generally apply the zoning ordinance in existence at the time a decision is rendered unless special facts are present which illustrate that the municipality acted in bad faith and unduly delayed acting upon an application while the zoning law was being changed. This case did not present any special facts and the Town Code does not authorize the Board of Zoning Appeals to extend the petitioner’s special permit. Denton v. Town of Brookhaven 32 A.D.3d 395, 819 N.Y.S.2d 547 (2d Dept. 2006).

Although the zoning board of appeals failed to make specific factual findings to support its grant of a special use permit for a home occupation, a court need not annul that determination if a review of the record demonstrates that the zoning board of appeals did make specific factual findings supporting its determination (citations omitted). In finding that the zoning board did make the requisite factual findings, the court noted that each of the criteria listed in the zoning law was considered and each conclusion with respect thereto has substantial support in the record. Ohrenstein v. Zoning Bd. of Appeals of Canaan, 39 A.D.3d 1041, 833 N.Y.S.2d 763 (3d Dept. 2007).

Pursuant to Town Law §274-b, the town board may keep the issuance of special permit authority to itself. Inland Western Coram Plaza, LLC v Town of Brookhaven, 14 Misc.3d 1225(A), 836 N.Y.S.2d 493 (Table)(Sup. Ct. Suffolk co. 2007).

The inclusion of a use allowed by special use permit in a zoning ordinance is tantamount to a legislative finding that the use is in harmony with the community’s general zoning and will not adversely impact the neighborhood. Inland Western Coram Plaza, LLC v Town of Brookhaven, 2007 WL 308559 (Sup. Ct. Suffolk co. 2007).

**Spot Zoning**

Where, prior to adopting a zoning amendment to rezone a parcel from rural residential to planned unit development district, the town engaged in sufficient forethought by conducting an extensive review of the proposed project, determining that the project fell within the guidelines for a planned unit development district, and determining that there would be no adverse impact to the surrounding properties, the Court determined that the rezoning did not constitute illegal spot zoning. Although the zoning amendment benefited the owners of the subject parcel, it also benefited the general welfare of the community. Baumgarten v Town of Northampton, 35 A.D.3d 1081, 826 N.Y.S.2d 811 (3rd Dept. 2006).

**Standing**
Petitioners have standing as property owners to challenge zoning changes that would allegedly impact the availability of affordable housing in the Town. *Land Master Montg I, LLC, et. al.* v *Town of Montgomery*, 13 Misc.3d 870, 821 N.Y.S.2d 432 (Sup. Ct. Orange Co. 2006).

“Ownership of property adjacent to or very close to affected property generally gives rise to a presumption of standing because it is reasonable to assume that an owner located in the immediate vicinity of a rezoned area will suffer an injury different from the community at large and this be brought in to the zone of interest.” In addition, a neighboring leaseholder also has standing to challenge a zoning action since the close proximity may affect the value and enjoyment of a leasehold as well. *Nash Metalware Co., Inc., et. al* v *The Council of the City of New York*, 12 Misc.3d 1211(a), 836 N.Y.S.2d 487 (Table)(Sup. Ct. NY Co., 2006).

To establish standing to sue under SEQRA in the context of a land use matter, the party challenging the action must show that they would suffer a direct harm or injury that is in some way different from the public at large. While a an allegation of close proximity may give rise to inference of damage or injury enough to challenge a zoning board decision without proof of actual injury, the neighbor must still demonstrate that it’s close proximity causes it to suffer some harm other than experienced by the public generally. *Ziemb v City of Troy*, 37 A.D.3d 68, 827 N.Y.S.2d 322 (3rd Dept. 2006).

Where a party wishes to intervene in a proceeding, the Court will determine whether the party is an “interested person” pursuant to CPLR §7802[d]. Here where the party demonstrated that he is the sole remaining member of the Stockbridge-Munsee Band of Mohican Indians residing within the tribe’s former aboriginal territory and he alleged that Native American Indian burial grounds are located on the subject property and could be disturbed if the requested demolition permit were to be granted, the Court determined that he established a harm within the zone of interests of the statute and different from what would be suffered by the public at large. *Ziemb v City of Troy*, 37 A.D.3d 68, 827 N.Y.S.2d 322 (3rd Dept. 2006).

Petitioners, who are residents and taxpayers of the Village, failed to establish that they would be adversely affected by the annexation determinations or the SEQRA review, and therefore they lacked standing to challenge the Town’s decision. *Kopald v Town Board of the Town of Highlands*, 34 A.D.3d 810, 823 N.Y.S.2d 901 (2nd Dept. 2006).

**Statute of Limitations**

Since plaintiff owned the property and secured approval from the NYS Department of Environmental Conservation to operate a mine on the land prior to
the enactment of a zoning ordinance prohibiting such use, when challenging the
right to operate a sand and gravel mine in the town, the statute of limitations
begins to run on the date the town notifies the owner that the use will not be
permitted, not from the date of the enactment of the zoning ordinance prohibiting
such use. Glacial Aggregates, LLC v Town o f Yorkshire, 13 Misc.3d 1207(A),

The developer’s Article 78 proceeding against the town seeking reimbursement
for consultant fees paid to the town was time barred because it was commenced
more than four months after the administrative matter was final - when the last
fee was paid, and not when subsequent protests were denied. The four month
statute of limitations begins to run when the administrative action or
determination to be reviewed became final and binding. An administrative action
is final and binding upon a petitioner when (1) the agency reaches a definitive
position on the issue that inflicts actual, concrete injury and (2) the injury inflicted
may not be prevented or significantly ameliorated either by further administrative
action or by steps available to the complaining party. The Court found no merit
to the contention that the fees were charged to the petitioner as part of the
subdivision approval process, which was not complete until the final plat was
endorsed, nor did they find merit to the argument that the petitioner’s demand for
an audit and return of certain fees extended the statute of limitations since this
was plainly a request for reconsideration of the fees. In re Properties of New
York, Inc. v Planning Bd. of Stuyvesant, 35 A.D.3d 941, 825 N.Y.S.2d 575 (3d
Dept. 2006).

A petition to challenge the reenactment of zoning amendments must be brought
within the four-month statute of limitations. Citizens Against Sprawl-Mart v City

Where the application to the board was for a renewal of a building permit and
several area variances, and not one seeking to appeal the revocation of a
building permit years earlier, the Article 78 action was properly filed within 30
days of the filing of the Board’s determination in the office of the town clerk.

The challenges brought against the determinations of the planning and zoning
boards in their approval of the development of a 53-acre parcel as a retail
shopping center was not timely commenced within the requisite 30-day period
set forth in General City Law secs. 27-a[11], 27-b[9], 38 and 81-c[1]. However,
since the petition was filed within the four-month statute of limitations that govern
the City Council’s legislative reenactment of the zoning amendments, that part of
the proceeding was properly commenced. Citizens Against Sprawl-Mart v City of

Since even after the Findings Statement was issued pursuant to SEQRA review
supporting the project, the Town Board still had the ability to deny the proposed
rezoning. As a result, the four month statute of limitations period began when the
town board enacted the rezoning. In situations where SEQRA precedes a
rezoning, the statute of limitations will not necessarily begin with the rezoning.
For example, if the petitioners “were contending that mitigation measures . . .
adopted in the Findings Statement unlawfully burdened their right to develop their
property” the injury would occur with the SEQRA process and not the rezoning.

**Subdivision**

The planning board has no discretion when approving a subdivision plat to waive
zoning regulations. So where an application for a subdivision would result in a
substandard lot, the planning board exceeded its decisional authority. *Matter of
Deon v. Town of Brookhaven*, 12 Misc.3d 1196(A), 824 N.Y.S.2d 768 (N.Y. Sup.
 Ct. Suffolk Co. 2006).

A town cannot be held liable for failing to enforce conditions on a subdivision
approval unless a special relationship was created and, “a special relationship
exists only where the municipality has violated a duty commanded by a statute
enacted for the special benefit of particular persons, where it has voluntarily
assumed a duty that was justifiably relied upon by those who benefited therefrom
or where it has assumed positive direction and control under circumstances in
which a known, blatant and dangerous safety violation exists.” In this case the
statutes were for the benefit of the general public, not those located in the
plaintiff’s subdivision and granting a building permit did not give rise to a special
(4th Dept. 2006).

