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PLANNING & ZONING CASE LAW UPDATE

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LEGISLATION

Manufactured Homes

Chapter 425 of 2015 (Chapter 425) amended Article 21-B of New York State Executive Law (EL) by adding a new Title 2 to provide that a "manufactured home" is a "single-family dwelling" when located in a residential district and if the home otherwise conforms to Title 2.[1] Chapter 425 became law in November 2015. The bill that became Chapter 425 provided this legislative justification:

> Frequently, local governments make no provision for manufactured housing in their zoning regulations or enact regulations designed to exclude this type of housing. During the past decade the improved design, appearance, and significant technological advances of manufactured housing have made it equivalent to conventional, site-built, single-family dwellings. This statute, which is modeled after one advocated by the American Bar Association, is predicated on the belief that manufactured housing provides homeowners with an affordable source of decent, safe, and sanitary housing on a permanent basis and that the State should promote its utilization to provide housing opportunities for persons with low, moderate, and fixed incomes. Given the growing disparity between the demand for housing and the ability to produce housing at an affordable price, there exists a need for state-enabling legislation such as this bill to oversee local government regulation of manufactured housing.

New Title 2 includes sections 615, 616, and 617. Section 615 defines "manufactured homes",[2] "identical development specifications and standards",[3] and "single-family dwelling"[4]. The statutory directives are in Section 616 and Section 617:

- SECTION 616: A ***manufactured home*** that is affixed to a <u>permanent foundation</u> and conforms with the ***identical development specification and standards***, including <u>general aesthetic and architectural standards</u>, applicable to conventional, site-built ***single-family dwellings*** in the residential district in which the manufactured home is to be sited, shall be deemed to be a conforming single family dwelling for purposes of the applicable local zoning law or ordinance.
- SECTION 617: ***Manufactured home*** parks may be established or existing parks

expanded consistent with the provisions of this title and consistent with the ***identical development specification and standards***, including general aesthetic and architectural standards, applicable to other ***single-family dwelling*** developments in the municipality in which the park is, or is to be, located.

Note: Neither "permanent foundation" nor "general aesthetic and architectural standards" has been defined in new Title 2. In addition, the phrase "general aesthetic and architectural standards" may be a subcategory of the statutorily-defined "identical development specification and standards" (which includes access, building setback distance, enclosures and vehicle parking space).

OPINION(S)

Unsafe Buildings

Attorney General Opinion ***2015 N.Y. Op. Atty. Gen. No. 3 (August 4, 2015)*** discussed certain procedures to abate dangerous conditions of abandoned buildings and discussed recoupment of abatement costs.

A village requested the opinion. Located within the village's borders had been several properties that were abandoned by owners unable to pay the mortgage but on which the mortgagees had yet to foreclose. It was explained that, under these circumstances, the condition of the property may deteriorate and become unsafe. The village wanted to know any process for remediation of unsafe conditions and process whereby it could seek reimbursement for its remediation costs from the property owner or another party with an interest in the property.

The AG restated the rule that a village (town, city) may adopt a local law establishing standards for maintaining safe conditions on privately-owned real property.[5] Further, the local law can provide that the village is authorized to perform the necessary maintenance or remediation if the property owner fails to and that the village's costs of remediation may be imposed on the real property owner as an assessment.[6] Under the same authority, the local law can provide that the village can demolish an unsafe building and that the property owner must reimburse the village for demolition costs.[7]

The AG first opined on when notice must be provided to persons or entities with a mortgage or other interest in an unsafe or abandoned building or a building to be demolished. According to the opinion, "the Village must provide notice to the mortgagee of the real property abandoned by

the owner if the Village intends to maintain, repair, or demolish the property", except when a village is faced with emergency circumstances that necessitate the immediate demolition or remediation of an unsafe building to protect the public from imminent danger if the village will not have time to provide advance notice to the owner or the mortgagee.[8] In the absence of such emergency circumstances, the AG stated that "the Village would be well-advised to **provide notice to the holder of a publicly-recorded mortgage**. Such a mortgagee possesses a legally protected interest in the mortgaged property. [[9]] To the extent the Village's remediation would significantly affect the mortgagee's interest in the property, the Village must provide the mortgagee with notice of its intended action and an opportunity to address the conditions to be remediated. [[10]] Demolition of the building on the property likely would significantly diminish the value of the mortgaged property and, if so, notice must be provided to the mortgagee. [[11]] Similarly, **assessing significant remediation costs against the property likely would require notice**. [[12]] The impact of other actions related to remediation of dangerous conditions must be determined on a case-by-case basis; *the safest course, however, would be for the Village to provide the mortgagee with notice in instances where notice would be provided to the property owner*."

The AG next opined on the Village's ability to recover unpaid remediation costs from the county that serves as the Village's collector of unpaid taxes (the County). The rule is that a "village is authorized to adopt a local law under which expenses incurred by the village while remediating dangerous conditions on private property that the property owner was obligated but refused to [cover] are imposed as an assessment against the real property. Such an assessment, if unpaid, becomes part of the annual village tax levy against the property for the purpose of collection."[13]

The AG added that, under "Real Property Tax Law § 1442(1), a village may request and a county can enact a local law providing that the county will collect delinquent village taxes." Under circumstances where the Village and the County have such an arrangement, the county would pay the village the amount of unpaid village taxes and then re-levy the taxes upon the real property owner for collection by and now owing to the county.[14] In such a case and if the Village has adopted a local law that assesses unpaid remediation costs against the real property, delinquent village taxes to be re-levied and collected by the County might include costs incurred by the Village in abating dangerous conditions on abandoned property.

The AG provided another opinion on whether the County could validly refuse to re-levy the remediation costs and pay the amount of the costs to the Village, as follows: "the County

cannot refuse to re-levy the remediation costs and pay the amount of the costs to the Village. Section 1442 of the Real Property Tax Law, authorizing a county to adopt a local law providing for the collection of delinquent village taxes, does not authorize a county that has adopted such a local law to choose which unpaid items included in a village tax bill to re-levy and collect. We are of the further opinion, however, that the County can refuse to collect all of the Village's delinquent taxes in the future unless the Village agrees not to include such special assessments in its tax roll. To do so, the County can simply repeal its local law providing that it will collect the Village's delinquent taxes."

The last question the AG opined upon was whether a mortgage lien would be extinguished by the sale of real property conducted after the village tax, including a special assessment for remediation costs, is re-levied by the County and remains unpaid. The AG opined that "the mortgage lien generally will be extinguished." The opinion reasoned that "Article 11 of the Real Property Tax Law establishes the procedure for the enforcement of the collection of delinquent property taxes. Under this procedure, the property owner and other parties with an interest in or lien upon the property are given a period of time in which to redeem the property by paying the delinquent taxes and associated penalties. [[15]] If the owner or another interested party does not redeem the property within the redemption period, the County can begin a proceeding to foreclose on the property. [[16]] By following this procedure, the mortgage interest is extinguished and the County will obtain full title to the property. [[17]] Assuming the County complies with all legal requirements, a purchaser of the real property at a subsequent tax sale will obtain title in fee simple absolute."[18]

CASES

State Environmental Quality Review Act (SEQRA)[19]

Ranco Sand & Stone Corp. v. Vecchio[20] is a Court of Appeals case that upheld the Supreme Court, Suffolk County, and the Appellate Division, Second Department[21] decisions to hold that a SEQRA positive declaration was not ripe for judicial review.[22] The case involved two parcels of contiguous property, both of which were located in a residential district in the Town of Smithtown and owned by Ranco Sand and Stone Corporation's (Ranco). Parcel #1 was a 2.16 acre site that was leased to a private school bus company and was used as a bus yard and trucking station; additionally, according to the Court, Parcel #1 put to an "unapprovedly nonconforming"

use that the Town had not enforced against Ranco. Parcel #2 was rezoned from residential to heavy industrial use in accordance with a stipulation of settlement in litigation commenced by its prior owner, the deceased spouse of Ranco's majority owner; No draft environmental impact statement (DEIS) was prepared for Parcel #2. In 2002, Ranco applied to rezone Parcel #1 from residential to heavy industrial use. Ranco challenged the Smithtown Town Board's positive declaration that Ranco's proposed rezoning of Parcel #1 may have one or more significant adverse effects on the environment, and that an attendant DEIS should be prepared and submitted to the Board by Ranco. Ranco argued that Parcel #1 should be processed as Parcel #2 under SEQRA, without a DEIS.

In preparation for the public hearing associated with Ranco's proposed rezoning for Parcel #1, the Town's Director of the Planning and Community Development Department prepared a report which characterized the zoning application as "a request for a significant amendment to the [Town's] Comprehensive Plan." The report highlighted the importance of assessing the rezoning application so that everyone would be fully aware of the physical and legal context of Parcel #1, including: previously documented problems in current and future development in the area; the indefinite adjournment of several zone change petitions; recent litigation involving the property immediately to the north of, and held in common ownership with, Parcel #1, which were rezoned for heavy industrial use purposes in accordance with a stipulation of settlement (Parcel #2); and the existence of nonconforming zoning activities on nearby properties.

