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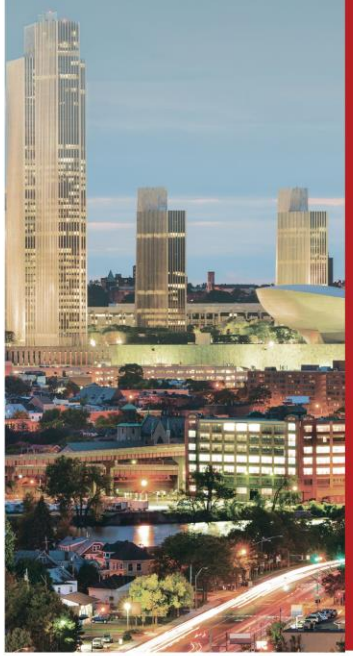

Case Law Update

2017 Planning and Zoning School

Robert Rosborough, Esq.

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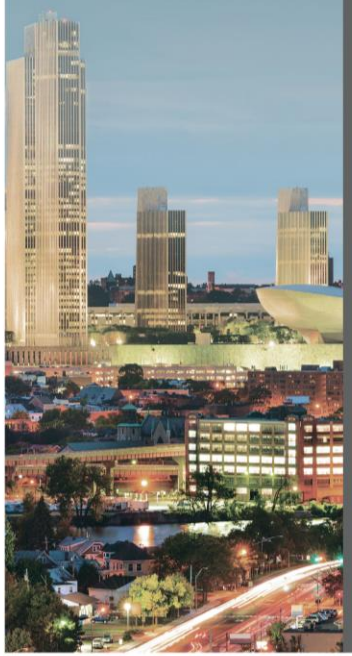

Court of Appeals

Matter of Ranco Sand & Stone Corp. v Vecchio, 27 NY3d 92 (2016)

- Issue
  - Was the Town Board's adoption of positive declaration a final agency decision subject to review?
- Facts
  - Petitioner operated a nonconforming bus yard and trucking station on its property.
  - In 2002, Petitioner sought to rezone property from residential to heavy industrial use.
  - In 2004, Town Board recommended approval of the application.
  - In 2009, Town Board issued a positive declaration for the proposed rezoning, requiring Petitioner to prepare a DEIS.

Matter of Ranco Sand & Stone Corp. v Vecchio, 27 NY3d 92 (2016)

- Holding
  - A positive declaration is ripe for review when (1) it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process, and (2) the apparent harm inflicted by the action may not be prevented or ameliorated by further administrative action available to the party.
  - The requirement to prepare a DEIS fulfilled the first requirement since it imposed a significant financial burden.
  - The second prong was not satisfied since Petitioner would be able to challenge the final decision if its application was denied after full SEQRA review.
  - Positive declarations requiring completion of a DEIS are only ripe for review when, *inter alia*, (1) the administrative agency is not empowered to serve as lead agency, (2) the proposed action is not subject to SEQRA, or (3) where there has been a prior negative declaration.

Matter of Exeter Bldg. Corp. v Town of Newburgh, 26 NY3d 1129 (2016)

- Issue
  - Does a conditional site plan approval grant Petitioner a vested right to the prior zoning scheme?
- Holding
  - The conditional site plan approval did not grant Petitioner a vested right in the prior zoning scheme because it was not reasonable for him to rely upon it given repeated warnings that his property was not zoned for the proposed development.

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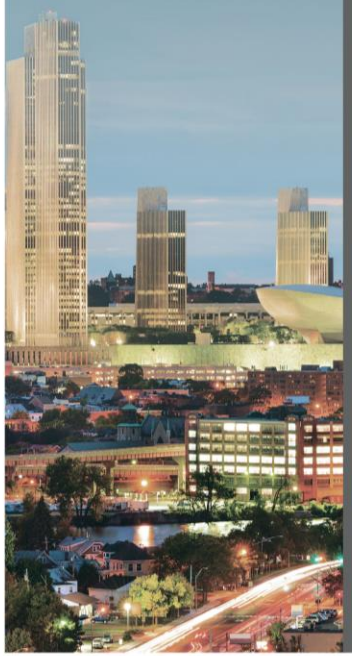

Appellate Division, First Department

Friends of P.S., Inc. v Jewish Home Lifecare, 146 AD3d 576 (1st Dept 2017)

- Issue
  - Did DOH take an appropriate "hard look" at the environmental impacts of a nursing home facility in Manhattan?

