KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 16. Zoning and Planning (Refs & Annos)

McKinney's Town Law § 263

§ 263. Purposes in view

Effective: March 1, 2004

Currentness

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor; to facilitate the practice of forestry; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Credits

(L.1932, c. 634. Amended L.1956, c. 295, § 1; L.1979, c. 742, § 3; L.2003, c. 602, § 5, eff. March 1, 2004.)

Notes of Decisions (101)

McKinney's Town Law § 263, NY TOWN § 263
Current through L.2017, chapters 1 to 334.

End of Document

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 16. Zoning and Planning (Refs & Annos)

McKinney's Town Law § 264

§ 264. Adoption of zoning regulations

Currentness

1. Method of procedure. The town board shall provide for the manner in which such regulations, restrictions and the boundaries of such districts including any amendments thereto shall be determined, established and enforced. However, no such regulations, restrictions or boundaries shall become effective until after a public hearing in relation thereto, at which the public shall have an opportunity to be heard. At least ten days' notice of the time and place of such hearing shall be published in a paper of general circulation in such town.

Every zoning ordinance and every amendment to a zoning ordinance (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the town board; such minutes shall describe and refer to any map adopted in connection with such zoning ordinance or amendment and a copy, summary or abstract thereof (exclusive of any map incorporated therein) shall be published once in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate, and affidavits of the publication thereof shall be filed with the town clerk. Such ordinance shall take effect ten days after such publication, but such ordinance or amendment shall take effect from the date of its service as against a person served personally with a copy thereof, certified by the town clerk under the corporate seal of the town; and showing the date of its passage and entry in the minutes. Every town clerk shall maintain a separate file or filing cabinet for each and every map adopted in connection with a zoning ordinance or amendment and shall file therein every such map hereafter adopted; said file or filing cabinet to be available at any time during regular business hours for public inspection.

2. Service of written notice. At least ten days prior to the date of the public hearing, written notice of any proposed regulations, restrictions or boundaries of such districts, including any amendments thereto, affecting property within five hundred feet of the following shall be served personally or by mail by the town upon each person or persons listed below:

(a) The property of the housing authority erecting or owning a housing project authorized under the public housing law; upon the executive director of such housing authority and the chief executive officer of the municipality providing financial assistance thereto.

(b) The boundary of a city, village or town; upon the clerk thereof.

(c) The boundary of a county; upon the clerk of the board of supervisors or other person performing like duties.

(d) The boundary of a state park or parkway; upon the regional state park commission having jurisdiction over such state park or parkway.

3. Additional requirements. The procedural requirements set forth herein shall be in addition to the requirements of the provisions of sections two hundred thirty-nine-l and two hundred thirty-nine-m of the general municipal law relating to review by a county planning board or agency or regional planning council; the provisions of the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations which are codified in title six part six hundred seventeen of the New York codes, rules and regulations and any other general laws relating to land use and any amendments thereto.

4. Public hearing. The public, including those served notice pursuant to subdivision two of this section, shall have an opportunity to be heard at the public hearing. Those parties set forth in paragraphs (a), (b), (c) and (d) of subdivision two of this section, however, shall not have the right of review by a court as hereinafter provided.

Credits

(L.1932, c. 634. Amended L.1941, c. 648, § 13; L.1947, c. 604, § 1; L.1950, c. 664; L.1951, c. 647, § 2; L.1954, c. 130, § 3; L.1956, c. 83, § 2; L.1972, c. 958, § 2; L.1973, c. 240, § 2; L.1991, c. 657, § 2; L.1997, c. 458, § 16, eff. July 1, 1998.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Terry Rice

2017

A. Preemption and Intergovernmental Immunity

Although the Town Law and Municipal Home Rule Law provide broad authority to towns to enact zoning regulations, such authority is absent if the State has preempted the field. The authority to adopt zoning regulations is revoked if the Legislature has expressly proscribed the enactment of laws dealing with particular matters. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 429-30, 548 N.Y.S.2d 144, 147, 547 N.E.2d 346, 349 (1989). In addition, intent to preempt a substantive area also may be found as a consequence of an explicit conflict between State and local laws or, alternatively, where the State has evidenced an intent to occupy the field. *See Albany Area Builders Association v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 629, 546 N.E.2d 920, 922 (1989). In particular, the intent to occupy the field "may be implied from the nature of the subject matter ... regulated and the purpose and scope of the State ... scheme, including the need for

State-wide uniformity." *Id*. Consistent therewith, a comprehensive and detailed statutory scheme evidences an intent to preempt a field. *See id*. If the State has preempted a field, local regulation is impermissible even if no actual conflict exists between the regulations. *See id*.