The report went on to warn that development on Parcel #1 could affect the Sunken Meadow Parkway directly and set a precedent for future uses and structures in the entire area west of the parkway. The report determined that because Parcel #1 is a mere 400 feet from several single-family residences, those homes could be affected by noise, odors, vibration, air pollution, glare, and other visual impacts, as well as traffic generation associated with heavy industrial uses. The report also found that, due to this close proximity to residences and residentially-zoned properties, Parcel #1's size and shape are not appropriate for certain types of heavy industrial uses, and that rezoning would permit more intense industrial uses than those previously conducted on Parcel #1 and some lots to its north. The Court found that the Director's report addressed various planning considerations, stressed the potential environmental impact of the proposed rezoning, and recommended approval of the application, if made subject to significant limiting land use conditions.

In 2004, the Town's Planning Board (whose members advise the Town Board on zoning matters) recommended approval of Ranco's rezoning application. No further action was taken on the application for another five years (until 2009), when the Town Board, acting as the lead agency under SEQRA, adopted a resolution issuing a positive declaration that rezoning Parcel #1 may have a significant effect on the environment and required Ranco to prepare a DEIS. The Town Board's positive declaration stated findings similar to that in the Director's report, including that the rezoning was "incompatible with existing residential land uses in the vicinity," and development of parcel one "has the potential to result in increased environmental impacts upon neighboring residentially-developed properties and upon the Sunken Meadow Parkway corridor relative to development of the subject parcel in accordance with the existing zoning."

Ranco filed court actions seeking to annul the positive declaration as "arbitrary, capricious, [and] unauthorized," and the company requested mandamus relief to compel the Town to process its rezoning application without a DEIS. Ranco argued that its matter was ripe for judicial review and that the Court of Appeals previous holding, in *Gordon v. Rush, 100 N.Y.2d 236 (2003),* should be applicable and binding on its case. The Court of Appeals, determined that Ranco's request was not ripe for judicial review and that *Gordon v. Rush* was inapplicable to Ranco's case.

The Court of Appeals explained that to challenge an administrative determination, the agency action must be "final and binding upon the petitioner". The finality requirement "draw[s] from case law on ripeness for judicial review". In previous cases, the Court recognized that the ripeness doctrine is closely related to the finality requirement, and in order for an administrative determination to be final, and thus justiciable, it must be ripe for judicial review.

The *Gordon v. Rush* case held that a positive declaration under SEQRA is ripe for judicial review when two requirements are satisfied. First, the action must impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. This threshold requirement consists of a pragmatic evaluation of whether the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. Second, there must be a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.

The *Gordon* case involved a challenge to a Town Board's positive declaration of potential significant environmental effects concerning proposed land use permit applications, and the Board's requirement that the property owners prepare a DEIS. The Board had declared itself as a

lead SEQRA agency when issuing the declaration, notwithstanding that it had previously advised the Department of Environmental Conservation (DEC) that it did not wish to assume the role of lead agency and requested that DEC serve in such capacity. In response to the Board's request, DEC assumed lead agency status and eventually issued a negative environmental impact declaration, along with wetland permits to the property owners. When the owners then sought coastal erosion permits, the Town Board issued the positive declaration.

The Court of Appeals concluded that the Town Board's administrative action in *Gordon v. Rush* was ripe for judicial review because the Town Board's SEQRA declaration imposed an obligation on the petitioners to prepare and submit a DEIS, after the Board "had already been through the coordinated review process and a negative declaration had been issued by the DEC as lead agency," and where no apparent further proceedings would remedy the injury caused by the unnecessary and unauthorized expenditures associated with conducting a DEIS. Thus, the *Gordon v. Rush's* analysis and its import must be considered in light of the Court's recognition that the administrative action in that case was potentially unauthorized because "the Board may not have had jurisdiction to conduct its own SEQRA review," given the existence of a prior negative declaration by a facially appropriate lead agency.

The Court of Appeals determined that Ranco only met the first requirement of the ripeness-for-review test adopted in the *Gordon* case. Indeed, the Town's positive declaration imposed on Ranco an affirmative obligation to prepare a DEIS, at significant cost of between $75,000 and $150,000. However, Ranco failed to meet the second requirement of the ripeness-for-review analysis, in that, Ranco's application could not be distinguished from any other preliminary administrative action and would disrupt the understanding of appellate courts that a positive declaration imposing a DEIS requirement is usually not a final agency action, and is instead an initial step in the SEQRA process.[23] Accordingly, the Court of Appeals restated the *Gordon v. Rush* rule as "where the positive declaration appears unauthorized, it may be ripe for judicial review, as, for example, when the administrative agency is not empowered to serve as lead agency (see *Gordon*, 100 N.Y.2d at 242–243, 762 N.Y.S.2d 18, 792 N.E.2d 168), when the proposed action is not subject to SEQRA (*Matter of Center of Deposit, Inc. v. Village of Deposit*, 90 A.D.3d 1450, 1452, 936 N.Y.S.2d 709 [3d Dept.2011]), or when a prior negative declaration by an appropriate lead agency appears to obviate the need for a DEIS suggesting that further action is improper (*Gordon*, 100 N.Y.2d at 243, 762 N.Y.S.2d 18, 792 N.E.2d 168)."

Another SEQRA case that was decided by the Court of Appeals is ***Sierra Club v. Vill. of Painted Post***,[24] where the Court examined the law of standing in land use cases and its holding in *Society of Plastics Indus. v. County of Suffolk*[25] and in *Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany*.[26] The rule established in *Society of Plastics* was that, in land use matters, the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large. The Court of Appeals also applied that standing test in *Matter of Save the Pine Bush*, concluding that petitioners, who alleged "repeated, not rare or isolated use" of the Pine Bush recreation area, had demonstrated standing by showing that the threatened harm of which petitioners complain will affect them differently from the public at large.

Here are the relevant facts. In February 2012, the Board of Trustees of the Village of Painted Post, Steuben County, adopted a resolution to enter into a surplus water sale agreement with respondent SWEPI, LP, a subsidiary of Shell Oil Co., which operates gas wells in Tioga County, Pennsylvania. The surplus water sale agreement provided for the sale to SWEPI, LP of 314,000,000 gallons of water in increments of up to one million gallons per day from the Village water system with an option to increase the amount by an additional 500,000 gallons per day. (The Village is located at the confluence of the Cohocton, Tioga and Chemung Rivers, and underlying the confluence of these rivers is the Corning aquifer, which is the principal drinking water supply of several municipalities, including the Village.)

Pursuant to SEQRA, the Village determined that the sale of its water was a Type II action. Another resolution, which approved a lease agreement with respondent Wellsboro & Corning Railroad (Wellsboro), was classified as a Type I action under SEQRA; the lease concerned the construction of a water transloading facility on 11.8 acres of land, previously used for industrial purposes, to be used as a filling station upon which the water would be withdrawn, loaded, and transported via rail line to Wellsboro, Pennsylvania. The Village issued a negative declaration, concluding that the lease will not result in any potentially significant adverse impact on the environment based on a review of a full environmental assessment form, a report prepared by engineering consultants to the Village, the site plan prepared for the railroad, and the 2005 deed to the site.

Construction of the water transloading facility began in April 2012. In June 2012, petitioners, including petitioner John Marvin, commenced this CPLR article 78 proceeding

challenging the municipal decisions, including that the Village failed to comply with the strict procedural mandates of SEQRA, particularly that it (1) failed to consider significant adverse environmental impacts of the water withdrawals, (2) improperly claimed a Type II exemption for the water sale agreement, and (3) impermissibly segmented its review of the water sale agreement and the lease agreement.

All of the ***Sierra Club*** courts focused on whether petitioner John Marvin established standing to challenge the Village's decisions. Petitioner Marvin specifically alleged that he is a longtime resident of the Village and resides "less than a block from the proposed rail loading facility, which is visible from his doorstep" and that he and his wife would be "adversely affected by the significant rail traffic and the increased noise and air contamination caused by the project." An affidavit of petitioner Marvin further stated that when the water trains began running, he "heard train noises frequently, sometimes every night" and that "[t]he noise was so loud it woke [him] up and kept [him] awake repeatedly." Marvin also stated that the "noise was much louder than the noise from other trains that run through the [V]illage" and he was concerned that the "increased train noise will adversely impact [his] quality of life and home value."

The Appellate Court dismissed the petition for lack of standing, and did not reach the merits of the SEQRA challenge. The Court of Appeals reversed the standing decision concluding that the Appellate Division applied an overly restrictive analysis of the requirement to show harm "different from that of the public at large". Under the Appellate Division's reasoning, because there are multiple residents who are directly impacted by the impacts of the transloading facility, no resident of the Village would have standing to challenge the actions of the Village. The Court restated these principles it recognized in *Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*:[27]

> Standing rules should not be "heavy-handed". Standing principles should not be applied in an overly restrictive manner where the result would be to completely shield a particular action from judicial review.

The Court of Appeals also added that this ***Sierra Club*** case provides an example that is distinctly different from other cases that did not confer standing on petitioners because of the generality of the complaint. Although more than one resident is directly impacted by the noise created from increased train traffic in the ***Sierra Club*** case, that more than one person may be harmed does not defeat standing. Indeed, the harm that is alleged for standing must be specific to

the individuals who allege it, and must be "different in kind or degree from the public at large" (*Society of Plastics* at 778), but the harm alleged need not be unique. In addition, the number of people who are affected by the challenged action is not dispositive of standing.