- Facts
  - Petitioner filed an application to construct a 20-story nursing home facility.
  - The New York Department of Health ("DOH") prepared a FEIS considering issues of noise mitigation and off-site migration of lead-bearing dust associated with the proposed project.
  - DOH considered arguments that window air conditioning units should be replaced by a central air system for noise reduction, and provided a rough cost estimate for such work.
  - DOH also required installation of new acoustical windows as an alternative basis for noise reduction.
  - DOH imposed protective measures to keep lead levels in soil samples surrounding the project below the threshold for child play areas set by the National Ambient Air Quality Standards.

Friends of P.S., Inc. v Jewish Home Lifecare, 146 AD3d 576 (1st Dept 2017)

- Holding
  - DOH took the appropriate "hard look" at both noise reduction and the containment of hazardous dust.
  - It was not necessary to provide a detailed study on the feasibility of a central air conditioning system, DOH's rough estimate to determine that it was not feasible was sufficient.
  - While the proposed noise mitigation did not completely eliminate disruptive noise levels, the combination of air conditioning replacement and acoustical windows was consistent the requirement to impose mitigation measures "to the maximum extent possible."
  - DOH was not required to completely eliminate hazardous dust migration, and the mitigation of such dust to below established federal standards was sufficient.
- The Appellate Division granted leave to appeal.

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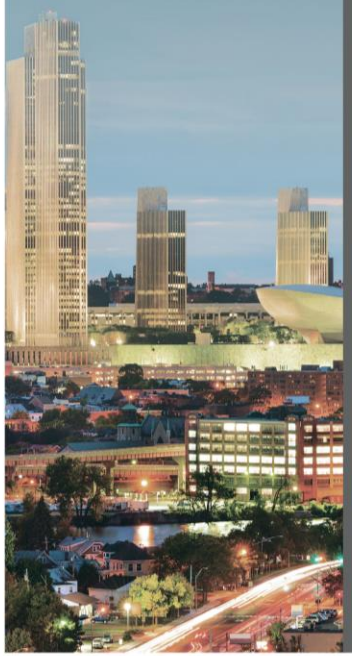

Appellate Division, Second Department

Matter of 24 Franklin Ave. R.E. Corp. v Heaship, 139 AD3d 742 (2d Dept 2016)

- Facts
  - Petitioner received final subdivision approval to subdivide two parcels into three.
  - The submitted subdivision site map indicated that one house existing on the property was to remain, and two new two-family homes would be constructed.
  - After receiving final subdivision approval and a negative declaration, Petitioner sought building permits to construct three new two-family homes.
  - The Town Board subsequently enacted a zoning amendment providing that only single family homes could be built on the subject property.
  - The Town Board did not comply with referral requirements of General Municipal Law ("GML") § 239-m, which requires town to submit a "full statement" of the proposed zoning amendment to the county planning agency.
  - The Town Board did comply with the County Administrative Code, which required that a town must provide to the County Planning Board 10 days notice of any hearing as to a zoning amendment.

Matter of 24 Franklin Ave. R.E. Corp. v Heaship, 139 AD3d 742 (2d Dept 2016)

- Issues
  - Does the County's administrative code supersede the GML 239-m referral requirements?
  - Did the Town Board properly issue a negative declaration for Petitioner's proposed development?
- Holding
  - Town Board erred in failing to comply with GML 239-m referral requirements since the County Administrative Code did not conflict with, and thus, did not supersede GML 239-m referral requirements. Thus, the zoning amendment was invalid.
  - The negative declaration for the proposed subdivision was improper because it was based upon a site plan submitted that indicated two, not three, two-family homes, such that the County Planning Board did not have a "full statement" of the proposed development for its consideration.

Matter of Citrin v Board of Zoning & Appeals of Town of N. Hempstead, 143 AD3d 893 (2d Dept 2016)

- Facts
  - Pursuant to provisions in the Town Code, the Town Zoning Board of Appeals granted Petitioner's application to continue the use of a parking lot in a residential district for a period of five years.
- Issue
  - Did the Town ZBA have the authority to impose a durational limit on the permit issued pursuant to its Town Code?
- Holding
  - The Town Code "does not explicitly provide the Town ZBA with the authority to impose durational limits upon permits granted pursuant to that section."
  - Thus, the durational limit was improper and it must be annulled because conditions imposed by a Town ZBA "must be authorized by the zoning ordinance."