In addition, the Court of Appeals has addressed the applicability of local zoning laws where a conflict exists between a guest governmental entity's intended land use and a host community's zoning regulations in *City of Rochester v. County of Monroe*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988). The Court articulated "a balancing of public interests" test which requires the consideration of various factors in order to determine whether an entity should be granted immunity from local zoning requirements. These factors include the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests. In addition to a lack of guidance in the application of the enumerated considerations, the decisions have not clarified which governmental entity, that is, the host or encroaching entity, should make the initial determination as to the applicability or exemption from local zoning requirements.

In *Town of Ellery v. New York State Dept. of Environmental Conservation*, 54 Misc.3d 482, 483, 40 N.Y.S.3d 877, 881 (Sup. Ct. Chautauqua Co. 2016), the county sought to expand an existing waste management facility ("CCLF") which had been constructed in the town pursuant to County Law § 226-b in 1981. The CCLF replaced more than 40 existing dumps in the county and occupied 83 acres of an 800-acre parcel. It was situated in a sparsely inhabited, rural area and in an agricultural zoning district, which was the town's least restrictive zoning designation. The CCLF was on the verge of exhausting its capacity to bury and process solid waste and sought to laterally expand the facility by creating new landfill cells adjacent to those in use over roughly 53 additional acres of the site. The town challenged the approval of the bonding resolutions adopted by the county legislature and, additionally, enacted a local law that effectively prohibited the expansion. The county asserted a counterclaim against the town seeking a declaration that the local law was preempted by County Law § 226-b. The town asserted that the local law was not preempted and that the court must hold a hearing in order to employ the *County of Monroe* balancing test.

The court invalidated the local law and determined that it was in direct conflict with and preempted by County Law § 226-b. Although a municipality is authorized to adopt local laws that are not inconsistent with state law pursuant to Art. 9, § 2(c)of the State Constitution and Municipal Home Rule Law § 10(1), such local legislation is preempted when the state legislature has evinced its intent to occupy a specific field ("field preemption") or where a direct conflict with a state statute occurs ("conflict preemption"). "Conflict preemption occurs when the ordinance prohibits what would be permissible under State law or imposes prerequisite additional restrictions on rights under State law so as to inhibit the operation of the State's general laws." *Id*. (*citing Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 687, 16 N.Y.S.3d 25, 30, 37 N.E.3d 82, 86 (2015); *Consolidated Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 107, 468 N.Y.S.2d 596, 600, 456 N.E.2d 487, 491 (1983)).

In *Town of Ellery*, no state statute or regulation expressly prohibited municipalities from enacting laws affecting landfills. County Law § 226-b authorizes counties to establish solid waste landfills if they consider local land use character and zoning. The statute does not authorize a municipality to prohibit the construction or expansion of a landfill. To the contrary, County Law § 226-b unequivocally was intended to provide for the collection and disposal of solid wastes as a county function. The court opined that state law only required the county to consider local land use laws and regulations. However, the local law endeavored to require the county to "acquiesce" to the town's land use laws. The "veto power" over the county's lawful actions "clearly frustrates the County's ability to exercise its powers and carry out its responsibilities under State law." *Id*. at 493, 40 N.Y.S.3d at 887. Accordingly, the local law was preempted and invalid.

The court additionally conducted a hearing assessing the *County of Monroe* balancing of the public interests' considerations. With respect to the first issue, that is, the nature and scope of the instrumentality in question, the use was as a landfill that is regulated by federal and state agencies. The land use involved was the extension of a county facility that had existed for 35 years. The public interest to be advanced was the continuation of an environmentally sound and cost-effective means of managing waste.

The impact of the local zoning regulation on the operation would be "oversight by a hostile Town Board under a duplicative (at best) local licensing system, which encroaches upon the regulatory authority of the DEC and subjugates an already rigorous and often complex environmental review process (as well as judicial review of the same) to the vote of the same Town Board." *Id*. at 494, 40 N.Y.S.3d at 888. The probable consequence of application of the zoning amendment would be the termination of the CCLF's operations.