The Court of Appeals found that this ***Sierra Club*** case is more akin to the facts in the *Matter of Save the Pine Bush, Inc. v. Common Council of City of Albany* case, where the Court vested the nine individual petitioners with standing. In *Save the Pine Bush*, the petitioners alleged that they lived near the site of the proposed project and used the Pine Bush for recreation and to study and enjoy the unique habitat found there. In *Save the Pine Bush*, the Court of Appeals did not deny standing simply because many people suffer the same injury: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody".

Here, in ***Sierra Club***, petitioner Marvin is not alleging an indirect, collateral effect from the increased train noise that will be experienced by the public at large, but rather a particularized harm that may also be inflicted upon others in the community who live near the tracks. Just as in *Save the Pine Bush*, Marvin alleges injuries that are "real and different from the injury most members of the public face" and Marvin's complaint of the train noise fell within the zone of interest of SEQRA. Thus, his allegation about train noise caused by the increased train traffic keeping him awake at night, even without any express differentiation between the train noise running along the tracks and the noise from the transloading facility, would be sufficient to confer standing.

Another SEQRA case is ***Falcon Group Limited Liability Company v. Town/Village of Harrison Planning Board***.[28] That case concerned a February 28, 2012 determination of the Town/Village of Harrison Planning Board, which adopted a SEQRA findings statement in connection with an application for subdivision approval. Falcon Group Limited Liability Company (Falcon) sought the issuance of a new findings statement that is consistent with a certain Final Environmental Impact Statement.

Falcon owns an undeveloped 14.62–acre parcel of land in the Town of Harrison. The property is located in an R–1 zoning district, in which single-family homes on one-acre lots are permitted. In May 2005, Falcon submitted an application to the Town/Village of Harrison Planning Board (Board) for approval to subdivide the property into 13 single-family building lots and a 14th lot for stormwater detention. The project would require improvement of a paper street and

construction of an emergency access road. It would also require a waiver of the cul-de-sac length requirements of the Town/Village's zoning regulation and steep slope and wetlands permits.

The Board declared itself the lead agency under the SEQRA and adopted a positive declaration finding that the site was significantly constrained by the presence of steep slopes, wetlands, a stream, and subsurface conditions. A public scoping session was held and a draft environmental review statement (DEIS) was prepared which included several alternative development plans. The Board accepted the DEIS as complete on March 25, 2008. Public hearings were held on the DEIS, which was then revised to incorporate a further alternative plan. Additional public hearings were held, and a final environmental impact statement (FEIS) was prepared. The Board accepted the FEIS as complete on September 27, 2011. The FEIS included two new alternatives which would reduce the density of the project and many of the environmental impacts. After a public hearing on the FEIS, on February 28, 2012, the Board adopted a findings statement, finding that the proposed action, as well as the various alternative development plans, did not minimize or avoid adverse environmental effects to the maximum extent practicable, and would result in significant adverse environmental impacts that could not be avoided.

Falcon argued that the findings statement should be annulled on the grounds that it contradicted conclusions reached in the FEIS and DEIS and was not supported by empirical evidence in the record before the Board. The Second Department upheld the Supreme Court's decision to annul the findings statement and remit the matter to the Board for the issuance of a new findings statement that is consistent with the FEIS.

The Court found that the Board was required to, but did not, render its conclusions regarding the sufficiency of mitigation measures, the propriety of permit approvals, and a balancing of considerations, based on the evidence contained in the environmental review. The Board's conclusions in the findings statement were based, at least in part, on factual findings which were contradicted by the scientific and technical analyses included in the FEIS and not otherwise supported by empirical evidence in the record. The findings statement also failed to give sufficient consideration to the various alternative plans reviewed in the FEIS. While the findings statement discussed the alternatives that involved clustering the development into a smaller area, it did not address the reduced-density alternative set forth in the FEIS, which was not a cluster alternative and which reduced many of the environmental impacts of the original plan. Accordingly, the Court found that it was proper to annul the findings statement and remit the matter to the Board for the

issuance of a findings statement that is consistent with the FEIS.

Zoning Board of Appeals – Use Variance

A use variance permits a use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations. To obtain a use variance, an applicant must demonstrate satisfaction of these four statutory requirements, that: (1) the property cannot realize a reasonable return under any of the uses permitted in the zoning district, (2) the hardship flows from the unique characteristics of the property, (3) the proposed use would not alter the essential character of the neighborhood, and (4) the hardship has not been self-created. Where a use variance is sought to expand a nonconforming use "the applicant must demonstrate that the land cannot yield a reasonable return if used as it then exists or for any other use allowed in the zone". Such an inability to yield a reasonable return must be established through the submission of "dollars and cents" proof with respect to each permitted use.

Application of the first use variance standard was discussed in two cases. The first case is ***Nemeth v. Village of Hancock Zoning Board of Appeals.***[29] In that case, the court reviewed the Village of Hancock Zoning Board of Appeals' (ZBA) decision to grant a use variance for the non-residential use of an 800 square feet addition to an industrial manufacturing business operated by K-Tooling.

The K-Tooling operation – without the 800 sq. ft. addition, was rendered a lawful and valid preexisting nonconforming use when the Village rezoned the K-Tooling property to R1 in 1983. The Appellate Division, Third Department, previously determined (in 100 A.D.3d 1271 (2012)) that the 800 sq. ft. was unlawfully added in 2001 and its use had to be for residential purposes. As a result, K-Tooling needed a use variance to lawfully use the 800 sq. ft. addition to "house older equipment that has been replaced by more advanced, efficient equipment". K-Tooling's variance request was approved by the ZBA and annulled in this case by the Third Department.

The Third Department determined that there was insufficient proof that the land without the 800 sq. ft. addition could not yield a reasonable return when used solely as a manufacturing facility; and that no reasonable return was demonstrated for use of the K-Tooling property as any permitted R1 use, i.e., converting the entire property to a residential use. Specifically, the Court reasoned that that "dollars and cents" proof of no reasonable return was not demonstrated based solely on one of K-Tooling's owner's "bare conclusory statements that an additional 10 to 20

percent of revenue would be needed to find a similarly sized location to house the older manufacturing equipment, and that we [would] go out of business.

The first use variance standard was also in issue in the case of ***DeFeo v. Zoning Bd. of Appeals of Town of Bedford***.[30] The Court stated the applicable rule as: a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses.[31]

The address of the subject property in the ***DeFeo*** case is 562–570 North Bedford Road, Westchester County, and it is located on the east side of North Bedford Road (known as Route 117), at the intersection with Valerio Court in Bedford Hills. The subject property includes three lots. ONAB Corp. (ONAB) is the owner of one lot, and 570 North Bedford Road, LLC (570 LLC) is the owner of the other two lots. The majority of the subject property is commercially zoned as "RB," or roadside business; a portion of the rear of the property, however, is residentially zoned as "R–1/2A," or residential ½ acre. The plan was to construct a "New Car Wash with Express Lube & Detail Facility" (Carwash) on the RB zoned portion of the subject property and to use the R–1/2A zoned portion of the property as a driveway and parking lot for the Carwash. The Town of Bedford Comprehensive Plan recommends that any property located along a side street (like Valerio Court) should consider connection to the side street, even if the side street is largely residential. Therefore, the applicants to the Town boards proposed an entrance and exit to the Carwash driveway on Valerio Court. The subject property's existing curb cuts on Route 117 were to be eliminated.

The petitioner, Dino DeFeo, is the owner of 17 Valerio Court, which is near the subject property. Mr. DeFeo challenged the proposal on many legal grounds (see below).

On or about July 23, 2010, ONAB, 570 LLC, and Splash Management Group, LLC (collectively the Splash parties), submitted a preliminary site plan for the Carwash with the Planning Board of the Town of Bedford (Planning Board). Due to its concern about traffic flow expected to be generated by the proposed project, the Planning Board took lead agency status for the purposes of a review pursuant to the State Environmental Quality Review Act (ECL art. 8; hereinafter SEQRA). Traffic consultant reports submitted by the Splash parties and by the neighbors opposed to the project, which included the petitioner, were considered and discussed during several public meetings. The Planning Board also retained its own traffic consultant who reviewed the other consultants' traffic reports and submitted his own report. The consultants also

commented on each other's reports. The Planning Board ultimately issued a negative SEQRA declaration, determining that there would be no large and important impacts and, therefore, that the project will not have a significant impact on the environment.

On or about June 10, 2011, the Splash parties applied to the Town of Bedford Zoning Board of Appeals (ZBA) for use and area zoning variances and a special permit. Several public meetings were held before the ZBA. The Splash parties submitted evidence that the residential portion of their property could not be developed for a residence, or for any of the permitted uses in the residential R–1/2A zone, due to, among other things, the topography, the fact that a septic system could not be supported, and the fact that the residential portion of the property was very narrow. The Splash parties also submitted an appraisal which stated that, if the use variance for the residential portion of the property were not granted, the development potential of the RB-zoned portion of the property would be reduced for the subject carwash project by 27%, for retail purposes by 35%, and for office space purposes by 53%. The Splash parties did not, however, submit any actual financial information, such as the original purchase price of the property, the expenses and carrying costs of the property, the present value of the property, the taxes, the amount of any mortgages or other encumbrances, the amount of income presently realized, if any, or an estimate as to what a reasonable return on the entire property or any portion should be.[32] Nonetheless, by resolution dated December 20, 2012, the ZBA granted the Splash parties' application. Regarding the use variance, the ZBA found that the applicants could not realize a reasonable return without the granting of the variance and that the hardship had not been self-created.