Phair v Sand Land Corp., 137 AD3d 1237 (2d Dept 2016); Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton, 137 AD3d 1289 (2d Dept 2016)

- Facts
  - Plaintiffs, as a resident taxpayers of the Town, commenced action to enjoin Defendant from using residentially zoned property for certain mining operations.
  - After action was commenced, Defendant applied for a "pre-existing certificate of occupancy" for (1) the operation of a sand mine, (2) receipt and processing of clearing debris into mulch, (3) receipt and processing of construction debris into a concrete blend, and (4) storage, sale, and delivery from the property of sand, mulch, and concrete blend.
  - Town Building Inspector determined Defendant was entitled to certificate of preexisting use for three of the operations, but not for processing construction debris into concrete blend.

Phair v Sand Land Corp., 137 AD3d 1237 (2d Dept 2016); Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton, 137 AD3d 1289 (2d Dept 2016)

- Facts
  - Town Zoning Board of Appeals ("ZBA") determined that only the operation of the sand mine, sale and delivery of sand, and receipt of clearing debris was legal preexisting uses, and all other proposed uses, including the processing and sale of clearing debris, were unpermitted expansions of these operations
  - Supreme Court annulled the ZBA's determination to the extent that it found that processing and sale of clearing debris were not preexisting uses, since the processing and sale of such debris is inherently consistent with the collection of such debris.
- Issues
  - Were Defendant's operations legal nonconforming uses?
  - Did the Plaintiffs have standing to bring the action pursuant to a Town Law authorizing direct action by taxpayers to challenge the failure of Town Officials to enforce zoning regulations?

Phair v Sand Land Corp., 137 AD3d 1237 (2d Dept 2016); Matter of Sand Land Corp. v Zoning Bd. of Appeals of Town of Southampton, 137 AD3d 1289 (2d Dept 2016)

- Holding
  - The ZBA's determination was not arbitrary or capricious since there was no evidence that Defendant had traditionally processed or sold the clearing debris that it collected on its property. The argument that the processing and sale of clearing debris is inherently consistent with the receipt of such debris does not defeat the applicant's burden to prove that such operations were prior nonconforming uses. Absent evidence that such operations were historically conducted on the property, it cannot be a legal prior nonconforming use.
  - Since the local zoning officials found that no zoning violation existed for certain preexisting nonconforming uses, Plaintiffs did not have standing to challenge those decisions pursuant to the Town Law because there was no violation to enforce.
  - Plaintiffs did have standing to challenge the nonenforcement of the zoning code for those operations that the ZBA determined to not be preexisting nonconforming uses because the continuation of those operations violated the zoning code.

Leonard v Planning Bd. of Town of Union Vale,
136 AD3d 868 (2d Dept 2016)

- Facts
  - In 1987, the Planning Board issued a negative declaration on a proposal to subdivide a 950-acre parcel and approved a proposal to develop a portion of the parcel, which was so developed.
  - In 2012, Petitioners applied for preliminary plat approval to develop the remainder of the parcel, relying on the 1987 negative declaration.
  - The Planning Board rejected the 2012 application on the ground that the 1987 negative declaration was not operative with respect to the current application, which it deemed a new action.
- Issue
  - Was the Planning Board's determination appropriate that the 1987 negative declaration was not applicable to the 2012 application?

Leonard v Planning Bd. of Town of Union Vale,
136 AD3d 868 (2d Dept 2016)

- Holding
  - The Planning Board's decision "was based on faulty premises, among which was the erroneous legal conclusion that the 1987 negative declaration had expired."
  - There were not sufficient changes between the 1987 and 2012 applications to treat the latter as a new action.
  - Since the negative declaration had not expired, the Planning Board was required to determine whether it should be amended to cover the 2012 proposal or must be rescinded.
  - Without an explicit decision to rescind the prior negative declaration, it does not automatically expire merely because a lapse of time.

Matter of DeFeo v Zoning Bd. of Appeals of Town of Bedford, 137 AD3d 1123 (2d Dept 2016)

- Facts
  - Town Zoning Board of Appeals ("ZBA") approved an application for a special permit and area and use variances to construct a car wash facility, which proposed certain restructuring of traffic patterns and elimination of existing curb cuts.
  - The applicant submitted evidence that if the use variance was not granted, the development potential for the property would be reduced by between 27% and 53%.
  - Petitioner, who owned property near the proposed car wash, challenged the ZBA's decision to grant the use and area variances.