“The time within which a planning board must act upon a preliminary subdivision
plat application does not commence until the application is deemed complete.”
And “a preliminary plat is not considered complete until either ‘a negative
declaration has been filed or until a notice of completion of the draft
environmental impact statement has been filed in accordance with the provisions
of the state environmental quality review act.’” In this case the preliminary plat
was not complete and therefore the town was not required to act. *Pheasant
Meadow Farms, Inc. v. Town of Brookhaven*, 31 A.D.3d 770, 820 N.Y.S.2d 94
(2d Dept. 2006).

The board’s denial of an application for a two lot subdivision on the basis that the
new lots would not be in harmony with the character of the neighborhood, lacked
a rational basis and was contrary to the evidence. The evidence established that
the lots would comply with the area requirements of the zoning ordinance and
would be larger than 30% of the lots in the neighborhoods, with no adverse
impact on the community. *Hauser v. Town of Webb*, 34 A.D.3d 1353, 824
N.Y.S.2d 539 (4th Dept. 2006).
The Planning Board did not violate lawful procedure under the Village Code when it conditionally granted the subdivision request, and their determination was not an abuse of discretion, nor was it arbitrary or capricious. *In re Boneparth v. Warshavsky*, 36 A.D.3d 804, 826 N.Y.S.2d 907 (2d Dept. 2007).

In 1962 when two developers purchased property in the Town to develop a condominium project, the planning board conditioned approval on the creation of a "permanent open space on the plat." The plat was divided into seven parcels ("1963 Plat") including two parcels, Parcels B and E, which were designated the "buffer" area where the open space would be. The plat was filed in the county clerk's office and the condominiums were constructed and continue to be occupied. Plaintiff acquired Parcels B and E to construct ten single-family houses. The Town issued a building permit and a temporary certificate of occupancy, and approved both an interim survey for the lot on which the house was to be built and a site plan. After a resident expressed concern that the development violated the 1963 Plat, a stop work order based on the open space restriction was issued. The Town then offered to grant a certificate of occupancy provided the rest of Parcels B and E were dedicated to the Town. The Court found that no New York court decision appears to have identified explicitly the law governing the enforceability of a zoning regulation imposed during a subdivision process against a subsequent purchaser. In approving the 1963 Plat, the Town Planning Board stated that it was acting pursuant to the authority of section 276 of New York Town Law, and that the approved final subdivision plat was filed by the owner of the subdivision in the office of the county clerk or register pursuant to section 334 of New York Real Property Law. The Court found that while approval and filing of the 1963 Plat complied with both statutory sections, neither section addresses whether a subdivision plat is enforceable against subsequent purchasers. Because there is no New York law that is authoritative on this issue, the court certified the following question to the New York Court of Appeals: Is an open space restriction imposed by a subdivision plat under New York Town Law § 276 enforceable against a subsequent purchaser, and under what circumstances? *O'Mara v. Town of Wappinger*, 485 F.3d 693 (2d Cir. 2007).

Where the Planning Board's conditional final plat approval was based upon the Planning Board's related determination, that it had taken the required "hard look" at the environmental impacts of the project for purposes of environmental review pursuant to SEQRA, yet in a prior appeal, decided while this appeal was pending, this Court annulled the respondent's SEQRA determination and remitted the matter to respondents for the preparation and circulation of a supplemental environmental impact statement, the court held that respondent's determination granting conditional final plat approval must be annulled pending the SEQRA review. *In re Ingraham v. Planning Bd. of Southeast*, 36 A.D.3d 911, 828 N.Y.S.2d 568 (2d Dept. 2007).
Where the extent of an easement granted in a deed conveyance, the subdivision map plays no role in determining the nature and extent of the easement. *Tervilliger v. Van Steenburg*, 33 A.D.3d 1111, 823 N.Y.S.2d 239 (3d Dept. 2006).

Where the planning Board, after a hearing, granted an application for subdivision approval and accepted a modified map of the same subdivision for filing, the Court determined that petitioner’s challenge to the subdivision approval was untimely, and that the determination by the Planning Board to accept a modified map of the same subdivision for filing was not illegal, nor was it arbitrary and capricious. *Kolatch v Town of Amenia Planning Board*, 40 A.D.3d 643, 833 N.Y.S.2d 396 (2nd Dept. 2007).

Petitioner, owner of a parcel of unimproved land in a district zoned for planned residential development, submitted an application to the Planning Board to subdivide the property into single-family residential lots. The Board refused to hear the application due to its erroneous belief that the property had been previously subdivided illegally. Petitioner brought an Art 78 mandamus to compel review, after which the Planning Board agreed to hear the application. Thereafter, the Town Board enacted an eight-month moratorium on Planning Board review of certain subdivision applications, including petitioner’s application. Citing the moratorium, the Planning Board refused to continue reviewing the petitioner’s subdivision application. The applicability of the moratorium to petitioner’s subdivision application did not violate the so-ordered stipulation of settlement in the previous Article 78 proceeding since the moratorium prevented the Planning Board from continuing to hear petitioner’s application during its effective dates, and the petitioner did not have a "clear legal right" to the relief requested in the first cause of action, seeking mandamus to compel the Planning Board to hear and determine its application for subdivision approval. *Laurel Realty, LLC v Planning Board of Town of Kent*, 40 A.D.3d 857, 836 N.Y.S.2d 248 (2nd Dept. 2007).

Petitioners’ application to the Planning Board for approval to subdivide 128 acres of undeveloped property located in the Town into 30 lots in order to build 30 single-family residences and to install a lengthy dead-end roadway, driveways, drainage facilities, and a sewage treatment plant was denied. Pursuant to the Town Code petitioners needed approval from the Planning Board to build the dead-end road because it exceeded 500 feet in length. The petitioners also sought the appropriate permits to build on environmentally sensitive portions of the property, which included steep slopes, wetlands, and “specimen tree[s].” The Planning Board considered whether to issue these permits in connection with its environmental review pursuant SEQRA, and then denied the permits for the project. The Planning Board’s decision to deny the necessary permits was rational, and not arbitrary and capricious because the Planning Board complied with the procedural and substantive requirements of SEQRA. The Planning Board identified the relevant areas of environmental concern, took a “hard look”
at them, and made a "reasoned elaboration" of the basis for its determination to disapprove the project. Matter of Commercial Real Asset Management Inc. v. Kessler, 38 A.D.3d 542, 831 N.Y.S.2d 477 (2nd Dept. 2007).

Takings

Plaintiff, a party to a contract for the purchase of property, was denied a zoning variance to build a single family home. In the 1970's defendants had denied variances to a different owner of the same property, approving the building of single family home, but disapproving as to the design. Plaintiff's application explained that the design is different from the 1970's. Plaintiff asserts that the denial resulted in an unconstitutional taking of its property without just compensation. The court found that since plaintiff at the time of the alleged taking was a "contract vendee to a contract for the purchase of the property" at issue, plaintiff lacks standing to assert a takings claim. R & V Dev., LLC v. Town of Islip, Zoning Bd. of Appeals, 36 A.D.3d 707, 826 N.Y.S.2d 579 (2nd Dept. 2007).

In 1995, plaintiff bought an undeveloped parcel of real property and obtained approval to subdivide the parcel into 36 lots, and a permit from the State of New York to allow a central sewage system. However, in 1997, NYC Department of Environmental Protection adopted the Watershed Regulations, revoking the permit because the central sewer system could not be constructed under the Regulation. Plaintiff then obtained approval to subdivide the parcel into 17 lots using subsurface septic systems, and then sold the property for more than $1.4 million, which it alleges is about 20% of the value it would have gotten had the parcel been approved for the 36-lot subdivision with a central sewer system. Plaintiff commenced this action under Public Health Law § 1105, alleging that the enforcement of the Watershed Regulations effected an unconstitutional taking of its property without just compensation. Since the plaintiff did not allege that it did not realize a "reasonable return" when it sold the property, they failed to state a cause of action because the alleged economic impact on the Plaintiff was insufficient as a matter of law to outweigh the substantial public interest in the City's enforcement of the Watershed Regulations. Putnam County Nat. Bank v. City of New York, 37 A.D.3d 575, 829 N.Y.S.2d 661 (2d Dept. 2007).

The petitioner was able to challenge the validity of a restrictive declaration on the grounds that it amount to a taking since a subsequent purchaser may attack the validity of a previously enacted zoning regulation. Middleland, Inc. v City Council of New York, 14 Misc.3d 1223(A), 836 N.Y.S.2d 486 (Table)(Sup. Ct. Kings Co. 2006).