The Appellate Court stated that entitlement to a use variance is not established merely by proof that the proposed use would be more profitable than a smaller scaled project not requiring a use variance.[33] The Splash parties are entitled to a reasonable return, not the most profitable return. Thus, Court upheld the Supreme Court's finding that the ZBA's determination that the Splash parties established unnecessary hardship was arbitrary and capricious since it does not have a rational basis in the record to support the conclusion that no reasonable return could be realized.[34] Because the use variance was not supported by a rational basis in the record, the Supreme Court properly granted that branch of the petition which asked the Court to also annul the ZBA's determination granting the area variances and special permit and the site plan

approval by the Planning Board, which were academic in light of its annulment of the ZBA's determination granting the use variance.

The Appellate Court next upheld the Supreme Court's order that the record demonstrated that the Planning Board took a hard look at the issue of traffic that would be generated by the proposed project. Contrary to the Defeo's contention, the Planning Board was not required to accept the opinions of his traffic consultant over its own traffic consultant.[35]

Zoning Board of Appeals – Standing

In the case of the ***Fund for Lake George, Inc. v. Town of Queensbury Zoning Board of Appeals***,[36] a professional engineer filed suit to challenge the Town of Queensbury Zoning Board of Appeals' issuance of an area variance to facilitate the construction of a residence on the property of two owners (the Owners) by authorizing the removal of vegetation and adjustment to the setback requirements for certain stormwater infiltration devices. The professional engineer (who claimed to be representing a number of neighbors of the Owners) opposed the project and requested several project determinations from the zoning enforcement official (ZEO). Dissatisfied with the ZEO's interpretations, the professional engineer appealed to the ZBA, which dismissed the appeal for lack of standing. The Appellate Division, Third Department, upheld the ZBA's decision to dismiss the professional engineer's appeal for lack of standing.

State law permits appeals to zoning boards of appeals by "any person aggrieved". The Court explained that the statutory phrase of "any person aggrieved" has consistently been interpreted to mean <u>a person or entity who has sustained special damage, different in kind and degree from the community generally.</u>[37] If no injury in fact has been established, a person or entity is presumed to have standing if he, she or it falls within the statute's zone of interests and his, her or its property is in sufficient proximity to the property at issue.[38]

According to the Court, the facts supported the ZBA's dismissal of the professional engineer's appeal for lack of standing. Even though the notice of appeal to the ZBA listed the firm of the professional engineer as the appealing party, and the engineer himself as the agent for the appealing party, <u>the professional engineer and his firm did not exhibit any specialized harm</u> and <u>owned no property near the property that was the subject of the application before the ZBA</u>. Thus, the professional engineer did not have standing in his individual capacity or as an agent for his firm. Next, although at the public hearings and in letters to the ZBA the professional engineer

identified himself as appearing on behalf of neighbors, the Court discredited these facts, because, at no point up until the day before the hearing on his ZBA appeal did the engineer identify who his clients were.

Violations of local rules of procedures also led the Court to uphold the ZBA's decision to dismiss the engineer's appeal for lack of standing. Some other parties that opposed the Owners' project, who later claimed that the professional engineer was their agent before the ZBA, did not comply with the following local procedures prior to the expiration of the statute of limitations for appealing an administrative determination: 1) listing their names on the notice of appeal, and 2) filing a formal designation form naming the engineer as their agent.

Zoning Enforcement – Citizen Suits under Town Law §268(2)

Town Law § 268(2) permits a town to "institute any appropriate action or proceedings" to prevent or restrain the violation of its zoning laws. It further provides that, "upon the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do".

The case of ***Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton***[39] was decided by the Appellate Division, Second Department (the Court) with ***Phair v. Sand Land Corp.***,[40] which was filed pursuant to Town Law § 268(2). Both cases reviewed the decision of the Supreme Court, Suffolk County, which annulled a determination of the Zoning Board of Appeals of the Town of Southampton, dated June 21, 2012, and vacated a determination and certificate of occupancy issued by the Chief Building Inspector of the Town of Southampton finding that the use of the subject property for the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil and mulch, and the storage, sale, and delivery of mulch, topsoil, and wood chips, constituted a preexisting nonconforming use.

Here are the facts applicable to both cases. Sand Land Corporation (hereinafter Sand Land) owns an approximately 50–acre parcel of real property in a residential zoning district in the Town of Southampton. Wainscott Sand & Gravel Corporation (hereinafter WS& G) owns and operates certain mining and reclamation activities conducted on that property. In 2005, individual residents

of the Town who owned homes nearby (hereinafter collectively the neighbors), commenced an action pursuant to Town Law section 268(2) to, inter alia, enjoin Sand Land from using the property for certain uses which, they alleged, violated the Town's zoning code. See ***Phair v. Sand Land Corp.*** (discussed below).

In May 2010, while the neighbors' action was pending, Sand Land filed an application with the Town's Chief Building Inspector requesting a "pre-existing certificate of occupancy" for the use of the property for (1) the operation of a sand mine, (2) the receipt and processing of trees, brush, leaves, and other clearing debris into topsoil or mulch, (3) the receipt and processing of concrete, asphalt pavement, brick, rock, and stone into a concrete blend, and (4) the storage, sale, and delivery from the property of sand, mulch, topsoil, wood chips, and concrete blend. In support of its application, Sand Land, which asserted that the property had been used continually for these operations since before the Town adopted its zoning code, submitted, inter alia, affidavits from eight individuals familiar with the site and its history. In opposition, the neighbors submitted various exhibits that, they insisted, conclusively refuted Sand Land's claim that the challenged uses pre-dated the adoption of the zoning code.

Sometime after July 18, 2011, the Town's Chief Building Inspector issued to Sand Land a certificate of occupancy certifying the preexisting use of the property for "[t]he operation of a sand mine, the receipt and processing of trees, brush, stumps, leaves and other clearing debris into topsoil or mulch, and the storage, sale, and delivery of sand, mulch, topsoil, and wood chips". The neighbors, however, appealed the Inspector's determination to the Town's Zoning Board of Appeals (hereinafter the ZBA). In that appeal, the neighbors argued that the evidence Sand Land had submitted to the Chief Building Inspector did not support the Chief Building Inspector's finding of "pre-existing use status" with respect to receipt and processing of trees, brush, stumps, leaves, and other clearing debris into topsoil or mulch, and the storage, sale, and delivery of sand, mulch, topsoil, and wood chips. Following a public hearing on the neighbors appeal, the ZBA, in a determination dated June 21, 2012, concluded that the evidence presented supported the finding that the operation of a sand mine, including the storage, sale, and delivery of sand, constituted a legally established nonconforming use, and that it also supported the finding that the receipt of trees, brush, stumps, leaves, and other clearing debris was a preexisting accessory use to the mining operation on the site. At the same time, however, the ZBA found that the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil or mulch, and the storage, sale, and delivery

of mulch, topsoil, and wood chips were "new uses" that were not preexisting and which were not a permitted expansion of any legally established nonconforming use. Accordingly, the ZBA annulled those portions of the Chief Building Inspector's determination and certificate of occupancy which approved such "new uses" as preexisting.

In the ***Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*** case, the Court found that the ZBA properly concluded that the evidence submitted supported the Chief Building Inspector's findings that the operation of a sand mine, including the storage and delivery of sand, constituted a preexisting nonconforming use, and that the receipt of trees, brush, stumps, leaves, and other clearing debris was a preexisting accessory use to this mining operation.

The Court next found that the ZBA did not "improperly" place the burden on Sand Land to demonstrate its entitlement to the claimed nonconforming uses. The Court stated this rule: the owner of a property, generally speaking, must establish that the allegedly pre-existing use was legal prior to the enactment of the prohibitive zoning ordinance which purportedly rendered it nonconforming.[41] In this case, even though the Chief Building Inspector found that Sand Land met this burden, when the matter went for review before the ZBA, the ZBA was authorized to consider the Chief Building Inspector's determination de novo and make such a "determination as in its opinion ought to have been made in the matter".[42] When presenting the matter to the ZBA, the neighbors only had to show that the evidence submitted by Sand Land in support of its application was insufficient to demonstrate that the challenged uses existed on the subject property prior to the adoption of the prohibitive zoning ordinance.[43] Moreover, the evidence supported the ZBA's finding, in effect, that Sand Land had not met its burden of proving that the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil or mulch, and the storage, sale, and delivery of mulch, topsoil, and wood chips were not "new uses," or were a permitted expansion of any legally established nonconforming use. The Court stated that the record, as a whole, could lead the ZBA to reasonably conclude, in effect, that the "new uses" constituted a "significant change" from the nonconforming sand mine operation and the accessory receipt of various yard debris. Accordingly, the Supreme Court erred in annulling the ZBA's determination.