Matter of DeFeo v Zoning Bd. of Appeals of Town of Bedford, 137 AD3d 1123 (2d Dept 2016)

- Issue
  - Was the applicant entitled to use and area variances?
- Holding
  - The applicant did not establish that the property could not yield a reasonable return without the use variance, and an owner not entitled to the most profitable use of its property.
  - Specifically, that "the proposed use would be more profitable than a smaller scaled project not requiring a use variance" does entitle an owner to a use variance.
  - Thus, applicant was not entitled to a use variance based solely upon purported reduction in development potential.

Corollary: Use Variances are Difficult to Sustain in Court

- Because the burden to show entitlement to a use variance is so heavy, courts regularly annul the grant of use variances
  - Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals, 147 AD3d 1427 (4th Dept 2017)
  - Matter of Jenkins v Leach Properties LLC, 151 AD3d 1419 (3d Dept June 22, 2017)
  - Matter of Leone v City of Jamestown Zoning Bd. of Appeals, 151 AD3d 1828 (4th Dept June 16, 2017) (annulled because no evidence that applicant could not realize a reasonable return on the property by any conforming use)

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

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

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

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

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

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

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

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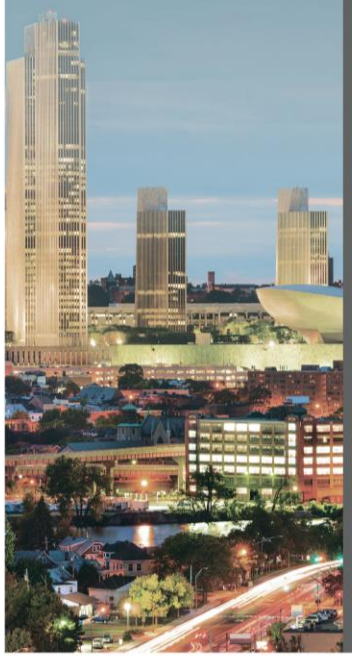

Appellate Division, Third Department

Matter of Lucente v Terwilliger, 144 AD3d 1223 (3d Dept 2016)

- Facts
  - In January 2006, Petitioner submitted an application to the Town Planning Board to subdivide its property into 50 parcels, consisting of 47 residential lots and three parcels preserved as open space or parks.
  - In July 2006, the Planning Board issued a negative declaration and issued a preliminary subdivision approval with various conditions.
  - On September 10, 2007, Petitioner submitted a proposed final plat, which included several changes to the drainage and stormwater management proposals for the project.

Matter of Lucente v Terwilliger, 144 AD3d 1223 (3d Dept 2016)

- Facts
  - The Town Board then adopted a 270-day moratorium that prohibited the Planning Board from considering any preliminary or final approval of Petitioner's subdivision application, which was extended for two additional 270-day periods.
  - Following expiration of the moratorium and until September 2014, no action was taken on Petitioner's application until Petitioner demanded that the Town issue a certificate of default approval of his application based upon the Planning Board's failure to take action on his 2007 final application within the statutory time limit.
  - The Town denied Petitioner's request, stating that Petitioner's application required additional SEQRA review.

Matter of Lucente v Terwilliger, 144 AD3d 1223 (3d Dept 2016)

- Issue
  - Should the Town have issued a certificate of default approval for Petitioner's final subdivision application?
- Holding
  - A certificate of default approval must be issued upon demand when a planning board fails to take action within the applicable time limit "after completion of all requirements under SEQRA."
  - Here, the time period never began to run because Petitioner's proposed final plat differed significantly from his preliminary approval, such the initial negative declaration was not applicable to the final subdivision application, and all SEQRA requirements were never completed.

Matter of Menon v State Dept. of Health, 140 AD3d 1428 (3d Dept 2016)

- Facts
  - Petitioners bought a parcel of lakefront property, which required approval of a homeowners association (the "Lake Club") and the Town's Zoning Board of Appeals ("ZBA") to construct a residence.
  - The Lake Club approved Petitioners' proposed construction plan, but the ZBA conditioned its grant of the necessary area variances upon the State Department of Health's ("DOH") approval of the proposed well and septic system.
  - After consulting with engineers about the necessary waivers for the separation requirements to construct Petitioners' proposed well and septic systems, DOH wrote a letter stating that "this vacant property is too small to be developed for a new home of any size."