A restrictive covenant amounts to a regulatory taking where it denies the owner of all economically viable use of the property. Because the covenant prohibited the use of the property for anything other than an accessory parking for a specific named company, the covenant amounted to a taking. Middleland, Inc. v City

The plaintiffs failed to allege facts sufficient indicating that a newly enacted regulation governing the siting of telecommunications towers so restricted their property that they are "precluded from using it for any purpose for which it was reasonably adapted." (citations omitted) Therefore the Court held that the new regulation did not effect a de facto taking of their land. Harris v Town of Fort Ann, 35 A.D.3d 928, 825 N.Y.S.2d 804 (3rd Dept. 2006).

The Town's L-1 zoning district only permits electric generating facilities by the granting of a special permit by the Town Board subject to criteria set forth in various sections of the Town Code. Respondent applied for special permit, with requests for variances from certain requirements, and the Town Board passed resolutions to approve the special use permit with variances and waivers. The Planning Board also adopted a Resolution approving the Site Plan for the project. Petitioners asserted that the Town Board violated both Town Law and the Town Code in adopting the Special Permit Resolution. The court found that petitioners lack standing because none of them live closer than one-half mile, and are not within the required notification area for Special Permit application, pursuant to the Town Code. Therefore, they do not demonstrate they are within the zone of interest, nor that they will suffer an injury different than the public at large. East End Property Company No. 1 LLC, et al v The Town Board of the Town of Brookhaven, 15 Misc.3d 1138(A) (Sup. Ct. Suffolk Co. 2007).


Uses, Permitted

In a proceeding challenging the denial of a request to operate a sidewalk café, the court observed that "[n]o case directly addresses the issue of rationality where the council denies an application for an unenclosed café license based on community opposition, despite a zoning resolution permitting such a café in the proposed location. However, it is well-settled that 'classification of a particular
use as permitted in a zoning district 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.” Therefore, where a zoning resolution permits unenclosed cafes in a particular neighborhood, denial of a petition to operate such a café must be based on more than community resistance to be rational.” (citations omitted). The court determined that neither section 14-40 of the zoning resolution nor any other section prohibits unenclosed sidewalks on University Place. Given that operating an unenclosed café is a permitted use at the proposed location, respondent’s denial of petitioner’s application based on the community’s “defacto moratorium” against such cafes, not on the failure of the proposal to meet applicable criteria, is arbitrary and capricious. Matter of Weprin v Council of the City of New York, 15 Misc.3d 684, 835 N.Y.S.2d 849 (N.Y. Sup. Ct. 2007)

Variance - Area

Petitioner sought to subdivide a parcel of property that was approximately 37,000 square feet, in a B-1 Residence Zoning District which requires lot sizes of at least 20,000 square feet. The resulting lots would be 22,709 square feet 14,367 square feet. The area already contained a large number of homes on lots that did not meet the 20,000 square foot requirement and more closely resembled the subdivision that the petitioner sought. The Zoning Board of Appeals, unaware that the Town Board adopted an amendment to the Town Code prohibiting the ZBA from acting on variances concerning minor subdivisions before review and determination by the planning board, held a hearing but then adjourned the hearing to refer the matter to the planning board. The planning board held a hearing and denied the application, exceeding its statutory power under §§ 276 and 277 of the Town Law since they attempted to exercise discretion granted only to the ZBA. Further, the court held that the Board failed “to identify any evidence to refute petitioner’s claim that this case involves nothing more than a minor variance application which in prior similar circumstances was routinely granted.” Therefore, the Board acted arbitrarily and petitioner’s request for a variance should have been granted and the case is remanded to the Town of Brookhaven for proper review. Matter of Deon v. Town of Brookhaven, 12 Misc.3d 1196(A), 824 N.Y.S.2d 768 (Table) (N.Y. Sup. Ct. Suffolk Co. 2006).

Petitioner was denied two area variances (1) to construct a second level atop his one story residence, and (2) to extend his house in a northerly direction to create a covered entry. The zoning board concluded, after considering the factors set forth in Village Law § 7-712-b(3)(b) and (c), that the petitioner purchased his house subject to the setbacks from which he now seeks exception and that he can adopt an expansion plan that does not require such significant area variances. The board concluded that the renovated house would double the size of the existing structure of 1200 square feet to 2300 square feet, and encroach on the two front yards. The new front entry would ultimately sit a mere eight feet from the abutting thoroughfare of Third Street, and the construction would impact
area drainage, given the elevated grade on an adjacent property. The board also
believed that the variances would produce undesirable changes in the character
of the streets and detrimental impacts to the neighborhood in the form of a
substantial and encroaching structure, the exacerbation of flooding and drainage
problems, and disruption of the flow of natural light on neighboring properties due
to the expansion. The Court noted that while the proposed expansion may
represent petitioner’s preferred plan, it is clearly not the only feasible plan. The
board’s decision was neither arbitrary nor capricious and it was supported by the
record, and was upheld by the court. Matter of Evans v. Zoning Bd. of Appeals
of the Village of Buchanan, 15 Misc.3d 1102(A), 836 N.Y.S.2d 498 (Table), 2007
WL 749697 (N.Y. Sup. Ct. 2007).

In 2005, the petitioner purchased real property and applied for permission to
subdivide the parcel and build a second residence on the vacant portion of the
land and was denied. The petitioner is not entitled to build on the proposed
vacant parcel as of right since the zoning code does not contain a single and
separate exemption from new zoning requirements. Therefore, the petitioner was
required to obtain an area variance to build on the parcel. The ZBA weighed the
relevant statutory factors and determined that the petitioner’s proposal would
exacerbate already existing traffic and parking problems on the street had a
rational basis. Further, the petitioner is presumed to have had knowledge of
applicable zoning restrictions in effect when he purchased the property, and as
such, any hardship was self-created. Matter of Rivero v. Voelker, 38 A.D.3d 784,
832 N.Y.S.2d 616 (2nd Dept. 2007)

In granting the requested area variances, the ZBA properly applied Town Law §
267-b(3)(b) and their determination had a rational basis and was not illegal,
arbitrary and capricious, or an abuse of discretion. Matter of Clark v. Town of

The zoning board of appeals has exclusive power to grant or deny zoning
variances, and that power may not be circumvented by the town board. The
Town Board is further without authority to settle a denial of a variance by the
zoning board. Matter of Deon v. Town of Brookhaven, 12 Misc.3d 1196(A), 824
N.Y.S.2d 768 (Table) (N.Y. Sup. Ct. Suffolk Co. 2006).

Town zoning board granted the petitioners area variance application on the
condition that no building permit would be issued until a nonconforming marina
was discontinued or variance is granted allowing the marina use in conjunction
with a residential use. “A zoning board may impose conditions when granting a
variance, as long as the conditions are reasonable and are directly related to the
real estate involved, without regard to the person who owns or occupies it, and to
the underlying purpose of the zoning code.” The court held that “the condition
imposed was reasonable and directly related to the use of the land and the

“A determination of an administrative agency which neither adheres to its prior precedent nor sets forth its reasons for reaching a different result on essentially the same facts is arbitrary and capricious.” Here the petitioner’s were unable to establish a previous determination by the zoning board of appeals that closely resembled their parking variance request. As a result the Board’s determination was upheld. *Conversions for Real Estate v. Zoning Board of Appeals of Incorporated Village of Roslyn*, 31 A.D.3d 635, 818 N.Y.S.2d 298 (2d Dept. 2006).

Where the Zoning Board granted appellant’s application for a variance to construct a single family home that exceeded the maximum height limitation in the Village, and where the petitioner planned to construct a 6 to 12 foot high retaining wall, the court held that the Zoning Board failed to weigh “the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted.” The Zoning Board did not issue specific findings or reasons that it relied upon in making its determination to grant the variance nor did it take into consideration the adverse impact that a 6 to 12 foot retaining wall could have on the neighborhood. The Zoning Board also failed to determine whether petitioner could achieve his result by some other method rather than a variance. *Margaritis v. Zoning Board of Appeals of Flower Hill*, 32 A.D.3d 855, 821 N.Y.S.2d 611 (2d Dept. 2006).