In the ***Phair v. Sand Land Corp.*** case, the Court concluded that the Town Law § 268(2) action was properly filed and not academic as it related to certain actions.

The Court began by restating the rationale for passage of Section 268(2), that the statute was "intended to create an avenue for direct action by which resident taxpayers, acting in concert,

may overcome official lassitude or nonfeasance in the enforcement of zoning laws".[44] The Court cautioned that, although the taxpayer's action can be commenced to enforce compliance with the zoning law upon failure of the town officers to do so, the taxpayer plaintiffs have no greater right to demand compliance than do the town officials'.[45] In this case, the Court upheld the ZBA's determination that the use of the subject property for the operation of a sand mine, including the storage, sale, and delivery of sand, constituted a legal preexisting nonconforming use, and also that the use of the property for the receipt of trees, brush, stumps, leaves, and other land-clearing debris was a preexisting accessory use to the mining operation. Because the local officials found no zoning violation, there is no "official lassitude or nonfeasance in the enforcement of zoning laws' which citizen taxpayers may overcome" and no action pursuant to Town Law § 268(2) can be maintained.

On the other hand, however, the ZBA made no such "legal pre-existing nonconforming use" finding with regard to the use of the property for the processing of trees, brush, stumps, leaves, and other land-clearing debris into topsoil or mulch, or for the storage, sale, and delivery of mulch, topsoil, and wood chips. Moreover, although the issue was not before the ZBA, the Chief Building Inspector also refused to grant preexisting use status with regard to the use of the property for the receipt, processing, and/or disposal of concrete, demolition debris, asphalt pavement, brick, rock, and metals. Since there was no finding by the zoning officials that these uses were legal, there is no reason why either the Town or the citizen taxpayers cannot seek to enforce compliance with the zoning code in an action brought pursuant to Town Law § 268(2). Accordingly, the Court held that the first cause of action is not academic insofar as it relates to the use of the property for the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil and mulch, the storage, sale, and delivery of mulch, topsoil, and wood chips, and the receipt, processing, and/or disposal of concrete, demolition debris, asphalt pavement, brick, rock, and metals.

The Court added that, in general, private property owners may maintain a common-law action to enjoin the continuance of a zoning code violation and to obtain damages to vindicate their discrete, separate, and identifiable interests as long as they can establish special damages due to the defendant's activities.[46] Since in this case Sand Land made no claim that the plaintiffs could not prove special damages, and Sand Land offered no other ground for dismissing the common-law claim in its entirety. Accordingly, the Court reversed the Supreme Court's order insofar as it dismissed, as academic, the common law action.

Special Facts Exception

Generally, a case must be decided upon the law as it exists at the time of the decision.[47] In land use cases, *the law in effect when the application is decided applies*, regardless of any intervening amendments to the zoning law.[48] This rule is inapplicable if an application falls within the "special facts" exception. Under the special facts exception, the application will be determined under the zoning law in effect at the time the application is submitted if the landowner establishes entitlement.[49] To be entitled to the special facts exception, the landowner must be in full compliance with the zoning requirements at the time of the application, such that proper action upon the permit would have given the landowner time to acquire a vested right.[50] The landowner must also show extensive delay on the part of the municipality, indicative of bad faith,[51] "unjustifiable actions" by the municipal officials[52] or abuse of administrative procedures.[53]

In the case of ***Elam Sand & Gravel Corp. v. Town of W. Bloomfield***,[54] the Appellate Division, Fourth Department agreed with Elam Sand & Gravel Corp. (Elam) that the special facts exception should be applied to its application for a mining special use permit, which was filed on September 1, 2010.

Here are some additional facts. The Town issued a moratorium on mining operations on June 8, 2011. After Elam sought court intervention on two occasions, the Planning Board conducted a public hearing on April 26, 2012, but did not issue a determination. The Town Board adopted a new zoning law on April 10, 2013 that prohibited mining of the subject property. On June 19, 2013, the Planning Board returned the mining application to Elam on the ground that mining was not a permitted use.

The Appellate Court agreed with Elam that the special facts exception may be applied to the application for a special use permit,[55] because Elam sought a declaration that it was entitled to apply for a special use permit under the former law after an administrative record was created. The existence of an administrative record would allow the Court to review the record in order to determine whether Elam complied with the requirements for a special use permit before the new zoning law was enacted.[56] The Court expressly noted that the Town did not render a substantive decision on the mining application.

County Planning Agency Referral (General Municipal Law §239-m)

General Municipal Law §239-m provides that a proposed amendment of a zoning ordinance (as well as a number of other enumerated actions) by a town (village and city located

with a county) must be referred to the county planning agency if the amendment affects real property located within 500 feet of the boundary of any city, village, or town.[57] A town must submit to the county planning agency a "full statement of such proposed action," defined as "all materials required by and submitted to the referring body as an application on a proposed action, including a completed environmental assessment form and all other materials required by [the] referring body" to make a determination of significance pursuant to the SEQRA.[58] The county planning agency will then have 30 days to report its recommendations to the referring body.[59]

24 Franklin Ave. R.E. Corp. v. Thomas Heaship[60] reaffirmed the rule that the failure to refer an action to a county planning agency, when statutorily required under General Municipal Law §239-m, constitutes a jurisdictional defect that would render the action invalid. That case concerned Local Law No. 4, which the Town/Village of Harrison Board enacted in September 2007 to amend the local Zoning Code.

The Appellate Division, Second Department, upheld the Supreme Court's decision to declare Local Law No. 4 invalid based on the failure of the Town Board to comply with the requirements of General Municipal Law § 239-m. The Court held that the mandatory referral requirements of General Municipal Law § 239-m was not superseded by Westchester County Administrative Code § 277.61 (2), because Section 239-m authorizes the county planning agency to provide comment on the action referred. By comparison, Westchester County Administrative Code § 277.61 requires only, as relevant here, that a town must provide to the County Planning Board 10 days notice of any hearing as to a zoning amendment. Because Westchester County Administrative Code § 277.61(2) does not conflict with the referral requirements of General Municipal Law § 239-m, Westchester County Administrative Code § 277.61 (2) does not supersede the referral requirements set forth in General Municipal Law § 239-m.[61] The Town did not dispute that it failed to comply with the notice and referral requirements of General Municipal Law § 239-m. Accordingly, this failure constitutes a "jurisdictional defect" rendering the zoning amendment, Local Law No. 4, invalid.

The Appellate Division further noted that the Town Board, in enacting that local law, failed to comply with the notice provisions of Town Law § 264 (1) and (2), and that the Town Board failed to prepare and review a complete Environmental Assessment Form prior to the enactment of that law, and that the Supreme Court wrongfully directed the Town Building Official to issue

the subject building permits, because the matter must be remitted to the Planning Board for further proceedings as to any planned subdivision of the subject property that was not in accordance with the original Planning Board's resolution that granted the plaintiffs' application for subdivision approval.

Another case is ***Village of Kiryas Joel v. Village of Woodbury***.[62] In that case, several legal challenges were made on the validity on the Comprehensive Plan adopted by the Village of Woodbury and certain Zoning Amendments enacted by the Village in Local Law Nos. 3 and 4 of 2011. The three main allegations were that the: 1) Comprehensive Plan and the Zoning Amendments are void and unenforceable because the Village of Woodbury Board of Trustees (hereinafter the Board of Trustees) failed to strictly comply with the procedural and substantive mandates of SEQRA, 2) Board of Trustees failed to comply with General Municipal Law § 239-m, and 3) Comprehensive Plan and the Zoning Amendments amounted to unconstitutional exclusionary zoning. The Appellate Division, Second Department, reversed the Supreme Court, Orange County.

The Appellate Division held that, first, the Supreme Court wrongfully granted the petition/complaint that sought to annul the Comprehensive Plan and the Zoning Amendments, because the Board of Trustees failed to order the preparation of an environmental assessment form (EAF). The court restated the rule that "SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act".[63] 6 NYCRR 617.6 (a) (4) expressly permits an agency, like the Village of Woodbury, to waive the requirement for an EAF if a draft environmental impact statement is prepared or submitted. In this case, such a draft environmental impact statement was prepared. Thus, the failure to prepare an EAF did not amount to a failure to literally comply with SEQRA's procedural requirements.