Matter of Menon v State Dept. of Health, 140 AD3d 1428 (3d Dept 2016)

- Issue
  - Did DOH improperly deny Petitioners' request for a waiver of well and septic system separation requirements?
- Holding
  - DOH may grant a waiver of its separation requirements if the applicant demonstrates (1) a hardship, and (2) the requested waiver is consistent with DOH's purpose of ensuring water safety.
  - DOH erred by denying the waiver due to the blanket statement that the property was too small to build a house of any kind.
  - DOH "did not mention a hardship or other circumstance encountered by petitioners that made it impractical to comply with [DOH's] regulations, and there was no conclusion as to how petitioners' proposed well and septic system or the proposed distances delineated in [the waiver application] were not consistent with the regulations' purpose."

Matter of Sullivan v Board of Zoning Appeals of City of Albany, 144 AD3d 1480 (3d Dept 2016)

- Facts
  - Bethany Reformed Church sought to partner with a non-profit to house 14 homeless individuals at its property in City of Albany, which allowed "houses of worship" as of right
  - Church sought interpretation from ZBA, which found "that the proposed use is consistent with . . . [the] mission and actions of a house of worship, which logically includes a structure or part of a structure used for worship or religious ceremonies."
  - Neighbor challenged the ZBA interpretation, and Supreme Court annulled the determination
- Issue
  - Does a homeless shelter falls within Zoning Code's definition of a house of worship?

Matter of Sullivan v Board of Zoning Appeals of City of Albany, 144 AD3d 1480 (3d Dept 2016)

- Holding
  - Third Department reversed, and upheld the ZBA's interpretation
  - Court emphasized that a "house of worship" must be defined flexibly in light of the State's policy to permit religious land uses
    - "[S]ervices to the homeless have been judicially recognized as religious conduct, and the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions" (internal quotation marks and citations omitted).
  - Thus, Court held that proposed use to house homeless was permitted as a "house of worship"
- See also Matter of Cohen v Town of Ramapo Building, Planning, & Zoning Dept., 150 AD3d 993 (2d Dept May 17, 2017) (affirming grant of area variances to build religious school, noting that religious land use applications must be viewed with greater flexibility and every effort must be made to accommodate the use)

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

- Facts
  - Applicant applied for special use permit to build a resort hotel. During review, a vacancy occurred on the ZBA, leaving only 4 members
  - In Sept. 2014, the ZBA members voted 2-2 on issue whether to grant the special use permit. In Nov. 2014, after a new member was appointed, the ZBA granted the permit on a 3-2 vote.
  - Petitioners, who own an inn and restaurant next door, commenced Article 78 arguing that the 2-2 tie vote resulted in a default denial of the special use permit application

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

- Issue
  - When does a tie vote of a ZBA result in a default denial?
- Holding
  - Court held that Sept. 2014 tie vote was non-action on the application, not a default denial
  - A tie vote of a ZBA results in a default denial only when it is exercising its appellate jurisdiction
  - Here, the ZBA was exercising original jurisdiction over the special use permit application, not appellate jurisdiction.

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

- Facts
  - Applicants submitted project to Town Zoning Administrator seeking a determination of what approvals were necessary to demolish and rebuild two cottages on a single lot on Lake George
  - Zoning Administrator said area variance for setback requirements, and "a variance" to construct the second dwelling on one lot, which was prohibited by the Zoning Code
  - Applicants applied to the ZBA for the variances, which granted only an area variance to alter both the setback and the density requirements
  - Petitioner did not challenge that determination, but challenged the issuance of building permits without first obtaining a use variance

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

- Holding
  - Court held that Petitioner's challenge was time-barred because the ZBA previously determined that only an area variance was required to alter the prohibition on building more than one dwelling on a single lot.
  - Petitioner could not use the building permits to revive the challenge that should have been brought to the ZBA's grant of only an area variance, and so the proceeding was dismissed as time-barred.