Petitioner’s property is located in a district that requires a minimum front yard setback of 100 feet for structures located in the front yard. Petitioner’s request for a variance to maintain an existing 6 foot fence in the front yard was denied because granting the application would result in applying a different standard for petitioners’ lot than for neighbors’ lots. Furthermore, the Board held that there would be adverse effects on the physical conditions of the neighborhood if a 6 foot fence were allowed. The court held that the Board’s determination was not arbitrary and capricious and was supported by substantial evidence. *Greco v. Fischer*, 13 Misc.3d 1216(A), 824 N.Y.S.2d 754 (N.Y. Sup.Ct. Suffolk Co. Sept. 25, 2006).

The Village Zoning Board engaged in the required balancing test and considered the relevant statutory factors when it denied petitioner’s application for certain area variances. The Board’s determination was based on a rational basis and was not illegal, arbitrary or an abuse of discretion. *Tersigni v. Village of Lynbrook Bd. of Zoning Appeals*, 33 A.D.3d 713, 821 N.Y.S.2d 919 (2d Dept. 2006).

Where the zoning board of appeals granted a special use permit and several variances permitting responding landowner to use its property for a parking lot and residence in conjunction with its religious purposes, petitioners sought to annul the determination. The court remanded the matter to the zoning board so

Owners of an undersized parcel received an area variance to reduce the front and rear yard setbacks on the condition that the porch remain open and that a drainage system is installed. Petitioner, a neighboring property owner, opposed the application over the concern for potential storm run-off problems, and challenged the granting of the variance. The Supreme Court granted the zoning board’s motion to dismiss and petitioner did not appeal. Two years later, the Building Inspector issued a certificate of occupancy for the owner’s home and petitioner challenged the issuance of the certificate but his petition was denied by the Board. The Court upheld the permit since petitioner failed to offer any evidence that the conditions imposed by the Board were not substantially met. *Hariri v. Keller*, 34 A.D.3d 583, 826 N.Y.S.2d 310 (2nd Dept. 2006).

Respondent was granted an area variance to build two family homes despite a recently passed zoning amendment reducing the lot coverage requirements from 35% to 30% in an effort to help preserve and protect the character of the neighborhood and to reduce problems with parking and flooding. The area variance because the property had been purchased before the amendment was passed and the applicant had expended substantial resources in both the subdivision approval process and the Architectural Review Board process. In upholding the determination of the board, the Court determined that the zoning board had carefully considered the 5 statutory factors in its review for the variance and properly concluded that the benefit to respondent outweighed the detriment to the health, safety and welfare of the community. *In re Brentwood Preservation Committee, Inc. v. Town of Harrison*, 2006 N.Y. Misc. LEXIS 2652 (N.Y. Sup. Ct. Westchester Co. Sept. 8, 2006).

Petitioners own a 29,799 square foot parcel which was once two separate lots which were merged under the Town Zoning Code. Petitioners submitted an application to the zoning board of appeals to subdivide the parcel back into two separate lots, as well as requesting several area variances. The ZBA granted the application but imposed certain conditions, including the requirement that the proposed property line be redrawn. The court annulled the condition that the proposed property line be redrawn because there was no evidence that the ZBA considered the location of petitioner’s existing residence and garage when the condition was imposed. A zoning board may impose reasonable conditions and restrictions that are directly related to the proposed use of the property and that are aimed at minimizing the adverse impact to an area but only when the conditions are appropriate. *Martin v. Brookhaven Zoning Bd. of Appeals*, 34 A.D.3d 811, 825 N.Y.S.2d 244 (2nd Dept. 2006).
Petitioners appealed the denial of three area variances to construct a residence on a substandard lot. The court held that the ZBA considered all the statutory factors in reaching its decision and therefore the determination of the ZBA was neither arbitrary nor capricious. Further, the Court noted that the petitioners' need for the variances was self-created because they knew when they purchased the land that it did not conform to the zoning requirements. Pietrzak & Pfau Assocs., LLC v. Zoning Bd. of Appeals of Walkill, 34 A.D.3d 818, 827 N.Y.S.2d 84 (2nd Dept. 2006).

In challenging the denial of a request area variance and a Natural Resources Special Permit, the Court held that the denial of petitioner's application for a 31 foot area variance to locate a sanitary system 119 feet from wetlands where a 150 foot setback is required was not illegal, had a rational basis and was not arbitrary and capricious. Mann v. Zoning Bd. of Appeals of East Hampton, 34 A.D.3d 588, 825 N.Y.S.2d 91 (2nd Dept. 2006).

Petitioner was granted an area variance to subdivide property into two lots and construct a single family residence on one of the lots. When construction was 85% complete, petitioner sought a building permit but was informed an area variance was required because an enlarged second story violated the Town Code. Petitioner's request for an area variance was subsequently denied. The Court held that the denial was improper since the zoning board of appeals articulated no rational basis for reaching a different result on the same facts. Aliperti v. Trotta, 35 A.D.3d 854, 827 N.Y.S.2d 274 (2nd Dept. 2006).

The zoning board of appeals denied a request for an area variance to build 50 feet from a "lot on which a dwelling unit is located" rather than, as prescribed by the zoning ordinance, at least 1,000 feet from any such lot. Although the petitioner should have sought a use variance, the court noted that a zoning board must weigh the benefit to the applicant of granting the variance against any detriment to the health, safety and welfare of the neighborhood or community affected thereby, taking into account the five factors listed in Town Law § 267-b (3). The zoning board's decision was upheld since the board properly applied the test and its determination had a rational basis. DeGroote v. Town of Greece Bd. of Zoning Appeals, 35 A.D.3d 1177, 825 N.Y.S.2d 878 (4th Dept. 2006).

In considering a request for a variance, the zoning board could consider the "cumulative effect" of sixteen requested variances, even if each variance request would have a minor effect. Similar applications being granted to a predecessor in interest are insufficient to establish that the Board's actions were arbitrary. A board can also consider previous determinations as persuasive evidence unless the character of the neighborhood has changed since that determination. Josato, Inc. v. Wright, 35 A.D.3d 470, 826 N.Y.S.2d 381 (2nd Dept. 2006).

A proceeding to review a determination of the zoning board of appeals, denying a rehearing of petitioner's application for certain area variances, and to compel the
respondent to further consider the application was time barred by the 30 day statute of limitations in Town Law and is not extended by a request for rehearing. *In re R & V Dev., LLC v. Town of Islip, Zoning Bd. of Appeals*, 36 A.D.3d 707, 826 N.Y.S.2d 579 (2nd Dept. 2007).

The court upheld the granting of an area variance by the zoning board of appeals to permit construction of a single-family home on the condition that no building permit be issued until nonconforming marina use was discontinued or a variance was granted permitting marina use in conjunction with residential use. A zoning board can impose conditions when granting a variance as long as the conditions are reasonably and directly related to the property involved, without regards to the owners or those who occupy the property, and is directly related to the underlying purpose of the zoning code. *Zupa v. Zoning Bd. of Appeals of Southold*, 31 A.D.3d 570, 817 N.Y.S.2d 672 (2nd Dept. 2006).

In challenging the denial of an area variance, the Court found that the record makes plain that the board weighed all of the relevant factors required to make its determination. Although the petitioners contended that they agreed to be responsible for the monitoring of the stream banks and periodically engage an engineer to assess the situation, the board contended that there was no practical way to ensure proper monitoring by petitioners or future owners of the property and that the Town should not have to undertake such a burden. The appellate court concluded that since respondent’s determination was rational, it must be upheld. *Silhanek v. Zoning Bd. of Appeals of Guilderland*, 36 A.D.3d 1184, 826 N.Y.S.2d 918 (3rd Dept. 2007).

Without obtaining a permit, petitioners raised the roof of their house and converted an attic into second-floor living space. The town issued a stop-work order, which prompted an application to the zoning board for front yard, side yard, and floor area ratio (FAR) variances, which were denied. The court found that although the original dwelling was not required to conform with the setback requirements, this protection did not extend to the newly constructed second story under the Town Code. In addition, the expansion was not eligible for a statutory exception to the area variance requirement because the unauthorized construction voided the building’s certificate of compliance, and the new second story did not comply with current setback requirements and triggered the requirement for a FAR variance under the local zoning. However, the court stated that the determination of the zoning board does not reflect that it weighed the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood if the variances are granted by considering the five statutory factors set forth in Town Law § 267-b(3)(b). Hence the board’s determination was annull ed and remitted for a new determination. *Hannett v. Scheyer*, 37 A.D.3d 603, 830 N.Y.S.2d 292 (2nd Dept. 2007).