The Supreme Court also wrongfully granted so much of the petition/complaint as sought to annul the Comprehensive Plan and the Zoning Amendments, because the Board of Trustees failed to identify the relevant areas of environmental concern, take a hard look at them, and make a reasoned elaboration of the basis for its determination.[64] The Board of Trustees satisfied SEQRA's substantive requirements by, in particular, adequately analyzing a reasonable range of alternatives.[65]

Additionally, the Supreme Court wrongfully granted so much of the petition/complaint as sought to annul the Comprehensive Plan and the Zoning Amendments, because the Board of Trustees failed to comply with General Municipal Law § 239-m. The Appellate Division found no record evidence to contradict the Village Planner's assertion that the report of final action was submitted following enactment of the Comprehensive Plan and the Zoning Amendments. Moreover, the revisions made to the Comprehensive Plan and the Zoning Amendments after referral were "embraced within the original referral".[66]

Finally, the Supreme Court wrongfully granted the fourth cause of action, which alleged that the Comprehensive Plan and the Zoning Amendments are void and unenforceable because they amounted to unconstitutional exclusionary zoning. The Appellate Division concluded that neither side was entitled to summary judgment. The Appellate Division explained that: Both the constitutional and statutory validity of a zoning ordinance depend on the facts of the particular case and whether it is really designed to accomplish a legitimate public purpose…As legislative acts, zoning ordinances carry a presumption of constitutionality[, and] that this presumption is rebuttable, but that unconstitutionality must be demonstrated beyond a reasonable doubt…Generally then, a zoning ordinance enacted for a statutorily permitted purpose will be invalidated only if it is demonstrated that it actually was enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect. Once an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant".[67] The Appellate Division reasoned that in this case, triable issues of fact exist as to whether the Comprehensive Plan and the Zoning Amendments amount to unconstitutional exclusionary zoning.

Vested Rights

The Court of Appeals (highest State court) explained the rule of vested rights in the case of ***Exeter Bldg. Corp. v. Town of Newburgh***,[68] as follows: An owner of real property can acquire a common law vested right to develop property in accordance with prior zoning regulations when, in reliance on a legally issued permit, the landowner effects substantial changes and incurs substantial expenses to further the development and the landowner's actions relying on the valid permit are so substantial that the municipal action results in serious loss rendering the

improvements essentially valueless.[69] Another Court of Appeals case, *Town of Orangetown v. Magee*,[70] adds further: Neither the issuance of a permit nor the landowner's substantial improvements and expenditures, standing alone, will establish the right.

The facts in the case of ***Exeter Bldg. Corp. v. Town of Newburgh***[71] are: in 2006, the Town Board of the Town of Newburgh rezoned certain property by enactment of Local Law No. 3 (2006). Developers of a certain project, called Madison Green, challenged that rezoning in court. Site plan review and approval would be required for the Madison Green development. In June 2007, the Planning Board granted preliminary site plan approval subject to 18 conditions, 11 of which were required to be met by the developer before the chairperson of the Planning Board would be authorized to sign the plans. The conditions precedent to the chairperson's signature were memorialized by the Planning Board in a "Resolution of Approval Site Plan Final" that was passed on December 20, 2007 (hereinafter the Resolution). The Appellate Division case explained that the Resolution provided (in relevant part):

> "THE PLANNING BOARD RESOLVES to approve this Site Plan as said proposal is depicted on the plans identified above upon the conditions outlined below, and the Chairperson ... is authorized to sign the plans upon satisfaction of those conditions below noted to be conditions precedent to signing."

Because the Madison Green developer did not fulfill the <u>conditions precedent</u> that were delineated in the Resolution, the Appellate Division concluded that the chairperson was not authorized to finally sign off on the site plan. The Court of Appeals added that the Resolution included a statement of the new zoning status – under Local Law No. 3 – of the Madison Green property. Accordingly, it was held that no vested rights were acquired to develop Madison Green under the R–3 zoning regulations in effect prior to March 6, 2006, because the Newburgh Town Planning Board never granted unconditional site plan approval. The Court of Appeals reasoned that it was unreasonable for the Madison Green developers to rely on the December 2007 conditional Final Site Plan Approval when there was a possibility that the Local Law No. 3 would be found legally valid.

The Court of Appeals next stated that, issuance of separate limited permits to authorize the Madison Green developers to "demolish a single-family residence, remove certain water tanks and their foundation, conduct clearing and grading, and erect signs on the subject property", did not,

either singly or together, amount to approval of the entire proposed development based on the acquisition of vested rights.[72]

42 U.S.C. §1983 Claim and Site Plan

The case of ***East End Resources, LLC v. Town of Southold Planning Bd.***,[73] was filed by a real estate developer under Article 78 of New York State Civil Practice Law and Rules for a mandamus to compel the Town of Southold Planning Board to conduct a public hearing on a site plan application pursuant to Town Law § 274–a(8).[74] The real estate developer also alleged violations of its rights to due process and equal protection under the U.S. Constitution and the New York Constitution and 42 U.S.C. §1983.

The Town of Southold enacted a moratorium precluding all residential site plan approvals, in 2002. After the moratorium expired, East End (the real estate developer) submitted a site plan application to the Planning Board, seeking approval for the construction of a 24–unit senior housing development on a 6.75 acre parcel located in the Hamlet's business zoning district, for which it entered into a purchase contract. Subsequently, on October 21, 2008, East End submitted an amended site plan application. East End filed this case, alleging that the Planning Board, Town Board, Town of Southold Planning Department, and Town of Southold Town Clerk (hereinafter collectively the Town) deliberately and systematically delayed review of its site plan application.

The Appellate Division, Second Department, held that East End raised issues of fact that would be worthy of a trial on its equal protection claim concerning whether the Town "would continue to use repetitive and unfair procedures so as to avoid making a final decision on the application".

However, East End's other claims should have been dismissed. First, East End had demonstrated no cognizable property interest that was protected by Due Process in the approval of the site plan application, because the Planning Board has significant discretion in reviewing site plan applications. Next, East End failed to serve a timely notice of claim on the Town, which is a condition precedent to the assertion of the real estate developer's claims (see General Municipal Law § 50–i); its contention that the verified complaint/petition was the functional equivalent of a notice of claim was deemed by the Court to be without merit. Finally, East End's mandamus to compel the Planning Board to hold a public hearing was held to be academic since the Town demonstrated that the Planning Board had indeed conducted a public hearing on the subject site

application.

Removal from Office

In November 2015, the New York State Appellate Division (Second and Fourth Departments) decided whether certain local public officials should be removed from office pursuant Public Officers Law § 36, which provides that:

> Any town, village, improvement district or fire district officer, except a justice of the peace, may be removed from office by the supreme court for any misconduct, maladministration, malfeasance or malversation in office. An application for such removal may be made by any citizen resident of such town, village, improvement district or fire district or by the district attorney of the county in which such town, village or district is located, and shall be made to the appellate division of the supreme court held within the judicial department embracing such town, village, improvement district or fire district. Such application shall be made upon notice to such officer of not less than eight days, and a copy of the charges upon which the application will be made must be served with such notice.

The Second Department decided the case of ***Hayes v. Avitabile***[75] and the Fourth Department decided ***Libordi v. Isaman.***[76] Each case was dismissed after the Court explained that removal from office pursuant to Public Officers Law § 36 is an extreme remedy reserved for officials engaged in self-dealing, corrupt activities, conflict of interest, moral turpitude, intentional wrongdoing or violation of a public trust.[77] No such conduct was found warranting removal from public office.

In the ***Hayes*** case, the Court was petitioned to remove the Mayor of the Village of Middleburgh in Schoharie County from office, based on the allegations that: 1) the Mayor simultaneously held the positions of Mayor and Village Constable and, during that time, issued Hayes two parking tickets; 2) appointed unqualified candidates to various positions in his administration; 3) published an email attempting to defame Hayes's character; and 4) improperly refused to reimburse Hayes for sewer rent charges.

The Court dismissed the petition. It was reasoned that the Mayor conceded without denial that he did indeed assume the duties of Village Constable upon his election to the position of Mayor. However, the Court noted that approximately five months thereafter, upon being advised by the Village Attorney that holding both positions simultaneously could present a conflict of interest, the Mayor immediately ceased all duties as Village Constable. The parking tickets issued

to Hayes during such time were later dismissed. Although the Mayor's initial decision to serve in that dual capacity "may have been imprudent", the Court held that such conduct did not amount to unscrupulous conduct or gross dereliction of duty or conduct that connotes a pattern of misconduct and abuse of authority, required for removal from office.[78] The Court added further that the Mayor's dissemination of the allegedly defamatory email was not an abuse of official power since it occurred prior to his assumption of public office. The Court dismissed the remaining allegations, finding no conduct that would warrant removal, because, at best, the conduct complained of were minor neglect of duties, administrative oversights and violations of law that do not warrant removal from office.

In the ***Libordi*** case, the Court was petitioned to remove the Town Supervisor of the Town of Hornellsville in Steuben County (Town) from public office. The Petitioner alleged that the Supervisor engaged in self-dealing, and a conflict of interest arose from the Supervisor's employment with an insurance agency that did business with the Town during his tenure as Supervisor. The Court concluded that the Supervisor conclusively refuted those allegations.

The Court dismissed the other allegation that a conflict of interest arose when the Supervisor voted at Town Board meetings in favor of appointing the Supervisor's wife to positions with the Town Board, and approving the salaries for her positions. It was reasoned that the Supervisor admitted that he should have abstained from voting on matters concerning his wife's employment and salary. Under such circumstances, the Court determined that the Supervisor's failure to do so did not constitute the type of conduct that would warrant removal from office.[79]

Endnotes

[1] http://public.leginfo.state.ny.us/navigate.cgi.

[2] Executive Law, Article 21-B, Title 2, § 615 (1) provides: "Manufactured home" shall have the same meaning as provided in subdivision seven of section six hundred one of this article.