The legislative grant of authority, County Law § 226-b, expressly provides for the collection and disposition of solid waste as a county function. With respect to the existence of alternative locations in a less restrictive zoning area, the facility was already situated in the town's least restrictive zoning district. Alternative methods would be exceptionally expensive and would not be more protective of the environment. Further, DEC's five-year-long environmental review provided many opportunities for the town and public to comment. Consequently, most, if not all, of the *County of Monroe* considerations weighed in the county's favor. Because "[t]he scales weigh heavily in the County's favor when all the factors are considered collectively," the county was immune from the application of the zoning regulation.

The Appellate Division found in *Village of Munsey Park v. Manhasset-Lakeville Water Dist.*, 150 A.D.3d 969, 57 N.Y.S.3d 154 (2d Dept. 2017), that it was permissible for the guest entity to make the initial determination of exemption from local zoning requirements. A water district, which was a special district of the town, had been established to provide and sell potable water to customers within its boundaries. The water district required water storage tanks to provide water and to maintain adequate pressure. An elevated water storage was located with Village of Munsey Park. The tank was not permitted by the zoning law, which banned "buildings" in excess of 30 feet in height. The water district determined that the tank, which had been constructed in 1929, had to be replaced. It conducted two public hearings with municipal officials and modifications were made to accommodate concerns of the village and its residents. Alternatives, including rehabilitation of the current tank and alternative sites, were considered and rejected. The water district then concluded that the plan was immune from the village's regulations and review pursuant to the balancing test of *County of Monroe*.

The village commenced an action seeking a judgment that the water district must comply with its zoning law. The decision noted that Court of Appeals did not identify the entity initially responsible for evaluating the *County of Monroe* factors and the village had failed to set forth any rationale for its contention that the application of the *Monroe* balancing test is within the exclusive jurisdiction of the host entity. Regardless, the Appellate Division determined that Supreme Court properly employed the "balancing of public interests" test and appropriately determined that the proposed plan was immune from the village's zoning laws.

The decision in *Town of Ellery* provides much needed guidance in the application of the *County of Monroe* considerations and confirms that local zoning regulations generally will not be permitted to thwart the performance of vital municipal functions by a complaining host community. Although prior decisions, including *County of Monroe*, have not provided instruction as to the municipal entity that should undertake the balancing of the public interests' analysis, *Village of Munsey Park* sanctions such analysis by the guest municipality.

B. Final, Reviewable Determination

Purported procedural irregularities in the adoption of a zoning law or amendment, including non-compliance with SEQRA, must be challenged in an Article 78 proceeding. *See Amodeo v. Town Bd. of Town of Marlborough*, 249 A.D.2d 882, 672 N.Y.S.2d 439 (3d Dept. 1998). However, an article 78 proceeding may not be used to challenge a nonfinal determination. *See Cor Route 5 Co., LLC v. Village of Fayetteville*, 147 A.D.3d 1432, 46 N.Y.S.3d 765 (4th Dept. 2017) (*citing Young v. Board of Trustees of Village of Blasdell*, 221 A.D.2d 975, 977, 634 N.Y.S.2d 605, 607 (4th Dept. 1995), *aff'd*. 89 N.Y.2d 846, 652 N.Y.S.2d 729, 675 N.E.2d 464 (1996)). In order to determine whether an action is final and binding on a litigant, a two-step approach is required. The agency must have reached a definitive position on the issue that inflicts actual, concrete injury and the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. *See id*. at 1433, 46 N.Y.3d at 766 (*citing Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of New York*, 5 N.Y.3d 30, 34, 799 N.Y.S.2d 182, 184, 832 N.E.2d 38, 40 (2005). In *Cor Route* 5, the issuance of a negative declaration and adoption of a zoning amendment were ripe for review despite the fact that the amendment was conditioned upon successful reviews and approvals by other agencies. Consequently, Supreme Court should not have granted the village's motion to dismiss the petition.

2016

Intergovernmental Immunity

More than twenty-five years ago, in *City of Rochester v. County of Monroe*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988), the Court of Appeals abandoned the governmental-proprietary analysis for evaluating the applicability of local zoning regulations to the activities of other governmental entities. The governmental-proprietary analysis was replaced by the "balancing of the public interests" test. The balancing of public interests methodology requires a balancing of: "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests, ... the applicant's grant of legislative authority, alternative locations in less restrictive zoning areas, alternative methods of providing the needed improvement and," lastly, the extent of "intergovernmental participation in the project development process and an opportunity to be heard." *Id*. at 343, 530 N.E.2d at 204, 533 N.Y.S.2d at 704. Relatively few decisions have been rendered since *County of Monroe* was decided to facilitate the understanding and application of the germane considerations or to identify the appropriate process for implementing the "balancing of the public interests" test.