Petitioners challenged the granting an area variance and approval for the construction of a Wal-Mart Supercenter. Under the Town’s Zoning Code, one
portion of the proposed site is in a Community Center (C-C) zoning district and
the rest is in a Residential-Agricultural (R-A) zoning district; in addition, the entire
property is within a Planned Development (P-D) overlay district. Wal-Mart also
submitted a request for an area variance to situate its tire and lube garage 146
feet from the property line of individual petitioners where the zoning code
requires a 200-foot setback. The planning board approved the request and the
area variance was granted. In upholding the zoning board’s determination, the
Court noted that the zoning board’s decision addressed the five specific criteria,
including a determining that the variance would not have an adverse impact on
the physical or environmental conditions in the neighborhood or district which
was also supported by SEQRA findings; and that the Wal-Mart Supercenter will
result in local availability of economical retail consumer products, property tax
revenues and job creation. Furthermore, the Court held that the board’s
determination was supported by substantial evidence in the record and was not
irrational, arbitrary or capricious. North Country Citizens for Responsible Growth,

Petitioner applied for a permit to build a subsurface sewage treatment system
(SSTS) on vacant land where he intended to build a house. The land is within
New York City Watershed, governed by New York Department of Environmental
Protection (DEP), and incorporates more stringent local standards enacted by
agreement between DEP and the County Department of Health. Petitioner
applied for, and was denied a variance as to the amount of fill required, on the
basis that the proposed mitigation for the SSTS was not adequate to offset the
potential for adverse water quality impacts associated with storm water runoff
from the new residence, driveway and septic system area, and that petitioner
refused to provide information on his other real estate holdings in the immediate
vicinity of the project area to substantiate a hardship case. Variances from the
requirements of the Watershed Regulations rest in the sound discretion of DEP
and the burden of proof is on the applicant. 15 RCNY 18-61(a)(1)(iii) requires an
applicant seeking a variance from the requirements of the Watershed
Regulations to demonstrate that the activity as proposed includes adequate
mitigation measures to avoid contamination to, or degradation of, the water
supply which are at least as protective of the water supply as the standards for
regulated activities set forth in these rules and regulations. The court found that
the DEP properly required petitioner under 15 RCNY 18-61(a)(1)(iii) to propose
measures to reduce potential contamination resulting from his proposed use of
excessive fill but that it was an abuse of discretion to require him to propose
mitigation of storm water runoff because storm water runoff from impervious
surfaces are contained in 15 RCNY 18-39, and that petitioner’s property and the
proposed SSTS are not within the regulated ranges delineated in 15 RCNY 18-
39, hence the storm water runoff regulations do not apply. Moreover, it was an
abuse of discretion to deny the variance application on the basis that petitioner
did not provide information on his other real estate holdings in the immediate
vicinity because where compliance with a provision of the Watershed
Regulations is possible, but the applicant claims that it is prohibitively expensive,
DEP may reasonably require the variance applicant to quantify the "substantial hardship" by submitting an estimate of the costs of compliance. But where the hardship claimed is the impossibility of building a residence on the parcel, DEP may reasonably request information about an applicant's contiguous real estate holdings, because an applicant who could combine lots may be able to minimize any hardship. Because petitioner failed to provide information concerning contiguous holdings to DEP, the question whether he demonstrated substantial hardship is remitted to DEP for reconsideration. Nilsson v. Dept. of Envtl. Prot. New York, 8 N.Y.3d 398, 834 N.Y.S.2d 688 (2007).

Town Law §267-b(3) requires a zoning board to engage in a (5) part balancing test in considering area variance applications, weighing the benefit to the applicant against the well being of the neighborhood or community. Here the board's denial was upheld since it properly considered whether an undesirable change will result in the character of the neighborhood or nearby properties by granting the area variance, whether the benefit sought by the applicant be achieved through another method rather than an area variance, whether the requested area variance substantial, whether if the variance is granted it will have an adverse impact on the physical or environmental conditions in the neighborhood, and whether the difficulty self created. McCabe v. Town of Clarkstown Bd. of Appeals, 31 A.D.3d 451, 817 N.Y.S.2d 507 (2d Dept. 2006).

Local zoning boards have discretion in considering variance applications and judicial review is limited to determining whether the action taken by the zoning board was illegal, arbitrary and capricious, or an abuse of discretion. A determination of an administrative agency which neither follows precedent nor gives reasons for reaching a different result on basically the same facts is arbitrary and capricious. The petitioners failed to establish that their case is sufficiently factually similar to a prior determination of the Board. Conversions for Real Estate v. Zoning Bd. of Appeals of Roslyn, 31 A.D.3d 635, 818 N.Y.S.2d 298 (2d Dept. 2006).

The Court held that the Village Code does not state that failure to complete construction within the time specified by the Zoning Board of Appeals in its granting of a variance is a violation. The zoning board of appeals is given the authority to permit construction and/or allow land use in variance with that permitted under the Code. State of New York v. Halpem, 12 Misc.3d 134(A), 820 N.Y.S.2d 844 (N.Y. Sup. Ct. App. Term June 22, 2006).

Petitioners challenged the granting of an area variance where the zoning board believed that the design of the dwelling was in keeping with the character of the neighborhood. In upholding the variance, the court held that the zoning board properly engaged in the required balancing test before granting the application and considered all the relevant statutory factors and that its determination was rational and neither arbitrary nor capricious. Fitz-Verity Silvera v. Town of Amenia Zoning Bd. of Appeals, 33 A.D.3d 706, 823 N.Y.S.2d 430 (2nd Dept. 2006).
Petitioner neighborhood group sought to annul the decision of the zoning board of appeals which granted certain area variances in connection with a proposal to build two family homes. Petitioner was key in bringing about the passage of a zoning amendment which reduced the lot coverage requirements in the B Two Family Zoning District from 35% to 30% in an effort to preserve and protect the character of the neighborhood and help to reduce the problems of parking and flooding in the area. The zoning board granted an area variance because the property has been purchased before the amendment was passed and the respondent had expended substantial resources in both the subdivision approval process and the Architectural Review Board process. In upholding the granting of the variance, the court noted that the zoning board carefully considered the five statutory factors and properly concluded that the benefit to respondent outweighed the detriment to the health, safety and welfare of the community. The Zoning Board properly concluded that a change in the character of the neighborhood would not occur since the three previously built new homes adjacent to respondent’s property were built to the 35% coverage and other homes in the area were the same size if not larger than the size of the homes proposed by respondent. Furthermore, the respondent was entitled to build the homes as a right and the extra space being used had already been resolved to the satisfaction of the Planning Board during the subdivision approval process. Finally, it was not a self-created hardship because respondent purchased the property before the amendment was passed. In re Brentwood Preservation Committee, Inc. v. Town of Harrison, 2006 N.Y. Misc. LEXIS 2652 (N.Y. Sup. Ct. Westchester Co. 2006).

The denial of an area variance by the zoning board of appeals was arbitrary and capricious since the requested variance was not substantial (the petitioner was requesting a reduction of slightly more than 3%); a two tenth of one foot variance will not have an adverse effect or impact on the physical or environmental conditions in the neighborhood (as shown in the environmental impact statement); a de minimus variance would not produce an undesirable change in the neighborhood or a detriment to nearby property owners; and none of the adjoining property owners objected to the variance for the garage. Vecce v Town of Babylon, 32 A.D.3d 1038, 822 N.Y.S.2d 94 (2nd Dept. 2006).

Petitioners parcel sits between two streets and is located in the Village’s Residence District which requires a minimum front yard setback of 100 feet for structures located in the front yard. Petitioners’ request for a variance to maintain an existing 6 foot fence on the front yard of their property was denied. Petitioners argued, among other things, that they wanted a 6 foot fence rather than the 4 foot fence maximum allowed under the Village’s Zoning Code because of their children and pets. They also sought the high fence to act as a barrier against the traffic on the street as well as the noise and lights generated by the Water Authority located across the street. The Zoning Board denied the application because the conditions were present when the property was
purchased. Furthermore, granting the application would result in the creation of a different standard applied to the applicants' lot versus the lots of the neighbors. Finally, the Board held that there would be adverse effects on the physical conditions of the neighborhood if a 6 foot fence were to be allowed. The court held that the Board's denial was not arbitrary and capricious and was supported by substantial evidence. *Greco v. Fischer*, 2006 N.Y. Slip Op. 51846(U), 13 Misc.3d 1216(A), 824 N.Y.S.2d 754 (N.Y. Sup. Ct. Suffolk Co. Sept. 25, 2006).