Executive Law, Article 21-B, Title 1, Section 601(7), provides: "Manufactured home" means a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term shall include any structure that meets all of the requirements of this subdivision except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States secretary of housing and urban development and complies with the standards established under Title 42 of the United States code; and except that such term shall not include any self-propelled recreational vehicle.

[3] Executive Law, Article 21-B, Title 2, § 615 (2) provides: "Identical development specifications and standards" includes access, building setback distance, enclosures and vehicle parking space.

[4] Executive Law, Article 21-B, Title 2, § 615 (3) provides: "Single-family dwelling" shall mean a building designed as a one-family residence and used or occupied, or intended to be used or occupied as the home or residence of one or more persons maintaining a household.

[5] Municipal Home Rule Law § 10(1)(ii)(a)(12); Village Law § 4-412(1)(a); D'Angelo v. Cole, 67 N.Y.2d 65 (1986); Op. Att'y Gen. (Inf.) No. 98-35.

Collapse Building and Structures regulations can be adopted by towns and cities as authorized in:

- Town Law §130(16)
- General City Law § 20(35).

[6] Municipal Home Rule Law § 10(1)(ii)(a)(9-a),(12); Village Law §§ 4-412(1)(a); 4-414; D'Angelo v. Cole, 67 N.Y.2d 65 (1986); Op. Att'y Gen. (Inf.) No. 85-13.

[7] Lane v. City of Mount Vernon, 38 N.Y.2d 344 (1976); Op. Att'y Gen. (Inf.) No. 98-35; 9 Op. Counsel State Bd. of Equalization & Assessment No. 105 (1992).

[8] See Calamusa v. Town of Brookhaven, 272 A.D.2d 426 (2d Dep't 2000).

[9] Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983); U.S. Bank Nat'l Ass'n v. Denisco, 96 A.D.3d 1659, 1661 (4th Dep't 2012).

[10] See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 (1983); Zaccaro v. Cahill, 100 N.Y.2d 884 (2003).

[11] See U.S. Trust Co. of N.Y. v. Town of Ramapo, 168 Misc. 2d 931 (Sup. Ct, Rockland Co., 1996); First Nat'l Acceptance Co. v. City of Utica, 26 F. Supp. 3d 185 (N.D.N.Y. 2014).

[12] See Garden Homes Woodlands Co. v. Town of Dover, 95 N.Y.2d 516 (2000).

[13] Village Law § 5-518(5).

[14] Real Property Tax Law § 1442(3),(4).

[15] Real Property Tax Law §§ 1110-1122.

[16] Real Property Tax Law §§ 1123-1137.

[17] Real Property Tax Law § 1136(3); Anderson v. Pease, 284 A.D.2d 871 (3d Dep't 2001).

[18] Melahn v. Hearn, 60 N.Y.2d 944, 946 (1983); Mittelmark v. County of Saratoga, 85 A.D.3d 1359, 1360 (3d Dep't 2011); cf. In re Killmer, 513 B.R. 41 (Bankr. S.D.N.Y. 2014) (tax sale void when conducted while property subject to bankruptcy stay).

[19] New York State Environmental Conservation Law, Article 8; 6 NYCRR Part 617.

A court's authority to examine a SEQRA review conducted by an entity that was required to do so is limited to reviewing whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. The relevant question before the court is: whether the agency identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination. Judicial review must be genuine, but the agency's substantive obligations under SEQRA must be viewed in light of a "rule of reason," and "the degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration".

[20] 27 N.Y.3d 92 (March 31, 2016).

[21] 124 A.D.3d 73 (2d Dept., November 26, 2014).

[22] Matter of Gordon v. Rush, 100 N.Y.2d 236, 242 (2003).

[23] See e.g. Matter of Rochester Tel. Mobile Communications v. Ober, 251 A.D.2d 1053, 1054, 674 N.Y.S.2d 189 (4th Dept.1998).

[24] 26 N.Y.3d 301, 306, 43 N.E.3d 745, 746 (November 19, 2015).

[25] 77 N.Y.2d 761 (1991).

[26] 13 N.Y.3d 297 (2009).

[27] 23 NY3d 1 (2014).

[28] 131 A.D.3d 1237 (2nd Dept. September 30, 2015).

[29] 127 A.D.3d 1360, 7 N.Y.S.3d 626 (3d Dept. April 9, 2015)

[30] 137 A.D.3d 1123 (2d Dept. March 23, 2016).

[31] Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 287 A.D.2d 453, 456, 731 N.Y.S.2d 54, quoting Matter of Village Bd. of Vil. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 256, 440 N.Y.S.2d 908, 423 N.E.2d 385, and Matter of Bella Vista Apt. Co. v. Bennett, 89 N.Y.2d 465, 469, 655 N.Y.S.2d 742, 678 N.E.2d 198.

[32] See Matter of Village Bd. of Vil. of Fayetteville v. Jarrold, 53 N.Y.2d at 256, 440 N.Y.S.2d 908, 423 N.E.2d 385; Matter of Crossroads Recreation v. Broz, 4 N.Y.2d 39, 44, 172 N.Y.S.2d 129, 149 N.E.2d 65.

[33] See Matter of Crossroads Recreation v. Broz, 4 N.Y.2d at 46, 172 N.Y.S.2d 129, 149 N.E.2d 65.

[34] |See Matter of Hejna v. Board of Appeals of Vil. of Amityville, 105 A.D.3d 843, 845, 964 N.Y.S.2d 164; Edwards v. Davison, 94 A.D.3d 883, 884, 941 N.Y.S.2d 873; *1127 Matter of Park Hill Residents' Assn. v. Cianciulli, 234 A.D.2d 464, 651 N.Y.S.2d 159; Matter of Ferruggia v. Zoning Bd. of Appeals of Town of Warwick, 233 A.D.2d 505, 507, 649 N.Y.S.2d 946; see also Matter of Westbury Laundromat, Inc. v. Mammina, 62 A.D.3d at 891, 879 N.Y.S.2d 188.

[35] See Matter of Thorne v. Village of Millbrook Planning Bd., 83 A.D.3d 723, 725, 920 N.Y.S.2d 369; Matter of Brooklyn Bridge Park Legal Defense Fund, Inc. v. New York State Urban Dev. Corp., 50 A.D.3d 1029, 1031, 856 N.Y.S.2d 235; Matter of Ball v. New York State Dept. of Envtl. Conservation, 35 A.D.3d 732, 733, 826 N.Y.S.2d 698.

[36] 126 A.D.3d 1152 (3d Dept. March 12, 2015), leave to appeal denied, 25 N.Y.3d 1039 (May 14, 2015).

[37] See Matter of Sun–Brite Car Wash v. Board of Zoning & Appeals of Town of N. Hempstead, 69 N.Y.2d 406, 413, 515 N.Y.S.2d 418, 508 N.E.2d 130 [1987]; see Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation, 23 N.Y.3d 1, 6, 988 N.Y.S.2d 115, 11 N.E.3d 188 (2014).

[38] See Matter of Sun–Brite Car Wash v. Board of Zoning & Appeals of Town of N. Hempstead, 69 N.Y.2d at 413–414, 515 N.Y.S.2d 418, 508 N.E.2d 130; Matter of Center Sq. Assn., Inc. v. City of Albany Bd. of Zoning Appeals, 9 A.D.3d 651, 652, 780 N.Y.S.2d 203 (2004).

[39] 137 A.D.3d 1289 (2d Dept., March 30, 2016).

[40] 137 A.D.3d 1237 (2d Dept. May 30, 2016).

[41] Matter of Keller v. Haller, 226 A.D.2d 639, 640, 641 N.Y.S.2d 380; see Matter of Cinelli Family Ltd. Partnership v. Scheyer, 50 A.D.3d 1136, 1137, 857 N.Y.S.2d 634; Incorporated Vil. of Old Westbury v. Alljay Farms, 100 A.D.2d 574, 473 N.Y.S.2d 505, mod. 64 N.Y.2d 798, 486 N.Y.S.2d 916, 476 N.E.2d 315.

[42] See Town Law § 267–b[1]; see Matter of BBJ Assoc., LLC v. Zoning Bd. of Appeals of Town of Kent, 65 A.D.3d 154, 159, 881 N.Y.S.2d 496; Matter of Board of Architectural Review & Historic Preserv. of Vil. of Southampton v. Zoning Bd. of Appeals of Vil. of Southampton, 279 A.D.2d 523, 524, 719 N.Y.S.2d 663.

[43] See Matter of Keller v. Haller, 226 A.D.2d at 640, 641 N.Y.S.2d 380; cf. Matter of Letourneau v. Town of Berne, 89 A.D.3d 1202, 931 N.Y.S.2d 810; Matter of Haberman v. Zoning Bd. of Appeals of Town of E. Hampton, 85 A.D.3d 1170, 926 N.Y.S.2d 165.

[44] Little Joseph Realty v. Town of Babylon, 41 N.Y.2d 738, 741, 395 N.Y.S.2d 428, 363 N.E.2d 1163.

[45] Marlowe v. Elmwood, Inc., 12 A.D.3d 742, 744, 784 N.Y.S.2d 206, quoting Forget v. Raymer, 65 A.D.2d 953, 954, 410 N.Y.S.2d 483.