The decision in *County of Herkimer v. Village of Herkimer*, 51 Misc.3d 516, 25 N.Y.S.3d 839 (Sup. Ct. Herkimer Co. 2016), is one of the very few decisions in which a court has analyzed the application of the various *County of Monroe* considerations.

Pursuant to County Law § 217, every county in the State is obligated to maintain a county jail. All new sites for correctional facilities must be approved by the New York State Commission of Correction. *See* County Law § 216. The Herkimer County Jail has been located within the Village of Herkimer since 1834.

The existing county jail suffered from severe overcrowding, requiring the County to house inmates at other facilities outside the County at considerable expense. The Commission had permitted the County to continue to operate the jail pursuant to multiple variances issued by it but had indicated that it would direct that the jail be closed if the County failed to make progress in the siting and construction of a new facility. The County began considering sites for a new facility in the early 2000s. A potential viable location required 10-15 useable acres of flat land, availability of municipal water and sewer services and close proximity to the busiest courts. The County reviewed approximately 40-50 locations before it narrowed its review to 14 sites and selected the

challenged site in the Village.

The chosen site in the Village was a demolished shopping center which was located less than one mile from the County Courthouse and near the Village and Town courts. The site is flat and partially sheltered from view, is accessible from a main road and would allow for reuse of a site that had remained vacant for many years. It also is in an area characterized by mixed commercial and industrial use with screening from residential uses and has access to existing infrastructure for municipal water and sewer.

Supreme Court had previously determined that the Village's zoning amendment prohibiting correctional facilities in the Village was preempted and, therefore, invalid. The Appellate Division reversed and determined that the provision was not preempted. However, it remanded the case to Supreme Court for a determination as to whether the County was immune from the zoning prohibition pursuant to the *County of Monroe* considerations. *See County of Herkimer v. Village of Herkimer*, 109 A.D.3d 1166, 971 N.Y.S.2d 764 (4th Dept. 2013).

In considering the *County of Monroe* factors, the Court first observed that "the general trend is that public interest and public safety concerns in particular are of paramount concern." *County of Herkimer*, 51 Misc.3d at 531, 25 N.Y.S.3d at 851. In evaluating the first consideration, that is, "the nature and scope of the municipality seeking immunity," the Court noted that it is the County seeking immunity from the Village's recent zoning amendment in order to comply with the State Department of Corrections' directive to construct a new jail. Although the Court declined "to go so far as to say the County is a superior instrumentality, under similar circumstances, other courts have held that 'it would be anomalous to allow a small village to impede the County in the performance of an essential governmental duty for the benefit of the health and welfare of residents of the entire County.' " *Id*. at 532, 25 N.Y.S.3d at 851 (*quoting County of Westchester v. Village of Mamaroneck*, 22 A.D.2d 143, 147-48, 255 N.Y.S.2d 290, 294 (2d Dept. 1964), *aff'd*, 16 N.Y.2d 940, 264 N.Y.S.2d 925, 212 N.E.2d 442 (1965)).

With respect to the second consideration, "the kind and function and land use," the use is a county jail. "The care and custody of criminals is a function of government and the Legislature has delegated this obligation to the counties, as each county is required to maintain a county jail." *Id*. (citing *County of Cayuga v. McHugh*, 4 N.Y.2d 609, 176 N.Y.S.2d 643, 152 N.E.2d 73 (1958); County Law § 217).

The Court characterized the third factor, "the extent of the public interest served thereby," as perhaps the most important in the instant matter. "Where a project serves an overriding public purpose, courts have not hesitated to find the project exempt from the host municipality's land use regulation." *Id*. at 532, 25 N.Y.S.3d at 851 (*citing Crown Communication New York, Inc. v. Department of Transp. of State*, 4 N.Y.3d 159, 168, 791 N.Y.S.2d 494, 499, 824 N.E.2d 934, 939 (2005); *County of Monroe*, 72 N.Y.2d at 344-345, 533 N.Y.S.2d at 705, 530 N.E.2d at 205; *Town of Hempstead v. State of New York*, 42 A.D.3d 527, 529-30, 840 N.Y.S.2d 123, 126 (2d Dept. 2007), *lv. denied*, 10 N.Y.3d 703, 854 N.Y.S.2d 103, 883 N.E.2d 1010 (2008); *King v. County of Saratoga Indus. Dev. Agency*, 208 A.D.2d 194, 200, 622 N.Y.S.2d 339, 343 (3d Dept.), *lv. denied*, 85 N.Y.2d 809, 628 N.Y.S.2d 52, 651 N.E.2d 920 (1995); *Town of Queensbury v. Glens Falls*, 217 A.D.2d 789, 791, 629 N.Y.S.2d 120, 122 (3d Dept. 1995)). In *County of Herkimer*, the facility would serve a "quintessential governmental function" that is required by state law, would bring the County into compliance with State mandates and would enhance the public safety of all County residents, including Village residents.