In denying an application for an area variance, the ZBA commented that the height of the new house depicted in the building plans, and which had been revised twice, suddenly jumped up to 4 feet in the final revision, and as a consequence the house was now 2.71 feet over the zoning code's maximum height limitation, which was 35 feet. The Town Zoning Code, provides that: "BUILDING HEIGHT. Unless otherwise stated, the vertical distance from the average grade of the ground at the base of the structure, or the average grade at the street, whichever is less, to the highest point of the roof, provided that chimneys, spires and similar permitted projections shall not be included in the height." According to the original plans, which were approved, the height was measured from the average grade of the ground at the base of the house, was 35 feet. The amended plans showed that the actual height of the house was 33 feet, 9 inches. Petitioners had measured the height of the house from the average grade of the ground at the base of the house, and had received a building permit, but the Town Building Examiner determined that the measurement should be taken from the average grade at the street in front of the house, the resulting height being 37.71 feet, and hence, greater than the zoning code's maximum height limitation. It was the difference in measurement that caused the height of the house to appear to suddenly increase by 4 feet between the revisions, and this, said the Court, established that the petitioners' hardship was not, as the ZBA found, "totally self-imposed." The court found that the ZBA misapprehended the facts, and this result influenced the ZBA's consideration of the factors that Town Law § 267-b(3) required it to consider. Hence, the court concluded that the ZBA's determination to deny the petitioners' application for the area variance was without sound basis in reason, and made without regard to the facts. Accordingly, the determination, which was arbitrary and capricious, should have been annulled. *Marotta v Richard I. Scheyer*, 40 A.D.3d 645, 835 N.Y.S.2d 421 (2nd Dept. 2007).

The zoning board of appeals denied petitioner's application for certain area variances as a prerequisite to the subdivision of the subject real property or, in the alternative, for relief under Town Law § 280-a excepting the subject real property from the requirement that a street or highway giving access to the proposed structures must be duly placed on the official map or plan of the Town. The court upheld the ZBA's denial because it was rational since as the record demonstrated, the proposed subdivision would result in a development in substantial nonconformity with the neighborhood. For the same reason, the ZBA
had a rational basis for denying the petitioner's alternative application for relief from the requirements of Town Law § 280-a(1), which generally prohibit the issuance of a building permit unless a street or highway giving access to the relevant structure is duly placed on the Town's official map or plan, and thus generally prohibit the issuance of building permits for structures on private roads. *Sheiban v Zoning Board of Appeals of Town of Huntington*, 40 A.D.3d 768, 835 N.Y.S.2d 448 (2nd Dept. 2007).

In denying applications for area variances, the court found that the ZBA failed to adequately consider whether the requested variances would, in fact, have an adverse impact on the neighborhood and the character of the community. Accordingly the court annulled the determination and remitted the matter to the ZBA a new determination of petitioner's applications. *Russia House at Kings Point, Inc. v. Zoning Board of Appeals of Village of Kings Point*, 40 A.D.3d 767, 835 N.Y.S.2d 450 (2nd Dept. 2007).

Petitioners seeking to develop a parcel of land consisting of two adjacent lots, one of which was improved, applied to the Planning Board for a de minimis lot line adjustment or, in the alternative, for an area variance because they needed to bring the unimproved 5,095 square-foot lot into conformity with a zoning ordinance requiring lots in the R-6 Zoning District to be a minimum of 6,000 square feet for development. Petitioners asserted that the "effective square" requirement of the Zoning Ordinance was not applicable to their request for a lot-line change, but the ZBA determined that the effective square requirement applied, denying the request for an area variance. The Court determined that the effective square requirement is not applicable to the de minimis lot line adjustment requested because at issue is a minor adjustment of a boundary line between two existing lots, and not the creation of two new lots through the subdivision process. Therefore, an area variance from the zoning board was not required, rather the planning board should review the matter for the de minimis lot line adjustment. *Corliss v Zoning Board of Town of Eastchester*, 40 A.D.3d 754, 836 N.Y.S.2d 244 (2nd Dept. 2007).

The denial of an area variance by the zoning board of appeals was found to be arbitrary, where aside from the generalized and unsubstantiated concerns of the neighboring owners, there was no evidence that the requested variance, which would not enlarge the footprint of the home, would have an undesirable effect on the character of the neighborhood or be detrimental to the physical and environmental conditions there. The Court directed the Board to grant the variance. *Marro v Libert*, 40 A.D.3d 1100, 836 N.Y.S.2d 691 (2nd Dept. 2007).

Petitioners challenged the denial of area variances from the off-street parking requirements of the City Code, which would allow them to subdivide their property into two lots, the southern portion of which contains a single-family dwelling and the northern portion contains a two-car garage, which, upon subdivision, would be removed. Although each of the resulting lots would meet
the minimum lot size requirement for single-family dwellings, a variance was required under the Code, because the resulting lots would not provide for off-street parking. The ZBA denied the petitioners' initial application, and in a second application to the ZBA submitted a more specific site plan proposal for the northern lot, showing that the northern lot would contain at least one off-street parking space. However, the southern lot still would not contain any off-street parking spaces. The court found that the ZBA appropriately considered the factors in General City Law § 81-b(4)(b) and concluded that the detriment to the neighborhood outweighed the benefit to the petitioners because the petitioners failed to show that the ZBA's determination was illegal, irrational, arbitrary, or an abuse of discretion. The court found that oral and written statements of neighbors at the public hearing showed that parking had become difficult as a result of overdevelopment which was corroborated by the petitioners' submission of a map indicating that two-thirds of the properties in the area did not contain offStreet parking. The fact that one property owner is denied a variance while others similarly situated are granted such variances, does not, in and of itself, indicate that the difference in result is due to impermissible discrimination or to arbitrariness. Here, petitioners' contention that the ZBA granted other area variances from the off-street parking requirement is insufficient to establish that its determination was arbitrary or capricious because petitioners failed to establish that the ZBA "reached a different result on essentially the same facts." Arata v Morelli, 40 A.D.3d 991, 836 N.Y.S.2d 292 (2nd Dept. 2007).

The zoning board's denial of a variance was arbitrary and capricious since although the evidence established that the variance sought was substantial, there was little, if any, evidence presented to demonstrate that granting the variance would have an undesirable effect on the character of the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community. Filipowski v. Zoning Bd. of Appeals of Village of Greenwood Lake, 38 A.D.3d 545, 832 N.Y.S.2d 578 (2nd Dept. 2007)

Variance - Use

The planning board granted an application for the construction of five additional vehicle paint spraying booths and seven work bays in the Retail Business District without conditioning such approval upon a special exception or use variance granted by the Board of Appeals. However, the Village Code states that the construction of the booths without a use variance or special exception from the Board is unlawful and beyond the scope of the authority of the Planning Board. The notice sent to nearby property owners did not state that the expansion would triple the size of the building, that the building addition would house 5 booths instead of one, that the discharge from the vents would be 5 feet from petitioner's property or that the interior of the building would be renovated to accommodate the additional bays. This Court granted petitioners' petition to annul the determination, holding that the language of the Village Code clearly states that
an application had to be made to the Board of Appeals and that adequate notice was not given to nearby property owners due to the vagueness of the notice. *Hejna v. Planning Bd. of Amityville*, 2006 N.Y. Slip Op. 51703(U), 13 Misc.3d 1206(A), 824 N.Y.S.2d 754 (Table) (N.Y. Sup. Ct. Suffolk Co. 2006).

Petitioner challenged the denial of an area variance that would have allowed him to locate his proposed adult bookstore 40 feet from a “lot on which a dwelling unit is located” rather than 1000 feet away, as prescribed by the zoning ordinance. In upholding the denial, the Court noted that when considering an application for an area variance, the local zoning board is required to weigh the benefit to applicant of granting the variance against any detriment to the health, safety, and welfare of the neighborhood or community affected thereby, taking into account the five factors of Town Law § 267-b (3). The board considered the appropriate factors and its determination had a rationale basis and was not illegal. *DeGroote v. Town of Greece Bd. of Zoning Appeals*, 35 A.D.3d 1177, 825 N.Y.S.2d 878 (4th Dept. 2006).