[46] See Little Joseph Realty v. Town of Babylon, 41 N.Y.2d at 741–742, 395 N.Y.S.2d 428, 363 N.E.2d 1163; Town of N. Elba v. Grimditch, 131 A.D.3d 150, 155, 13 N.Y.S.3d 601; Nemeth v. K–Tooling, 100 A.D.3d 1271, 1273, 955 N.Y.S.2d 419; Zupa v. Paradise Point Assn., Inc., 22 A.D.3d 843, 803 N.Y.S.2d 179; Williams v. Hertzwig, 251 A.D.2d 655, 656, 675 N.Y.S.2d 113; Futerfas v. Shultis, 209 A.D.2d 761, 762, 618 N.Y.S.2d 127; see also Allen Avionics v. Universal Broadcasting Corp., 118 A.D.2d 527, 528, 499 N.Y.S.2d 154, affd. sub nom. Matter of Sun–Brite Car Wash v. Board of Zoning Appeals of Town of N. Hempstead, 69 N.Y.2d 406, 515 N.Y.S.2d 418, 508 N.E.2d 130.

[47] *Matter of Pokoik v. Silsdorf*, 40 N.Y.2d 769, 772, 390 N.Y.S.2d 49, 358 N.E.2d 874 (1976).

[48] *Matter of Pokoik v. Silsdorf*, at 773, 390 N.Y.S.2d 49, 358 N.E.2d 874.

[49] *Pokoik*, at 772, 390 N.Y.S.2d 49, 358 N.E.2d 874, *citing Matter of Boardwalk & Seashore Corp. v. Murdock*, 286 N.Y. 494, 36 N.E.2d 678 (1941), and *Matter of Rosano v. Town Bd. of Town of Riverhead*, 43 A.D.2d 728, 350 N.Y.S.2d 697 (2d Dept.1973).

[50] *Pokoik*, 40 N.Y.2d at 773, 390 N.Y.S.2d 49, 358 N.E.2d 874, *citing Marsh v. Town of Huntington*, 39 A.D.2d 945, 333 N.Y.S.2d 990 (2d Dept.1972), and *Matter of Golisano v. Town Bd. of Town of Macedon*, 31 A.D.2d 85, 296 N.Y.S.2d 623 (4th Dept.1968).

[51] *Matter of Alscot Inv. Corp. v. Incorporated Vil. of Rockville Ctr.*, 64 N.Y.2d 921, 922, 488 N.Y.S.2d 629, 477 N.E.2d 1083 (1985).

[52] *Pokoik*, 40 N.Y.2d at 773, 390 N.Y.S.2d 49, 358 N.E.2d 874.

[53] *Pokoik*, 40 N.Y.2d at 773, 390 N.Y.S.2d 49, 358 N.E.2d 874 ("the village improperly delayed reviewing the application and the board presented unsatisfactory reasons for denial, resulting in the disregard of petitioner's rights").

[54] 140 A.D.3d 1670 (4th Dept. June 10, 2016), leave to appeal denied, 142 A.D.3d 1403 (September 20, 2016).

[55] See Matter of Gardiner v Lo Grande, 83 AD2d 614, 615 [1981], following remittal 92 AD2d 611 [1983], affd 60 NY2d 673 [1983] for the reasons stated in 83 AD2d 614 [1981]; Matter of c/o Hamptons, LLC v Rickenbach, 98 AD3d 736, 736-737 [2012]; see also Matter of Huntington Ready-Mix Concrete v Town of Southampton, 104 AD2d 499, 499-500 [1984].

Morgan v Town of W. Bloomfield (295 A.D.2d. 902, 904 [4th Dept. 2002]) was not contrary to its decision.

[56] See generally Matter of Pokoik v Silsdorf, 40 NY2d 769, 772-773 [1976], rearg denied 42 NY2d 824 [1977]; see also Matter of Lemir Realty Corp. v Larkin, 11 NY2d 20, 24 [1962].

[57] See General Municipal Law § 239-m [3] [b] [i].

[58] General Municipal Law § 239-m [1] [c].

[59] General Municipal Law § 239-m [4] [b].

[60] 139 A.D.3d 742 (2 Dept., May 4, 2016).

[61] Annabi v City Council of City of Yonkers, 47 AD3d 856, 858 [2008]; cf. 208 E. 30th St. Corp. v Town of N. Salem, 88 AD2d 281, 285-286 [1982]; Bloom v Town Bd. of Town of Yorktown, 80 AD2d 823, 824 [1981].

[62] 138 A.D.3d 1008 (2d Dept., April 20, 2016).

[63] See, Matter of East End Prop. Co. #1, LLC v Kessel, 46 A.D.3d 817, 820 (2007).

[64] (Matter of Falcon Group Ltd. Liab. Co. v Town/Village of Harrison Planning Bd., 131 AD3d 1237, 1239 [2015] [internal quotation marks omitted]; see Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986]).

[65] See Matter of East End Prop. Co. #1, LLC v Kessel, 46 AD3d at 822; Matter of Rusciano & Son Corp. v Kiernan, 300 AD2d 590, 591-592 (2002).

[66] Matter of Benson Point Realty Corp. v Town of E. Hampton, 62 A.D.3d 989, 992 (2d Dept. 2009).

[67] Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville, 51 NY2d 338, 343 (1980).

[68] 2016 WL 527034 (N.Y. Feb. 11, 2016), affirming, 114 A.D.3d 774, 980 N.Y.S.2d 154, 2014 N.Y. Slip Op. 00996 (2d Dept. 2014).

[69] Citing to *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 47-48 (N.Y. 1996) and 4 Rathkopf's The Law of Zoning and Planning § 70:20 (4th ed).

[70] See, *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (N.Y. 1996).

[71] 2016 WL 527034 (N.Y. Feb. 11, 2016), affirming, 114 A.D.3d 774, 980 N.Y.S.2d 154, 2014 N.Y. Slip Op. 00996

(2d Dept. 2014).

[72] Please note that the Appellate Court held that vested rights had been acquired by the landowners even though, from the 2002 initial submission of the landowners' application for Madison Green approval until the Resolution was approved, the plaintiffs had incurred $358,999.73 in engineering and review costs. In addition, from the Planning Board's approval of the Resolution in December 2007, to the expiration of the Town Law section 265-a three-year exemption period in January 2009, the plaintiffs incurred $46,581.73 in engineering and review costs, and $135,199.24 in construction costs, for a total cost during that period of $181,780.97.

[73] 135 A.D.3d 899 (2d Dept. January 27, 2016).

[74] N.Y. Town Law § 274-a (8) provides as follows:

> "Public hearing and decision on site plans. In the event a public hearing is required by ordinance or local law adopted by the town board, the authorized board shall conduct a public hearing within sixty-two days from the day an application is received on any matter referred to it under this section. The authorized board shall mail notice of said hearing to the applicant at least ten days before said hearing and shall give public notice of said hearing in a newspaper of general circulation in the town at least five days prior to the date thereof and shall make a decision on the application within sixty-two days after such hearing, or after the day the application is received if no hearing has been held. The time within which the authorized board must render its decision may be extended by mutual consent of the applicant and such board. The decision of the authorized board shall be filed in the office of the town clerk within five business days after such decision is rendered, and a copy thereof mailed to the applicant. Nothing herein shall preclude the holding of a public hearing on any matter on which a public hearing is not so required."

[75] 133 A.D.3d 1184 (3d Dept. November 25, 2015).

[76] 133 A.D.3d 1328 (4th Dept. November 20, 2015).

[77] Citing to Matter of Price v. Evers, 45 A.D.3d 1075, 1077, 845 N.Y.S.2d 553 (2007), quoting Matter of Miller v. Balland, 7 A.D.3d 916, 917, 776 N.Y.S.2d 630 (2004); see Matter of Salvador v. Ross, 61 A.D.3d at 1164, 876 N.Y.S.2d 754; Matter of McCarthy v. Sanford, 24 A.D.3d 1168, 1168–1169, 807 N.Y.S.2d 431 (2005).

[78] Citing to Matter of Hayes v. Ansel–McCabe, 83 A.D.3d 1180, 1181, 920 N.Y.S.2d 479 (2011), quoting Matter of Salvador v. Ross, 61 A.D.3d at 1164, 876 N.Y.S.2d 754; see Matter of Price v. Evers, 45 A.D.3d at 1076, 845 N.Y.S.2d 553; Matter of McCarthy v. Sanford, 24 A.D.3d at 1169, 807 N.Y.S.2d 431; compare Matter of Greco v. Jenkins, 118 A.D.3d 1248, 1250–1251, 989 N.Y.S.2d 153 (2014).

[79] Citing to, Reszka v. Collins, 109 A.D.3d 1134, 1135 (4th Dept. 2013) (stating that allegations do not demonstrate unscrupulous conduct, gross dereliction of duty, or a pattern of misconduct and abuse of authority); see, Salvador v. Ross, 61 A.D.3d 1163, 1165 (3d Dept. 2009)(stating that other than alleging "mismanagement" on public officer's part, the petition does not set forth a single act of unscrupulous conduct or intentional wrongdoing, let alone evidence of any gross dereliction of duties or a pattern of misconduct. Because the public officer's alleged conduct does not warrant removal, the petition fails to state a cause of action and must be dismissed).