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

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

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

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

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

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

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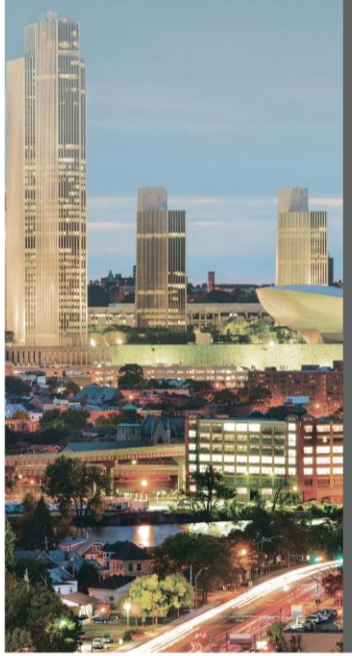

Appellate Division, Fourth Department

Matter of Smoke v Planning Bd. of Town of Greig, 138 AD3d 1437 (4th Dept 2016)

- Facts
  - Petitioners filed an application for a special permit seeking to install an underground pipeline to collect water from the naturally occurring aquifer under their land and store it on another property in the neighboring town for purposes of bulk sale.
  - The Planning Board granted the special permit with several conditions, one being that "no construction on the pipeline may commence until the use of wells on the other property of the applicants is approved for commercial uses by the [neighboring town]."
  - Petitioners commenced action seeking declaration that Planning Board was without legal authority to regulate the use of water resources.

Matter of Smoke v Planning Bd. of Town of Greig, 138 AD3d 1437 (4th Dept 2016)

- Issue
  - Does the Planning Board have legal authority to impose the above-stated condition upon Petitioners' application to construct a water pipeline?
- Holding
  - The Water Resources Law does not preempt local zoning laws concerning land use, only those local laws that attempt to regulate withdrawals of groundwater.
  - Here, the condition that Petitioner must first approve its wells for commercial use was a condition that dealt with where in the town such extractions may take place, i.e. commercial versus residential areas.
  - The condition was an appropriate land use regulation that sought to separate business from nonbusiness uses of property, and did not seek to regulate the actual withdrawal of groundwater.
  - Thus, the Planning Board's conditions were appropriate.

Matter of Elam Sand & Gravel Corp. v Town of W. Bloomfield, 140 AD3d 1670 (4th Dept 2016)

- Facts
  - Petitioners filed an application for a special use permit pertaining to proposed mining operations on September 1, 2010.
  - The Town issued a temporary moratorium on all mining operations on June 8, 2011.
  - After Petitioners sought court intervention on two occasions, the Planning Board conducted a public hearing on Petitioners' application on April 26, 2012, but did not issue a final determination.
  - The Town Board adopted a new zoning law on April 10, 2013 that prohibited mining on Petitioners' property.
  - On June 19, 2013 the Planning Board returned Petitioners' application on the ground that mining was not a permitted use.

- Issue
  - Should Petitioners have been entitled to the prior zoning scheme pursuant to the special facts exception for its application for a special use permit?

Matter of Elam Sand & Gravel Corp. v Town of W. Bloomfield, 140 AD3d 1670 (4th Dept 2016)

- Holding
  - A land use application is generally decided upon the zoning regulation in effect at the time of the final decision on such application.
  - However, under the special facts exception, where the landowner establishes entitlement as a matter of right to the underlying land use application, the application is determined under the zoning law in effect at the time the application is submitted.
  - To invoke the special facts exception, the landowner must establish "full compliance with the [zoning] requirements at the time of the application" and that the administrative body engaged in "extensive delays indicative of bade faith," unjustifiable actions by the municipal officials, or abuse of administrative procedures.
  - Here, Petitioners sufficiently alleged that the special facts exception should apply to its special use permit due to the Town's unexplained delay, Petitioners' multiple requests for judicial intervention, and the Town's failure to ever make a final determination on Petitioners' application.

Matter of Pittsford Canalside Props., LLC v Village of Pittsford, 137 AD3d 1566 (4th Dept 2016)

- Facts
  - The Village Board of Trustees was designated as lead agency pursuant to SEQRA for Petitioner's proposed development project.
  - Following three years of review, the Board of Trustees issued a negative declaration and issued the requisite special permits for Petitioner's project.
  - Following the Planning Board's approval of preliminary site plan approval, the Board of Trustees adopted a resolution rescinding the negative declaration and issuing a positive declaration.
  - Two of the Board of Trustees members expressed opposition to Petitioner's project before and after their elections, and prior to the rescission of the negative declaration.

- Issues
  - Did the Board of Trustees members have a conflict of interest disqualifying them from participating in deliberations on Petitioner's project?
  - Did the Board of Trustees have the authority to withdraw its negative declaration and issue a positive declaration?