The Board’s denial of a use variance request to convert an existing four-story building located in a manufacturing zone to a residential dwelling, had a rational basis in the record and was not illegal, capricious and arbitrary, or an abuse of discretion. The court also determined that the instant variance application lacked “sufficient factual similarity” when compared to another variance presented by petitioner. *In re B.Z.V. Enterprise Corp. v. Srinivasan*, 35 A.D.3d 732, 825 N.Y.S.2d 784 (2nd Dept. 2006).

Petitioners sought to annul a variance granted by the zoning board in 2006, when in 1991 the board refused to grant the same variance to the previous owners on very similar facts, on the same land, and without any subsequent change in the neighborhood. Petitioners also asserted that the determination was arbitrary and capricious since it did not follow the 1991 decision. The Court found that the ZBA’s determination was arbitrary and capricious insofar as it failed to set forth a rational reason for its departure from its 1991 determination because the previous owners’ application was not materially different from the present application, and therefore there was no rational basis for the ZBA to reach a different result on essentially the same facts. *Lucas v. Bd. of Appeals of Mamaroneck*, 14 Misc.3d 1214(A), 836 N.Y.S.2d 486 (N.Y. Sup. Ct. Westchester Co. 2007).

In 1999 the defendants purchased the subject property and sought a variance to maintain and enlarge a pre-existing, nonconforming principal dwelling on the subject property, specifically seeking to build a second story addition over the existing garage and to change the roof line which would affect the neighboring properties’ existing views of the waters of Oyster Bay. The ZBA granted the variance subject to conditions contained in a Declaration. Plaintiffs alleged that the defendants violated the conditions by planting certain shrubs and trees which obstructed “open views from points off the premises to Oyster Bay.” The court
found that the language of the "Declaration" read as a whole manifests that, in consideration for the granting of the variance, the defendants agreed to maintain all open views from points off the premises to Oyster Bay in their present unobstructed state. Thus, to the extent that certain shrubs and trees planted by the defendants obstruct "open views from points off the premises to Oyster Bay," these violate the "Declaration." *Incorporated Village of Centre Island v. Comack*, 39 A.D.3d 712, 834 N.Y.S.2d 288 (2nd Dept. 2007).

Petitioner sought area variances in Feb 2004, that in effect, merely modified area variances that had been previously approved and granted to petitioner’s predecessor-in-interest in April 1998. The ZBA stated that the three lot configurations as granted by the Board in 1998 for construction have since been abandoned as a condition of approval of the subdivision map and that in light of changed circumstances, the Board was not bound to adhere to its prior grant as the application contains substantially different relief and changed circumstances than the prior application. The court noted that a determination of a zoning board of appeals that neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination. Here the ZBA failed to provide a rational explanation for reaching a different result, on substantially similar facts, than it did on a prior determination. Furthermore, the planning board approved the development on January 13, 2003. Consequently, the ZBA’s conclusion that the map constituted an adverse change of circumstances warranting a departure from the 1998 variance was not supported by the evidence in the record, and was irrational. *Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 834 N.Y.S.2d 295 (2nd Dept. 2007).

Since the petitioner had no ownership interest in the prior subdivision and came into ownership of the parcel only after the map had been filed and approved, the record did not support the ZBA’s conclusion that any hardship in developing the proposed lots in accordance with the existing zoning regulations was self-created. *Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 834 N.Y.S.2d 295 (2nd Dept. 2007).

The court held that the ZBA’s findings that the character of the neighborhood and community was changing in light of development were irrational. The ZBA stated that there had been substantial development in the area since 1998, explaining that it had considered and evaluated the 1998 application in light of the then existing surrounding neighborhood. But the record indicates that several conditions have changed since 1998, specifically approval and development of two major subdivisions within 200 feet of the parcel, hence the ZBA’s reliance on what it characterized as subsequent development was arbitrary and capricious. Hence contrary to the ZBA’s conclusion, the proposed development did not constitute a subsequent material change of circumstances. The petitioner established that the ZBA lacked a rational basis for reaching a different
conclusion in 2004 on substantially the same facts that were before it in 1998, hence the ZBA's determination was arbitrary and capricious and the determination is annulled. *Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 834 N.Y.S.2d 295 (2nd Dept. 2007).

The purpose for imposing a time limitation when granting a special use permit or variance is to insure that if conditions have changed at the expiration of the prescribed period, the board has an opportunity to reappraise the proposal. *Haberman v. Zoning Bd. of Appeals of City of Long Beach*, 35 A.D.3d 465, 827 N.Y.S.2d 176 (2d Dept. 2006).

The Court determined that the granting of a use variance by the board of standards and appeals lacked substantial basis on the evidence before it. Specifically, the Board's conclusion that the hardship was not self-created by the application was contrary to both the evidence and the well established caselaw that "a prospective purchaser is chargeable with knowledge of the applicable zoning restrictions, and is bound by them and any other facts and circumstances which can be learned through the exercise of due diligence." The applicant knew of the existing zoning regulations when it purchased the property and there was no proof of any subsequently-discovered problem or obstacle to allowable development. Furthermore, the Board's determination that the lot was "unique" was flawed since it was the same size as the other residential lots in the subject area. Because the rate of return may be higher with another use, that is not a permissible basis for the granting of a use variance. The Court also found that there was no proof before the Board demonstrating that the property was unique as compared to the rest of the block, and there was no substantial evidence that the proximity of the residential area to the commercial area rendered the use of the parcel in conformity with the existing zoning unfeasible, nor that the property was unmarketable. The Court said that although the granting of the variance would not significantly alter the character of the neighborhood, it could produce negative effects on the future viability of the remaining residential uses. Finally, with respect to reasonable return, the Court noted that in addition to the self created hardship and uniqueness issues, the Board had before it, evidence that the assessed valuation of the property had increased substantially since the time of initial purchase, and that a contractor had offered to purchase the property for residential development at a sum that would have yielded a 50% return on investment. *Vomero v. City of New York*, 13 Misc.3d 1214 (A), 824 N.Y.S.2d 759 (Sup. Ct. Richmond Co. 2006).

**Vested Rights**

In denying a motion to dismiss, the Court noted that determining whether the plaintiff has effected substantial changes or incurred substantial expenses, or whether substantial work has already been performed in good faith and reliance on a valid permit, or whether the town's actions would inequitably cause a serious hardship or loss, are fact based issues that require a trial to resolve.

Zoning - Amendment

In 2005, the Village enacted Local Law 1/2005, which provided that a “zoning district’s ‘dimensional requirements’ would always ‘apply to all uses within such district.’” Petitioner sought to annul the law on the grounds that the environmental review that took place prior to the enactment of the law was deficient and that the Village’s Planning Board had failed to report on the proposed amendment to the Village’s zoning code. In dismissing the petition, the court held that the arguments regarding the validity of the law are not properly before the court and that petitioner had not raised the applicability of the law to its property. In re Nozzleman 60, LLC v. Village Bd. of Cold Spring, 34 A.D.3d 680, 825 N.Y.S.2d 105 (2nd Dept. 2006).

Since zoning is a legislative function, an Article 78 proceeding is not available as a means of challenging a legislative action. Inland Western Coram Plaza, LLC v Town of Brookhaven, 14 Misc.3d 1225(A), 836 N.Y.S.2d 493 (Sup. Ct. Suffolk Co. 2007).

Although the town board amended its zoning ordinance by labeling the amendment a resolution, the town board did not violate the Doctrine of Legislative Equivalency because it complied with the procedural formalities set forth in Town Law §§264 and 265. The Court noted that the Town had changed the entire town code to a local law in 1987 but in 1990 is repealed the zoning section as a local law and re-adopted it as an ordinance, thereby extinguishing the need for the more formal adoption procedures required to amend a local law. Inland Western Coram Plaza, LLC v Town of Brookhaven, 2007 WL 308559 (Sup. Ct. Suffolk Co. 2007).

Zoning Board of Appeals

The Attorney General has opined that Village boards can limit the number of terms that members of the planning board and zoning board of appeals may serve. Inf. Op. N.Y. Att’y Gen. 2007-1 (2/21/07).

In seeking to annul a determination by the zoning board of appeals which reversed the decision of the Director of Building that the petitioners’ proposal of 31 seasonal residences, ranging in size from 700 square feet to 1000 square feet, and destined to be used as seasonal residences (April-October) by petitioners members and guests of members, were the permitted accessory use of seasonal residences set forth in the Village Zoning Code, the court found that petitioners’ proposed seasonal residences are zoning compliant as a permitted accessory use of seasonal residences as provided for in Zoning Code. The court further found that the clear language of Zoning Code established that the ZBA's
determination was arbitrary and capricious. *In re Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. of Appeals of Mamaroneck*, 14 Misc. 3d 1221(A), 836 N.Y.S.2d 486 (Sup. Ct. Westchester Co. 2007).

Respondent granted an application for the construction of five additional vehicle paint spraying booths and seven work bays in the Retail Business District without conditioning such upon a special exception or use variance granted by the Board of Appeals. The Village Code states that the construction of the booths without a use variance or special exception from the Board of Appeals is unlawful and beyond the scope of the authority of Respondent Planning Board. A notice was sent to nearby property owners but it failed to set forth the extent of the request to the planning board. It did not state that the expansion would triple the size of the building, that the building addition would house 5 booths instead of one, that the discharge from the vents would be 5 feet from petitioner’s property or that the interior of the building would be renovated to accommodate the additional bays. The Board of Trustees held that the Planning Board went beyond the scope of their authority in granting the application. This Court agreed stating that the language of the Village Code clearly states that an application had to be made to the Board of Appeals. This Court also agrees with petitioners that adequate notice was not given due to the vagueness of the notice sent out to neighboring property owners. *Hejna v. Planning Bd. of Amityville*, 13 Misc.3d 1206(A), 824 N.Y.S.2d 754 (Table) (N.Y. Sup. Ct. Suffolk Co. 2006).

Pursuant to N.Y. Village Law, the boards of trustees appoint the zoning board of appeals members, but they do not control the operations of the zoning boards. Zoning boards are vested with independent appellate jurisdiction to review decisions of administrative officials concerning certain local laws. Therefore, a Village has no discretion to take part in any decision made by a zoning board of appeals, and no power to intervene or take pre-emptive action to prevent a potential civil rights violation by the zoning board of appeals. *Petruso v Schlaeger*, 474 F.Supp.2d 430 (E.D.N.Y. 2007).

The decision of a zoning board of appeals will ordinarily be upheld where the determination has a rational basis and is supported by the record. Where the petitioners merely state, in conclusory terms, that the board's finding is defective, the Court upheld the board's determination. *In re Sterling Basin Neighborhood v. Zoning Board of Appeals of the Village of Greenport*, 13 Misc. 3d 1219(A), 831 N.Y.S.2d 350 (N.Y. Sup. Ct. Suffolk Co. 2006).


**Zoning - Effective Date**
Petitioners sought to construct a 230-unit clustered housing development pursuant to a Planned Unit Residential District (PURD) designation that was formerly available under the Town Zoning Law but was no longer available following the enactment of a new comprehensive Town Zoning Law in March 2005. In August 2001, pursuant to Town Law § 272-a, the Town adopted a Master Plan providing for the enactment of a new comprehensive zoning law. Petitioners applied for a PURD designation and approval of its proposed development plan (PURD application) in May 2002 and the Town Board, as lead agency under SEQRA made a negative recommendation to the Planning Board concerning the PURD application. Petitioners sought to annul the Town Board’s May 25, 2005 resolution, directing the Town Board to grant the PURD application, and declaring the new Town Zoning Law “invalid to the extent that it does not conform to the Master Plan by failing to provide the PURD designation.” As a general rule, when a zoning law has been amended after the submission of an application seeking for example, a subdivision approval, but before a decision, courts are bound to apply the law as amended unless special facts indicate that the reviewing agency acted in bad faith and unduly delayed acting upon the application while the zoning law was changed. Petitioners do not allege that the Town Board acted in bad faith or unduly delayed its determination of the PURD application while the Town Zoning Law was being changed, hence the court concluded that the Town Board’s May 2005 determination was governed by the Town Zoning Law enacted in March 2005. Matter of Meteor Enterprises, LLC v. Bylewski, 38 A.D.3d 1356, 831 N.Y.S.2d 787 (4th Dept. 2007)

Zoning – Interpretation

The Village sought a judgment declaring that the defendants violated certain provisions of the Village Code, and they sought to enjoin the defendants from constructing on the premises without first filing for a building permit. The Village Code states in part, that “no person shall commence the erection, construction, enlargement, alteration, removal, improvement, conversion, or change in the nature of the occupancy of any building or structure or cause the same to be done without first obtaining a separate building permit for each such building or structure, except that no building permit shall be required for the performance of ordinary repairs which are not structural in nature.” The Village Code does not, however, define the terms "ordinary" or "structural." The Court held that the relevant section of the Village Code is ambiguous insofar as it does not define the terms "ordinary" or "structural," and that it is not clear as to whether the work performed was "ordinary" or "structural" in nature. Since the Village failed to raise a triable issue of fact, the Court upheld the summary judgment in favor of the defendants. Incorporated Village of Saltaire v Noel Feustel, et al., 40 A.D.3d 586, 835 N.Y.S.2d 372 (2nd Dept. 2007).

The Town Zoning Code prohibits the use of land within any district for a dump not operated or controlled by the Town. "Dump" is defined as land used for the
disposal by abandonment, burial, burning or any other means and for whatever purpose of garbage, sewage, trash, refuse, junk, discarded machinery, vehicles or parts thereof or waste material of any kind. The ZBA interpreted the Zoning Code to include only such facilities intended to perpetually store garbage. Zoning codes and ordinances must be construed according to the words used in their ordinary meaning, and must be strictly construed against the municipality and in favor of the owner of the subject property. "Disposal" is not defined in the Zoning Code, thus, an interpretation that the term embraces only a final disposal of garbage and similar material is not unreasonable. The materials will not be disposed at the facility, but "must ultimately be recycled or be disposed of at a solid waste management facility" (6 NYCRR 360-18.4(b)(3)). An affidavit affirming that much of the material will be processed or resold was submitted, and based upon this the Court held that ZBA rationally determined that the proposed facility fit within the definition of a "recycling business" as set forth in the Zoning Code, and that it was not prohibited by the Code. Falco Realty, Inc. v Town of Poughkeepsie Zoning Board of Appeals, 40 A.D.3d 635, 835 N.Y.S.2d 398 (2nd Dept. 2007).

Petitioners sought an injunction and annulment of the planning board determination granting site plan approval to a hospital to construct a parking lot. The Court held that since planning boards do not have the power to interpret the local zoning law because that power is reserved for the local code enforcement officer and the zoning board of appeals (ZBA), and in this case, the code enforcement officer determined that the proposed parking lot was a permitted use, the petitioners should have challenged the determination by making an application to the ZBA, which the petitioners did not do. Therefore, the zoning issue was not properly before the Court. Swantz v. Planning Bd. of Cobleskill, 34 A.D.3d 1159, 824 N.Y.S.2d 781 (3rd Dept. 2006).

Petitioners, without a variance, built a replica Mayan monument 24 feet from the rear of their property. The Town of Bedford Zoning Code dictates that a building permit be issued prior to the construction of a "structure" (Code § 125-125[B]) and that a structure be "setback" a minimum of 50 feet from the rear or side property line (Code § 125-50). After a neighbor complained, the petitioner applied for a variance after the monument was built, and their request was denied. Petitioners argued that the Mayan structure is a ceremonial monument, that respondent must respect and accommodate their religious exercise, and that the summons infringed on their religious freedom or violated the Federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") (see 42 USCA § 2000cc et. seq.) The court found that Petitioners could retain the religious structure without an area variance if they relocate it to conform to the Town's code and the respondent's findings that the trees that Petitioners planted to block the neighborhood's view of the structure may not be there perpetually. The court also found that respondent's determination that the monument is a structure was based on physical placement rather than the use. Hence respondent's determination that the monument is a structure is neither arbitrary nor capricious.
In re Winston v. Town of Bedford, 14 Misc. 3d 1235(A), 836 N.Y.S.2d 504 (Sup. Ct. Westchester Co. 2007).

Zoning Ordinance

Petitioners challenged transfer station permit denials by the New York City Department of Sanitation (DOS) contending that "the Zoning Law is the controlling authority as to what uses ... owners may make of their property in a given district." However, the court found that pursuant to Local Law 40, the New York City Council specifically directed respondent DOS to adopt siting rules for transfer stations. Matter of Jamaica Recycling Corp. v. City of New York, 38 A.D.3d 398, 832 N.Y.S.2d 40 (1st Dept. 2007)