Matter of Pittsford Canalside Props., LLC v Village of Pittsford, 137 AD3d 1566 (4th Dept 2016)

- Holding
  - The Board of Trustees' public statements concerning Petitioner's proposed project were simply the expressions of opinion on matters of public concern.
  - Such opinions do not amount to a conflict of interest, and the Board members were not disqualified from considering Petitioner's application.
  - The Board of Trustees was only authorized to rescind its negative declaration "prior to its decision to undertake, fund, or approve an action."
  - The Board of Trustees officially approved the action when it issued the requisite special permits, thus it could not thereafter rescind its negative declaration and its decision to do so was annulled.

Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc., 140 AD3d 1767 (4th Dept 2016)

- Facts
  - Town Board, acting as lead agency for SEQRA review, issued a negative declaration for a proposed Wal-Mart Supercenter construction project.

- Issue
  - Did the Town Board take the requisite "hard look" at the proposed action?

Matter of Wellsville Citizens for Responsible Dev., Inc. v Wal-Mart Stores, Inc., 140 AD3d 1767 (4th Dept 2016)

- Holding
  - The Town Board did not properly consider the impact of the project on wildlife, the community character, and surface water impacts.
  - The Town Board was made aware that birds listed as "threatened" and of "special concern" by the New York DEC, and listed on a "watch list" by the New York Natural Heritage Program ("NHP"), had been spotted on the project site.
  - Despite this notice, the Town Board merely relied on letters from the NHP and U.S. Fish and Wildlife Service indicating that those agencies did not have any records of any endangered or threatened species on the project site. The Town Board did not conduct any further review or request any on-site surveys prior to issuing the negative declaration.
  - The Town Board also failed to take a "hard look" at the surface water impacts; while it considered surface water impacts relating to the footprint of the Wal-Mart store, the proposed project also provided for the reconstruction of four holes of an adjacent golf course and the surface water studies submitted to the Town Board did not include potential surface water impacts from the golf course reconstruction.
  - Lastly, the Town Board's negative declaration must be annulled because there was no evidence in the record that it considered the impact of the project on the community character of the village.

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

- Facts
  - Developer wanted to build a Tim Horton's with a drive-through window. Town Board, as SEQRA lead agency, designated the action as "Unlisted," and requested preparation of a DEIS.
  - Developer revised the site plan an asked for a reclassification to a Type II action.
  - Town Board adopted a local law that required classification of actions involving drive-through windows as Type I, and denied developer's request to reclassify the action to Type II
  - Supreme Court annulled the local law and declared the action Type II

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

- Holding
  - In contrast to *Ranco Sand*, challenge was ripe because timely challenge to local law requiring designation of project as Type I
  - Court invalidated local law because "the Department of Environmental Conservation contemplated restaurants with drive-through windows as Type II actions when it promulgated that regulation" and annulled the classification of the project as a Type I action
  - But the Court declined to declare that the project actually was a Type II action without the Town Board first reviewing the matter again

County of Herkimer v Village of Herkimer, 25 NYS3d 839 (Sup Ct, Herkimer County 2016), *affd on Sup Ct opn* 147 AD3d 1349 (4th Dept 2017)

- Facts
  - Herkimer County (the "County") is in the process of finding a location to construct a new Herkimer County Jail ("HCJ") facility.
  - After initial review of potential sites, the County focused on 14 potential locations for the new facility.
  - The County ultimately decided on a site within the Village of Herkimer (the "Village") to locate the new facility.
  - The County has conducted the necessary studies, SEQRA review, designed the facility, received approval from the New York State Commission of Correction, and commenced the bidding process for the cell packages for a new facility within the Village.

County of Herkimer v Village of Herkimer, 25 NYS3d 839 (Sup Ct, Herkimer County 2016), *affd on Sup Ct opn* 147 AD3d 1349 (4th Dept 2017)

- Facts
  - According to the County Administrator, the Village site is the only viable option to locate the new facility within the County.
  - The Village has amended its zoning ordinance so as to prohibit the construction of the new HCJ facility on the proposed Village site.
  - The Village contends that its zoning ordinance is valid due to the legitimate local interests, including (1) the jail would change the character of the village, (2) over half of village residents are opposed to the jail, (3) the siting of the jail would violate the Village's Strategic Economic Development Plan by taking a large portion of its available land and tax base, (4) the Village would require a payment in lieu of taxes ("PILOT") agreement to replace the lost tax revenue if the facility is constructed, and (5) the County maintains that it may not legally enter into such PILOT agreement.

County of Herkimer v Village of Herkimer, 25 NYS3d 839 (Sup Ct, Herkimer County 2016), *affd on Sup Ct opn* 147 AD3d 1349 (4th Dept 2017)

- Issue
  - Is the County immune from the requirements of the Village Zoning Ordinance?
- Holding
  - Courts employ the County of Monroe, balancing of interests test to determine the applicability of local zoning laws where a conflict arises between two governmental entities.
  - The factors considered in such balancing of interests include (1) the nature and scope of the municipality seeking immunity, (2) the kind of function and land use of the proposed action, (3) the extent of the public interest to be served thereby, (4) the effect the land use would have on the enterprise concerned, (5) the impact of legitimate local interests, (6) the applicant's legislative grant of authority, (7) alternative locations for the facility in less restrictive zoning areas, (8) alternative methods for providing the needed improvement, and (9) intergovernmental participation in the project development process and an opportunity to be heard.

County of Herkimer v Village of Herkimer, 25 NYS3d 839 (Sup Ct, Herkimer County 2016), *affd on Sup Ct opn* 147 AD3d 1349 (4th Dept 2017)

- Holding
  - First, while the County is not per se a more important municipality than a village, the County is seeking to comply with the State Department of Corrections mandate, and it would be improper for a village to be allowed to impede such a mandate upon the County.
  - Second, the proposed land use is the construction of a jail. The Legislature has delegated the governmental obligation to provide for the care and custody of criminals to the counties.
  - Third, the extent of public interests served by the proposed land use is the most important factor in this case. Providing a jail facility is a "quintessential governmental function that is mandated by state law and serves to provide for public safety."
  - Fourth, subjecting the County to abide by the Village Zoning Ordinance would frustrate over fifteen years of work that has been put toward siting the facility in the Village. The County credibly established that the only location to build the facility is within the Village limits, so enforcing the Zoning Ordinance would have a prohibitive effect upon the County's ability to construct a jail.

County of Herkimer v Village of Herkimer, 25 NYS3d 839 (Sup Ct, Herkimer County 2016), *affd on Sup Ct opn* 147 AD3d 1349 (4th Dept 2017)

- Holding
  - Fifth, while the Village established its legitimate local concerns to having the facility within its boundaries, those concerns are not sufficient override all other considerations. Significantly, the existing Herkimer County Jail has been located within the Village for over 100 years, the vacant property of the proposed site does not contribute, either financially or to the community character, of the Village, and the County has encountered opposition to every proposed site and giving credence to such generalized opposition would essentially zone the jail out of the County entirely.
  - Sixth, the County is legally obligated to provide a county jail facility.

County of Herkimer v Village of Herkimer, 25 NYS3d 839 (Sup Ct, Herkimer County 2016), *affd on Sup Ct opn* 147 AD3d 1349 (4th Dept 2017)

- Holding
  - Seventh, the zoning district of the proposed facility permitted construction of a jail prior to the zoning amendment at issue. In considering over 40 potential sites, and closely evaluating 14 locations, there were no better alternatives that would provide a possibility for the County to construct the facility.
  - Eighth, the Village conceded that there are no alternative methods to provide the needed service of a new jail.
  - Ninth, the County provided numerous opportunities, both with public comment periods and hearings before the County Legislature and meetings for intergovernmental communication.
  - In sum, the Village did not establish a countervailing local interest of substance and significance sufficient to impose its zoning ordinance upon the County. Thus, the County is immune from the Village's Zoning Ordinance concerning the siting of the jail.

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

- Facts
  - Petitioners challenged a SEQRA negative declaration for construction of an ALDI supermarket
- Issues
  - Do Petitioners have standing?
  - Can a negative declaration be supported by written reasoning after it is adopted?

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

- Holding
  - Petitioners have standing because they own property approximately 300 feet from the property line of the project
    - Notable because the Second Department has held that the relevant measurement for standing purposes is not to the property line, but to the proposed construction itself. See Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo, 112 AD3d 726, 728 (2d Dept 2013)
  - Negative declaration annulled because it did not contain any findings concerning the "undisputed presence of preexisting soil contamination on the project site . . . The document containing the purported reasoning for the lead agency's determination of significance, which was prepared subsequent to the issuance of the negative declaration, does not fulfill the statutory mandate."

Comments or Questions?

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