The fourth *County of Monroe* concern is "the effect land use would have on the enterprise concerned." The Village's land use regulations prevent the development of any correctional facility in the entire Village. The Court of Appeals has discouraged parochial regulations which "could otherwise foil the fulfillment of the greater public purpose of promoting" a municipality's public safety goals and responsibility to comply with state laws.

Id. at 534, 25 N.Y.S.3d at 852 (*quoting County of Monroe*, 72 N.Y.2d at 344, 533 N.Y.S.2d at 205, 530 N.E.2d at 705). It has rejected claims of governmental immunity where the host municipality has "effectively tailored its zoning laws to block placement" of a project or taken action which could "result in a court proceeding and even an appeal" delaying the project by "many months, or even years, during which time the [...] problems remain." *Village of Nyack v. Daytop Village*, 78 N.Y.2d 500, 508, 577 N.Y.S.2d 215, 219, 583 N.E.2d 928, 931-32 (1991); *see also Port Washington Police District v. Town of North Hempstead*, 24 Misc.3d 1235(A), 899 N.Y.S.2d 62 (Table), 2009 WL 2477633 (Sup.Ct. Nassau Co. 2009); *Bruenn v. Town Board of Town of Kent*, 44 Misc.3d 1214(A), 997 N.Y.S.2d 668 (Table), 2014 WL 3671324 (Sup.Ct. Putnam Co. 2014).

Significantly, the process of siting the jail, including resulting litigation, exceeded 15 years. Subjecting the County to the Village's prohibitory zoning amendment would require the County to start the process anew, which would delay the project for a substantial period of time while the County would continue to be out of compliance with the Commission's mandates. Moreover, the continuation of boarding inmates elsewhere while the approval process and construction transpired would be costly. In addition, because the availability of water and sewer services was the most challenging of the siting criteria, the jail could only be built within the Village limits. Consequently, the zoning regulation had a "prohibitive effect" on the County's ability to construct the imperative facility.

The fifth element, "the impact of legitimate local interests," also weighed against the Village's position. Although the Village expressed legitimate concerns with the location of the facility in the Village, "they must be viewed in light of all the circumstances." The existing jail had been located in the Village for more than 100 years. The site, which had been vacant for more than 10 years, did not enhance the character of the Village or its economic viability. The exhaustive 15-year siting process concluded that there were few available viable sites and that siting in rural locations was problematic because of the lack of access to water and sewer services. Although the Village's concern about losing taxable property was genuine because 50% of its property was tax exempt, the site produced only $5,000 per year in property taxes. Although the Village would have collect more revenue in property taxes if the land were developed, the site had remained undeveloped. Further, if the Commission were to close the existing jail, the taxpayers would be required to pay the cost of boarding out inmates, $64,000 of which would be allocated to the Village taxpayers. Lastly, generalized opposition to building the jail cannot constitute justification for sustaining the land use regulation because every alternative proposal also was the subject of opposition and such a rationale could result in the jail being excluded from the entire County. "A court will not uphold a zoning restriction when 'the intruder cannot perform many of its statutory duties without use of lands within the territory of the host and other municipalities within the county.' " *County of Herkimer*, 51 Misc.3d at 535, 25 N.Y.S.3d at 853 (*quoting Town of Caroline v. County of Tompkins*, 2001 WL 1422152 at 4 (Sup.Ct. Tompkins Co. 2001)). As a result, the Court found that Village's expressed concerns did not to rise to the level of a "countervailing local interest of substance and significance." *Id.* (*citing Town of Caroline*, 2001 WL 1422152 at 6). Instead, the benefits inherent in the development of the project necessary for the public welfare and safety of an area outweighed the interests of the Village in excluding the jail from the Village.

The sixth *County of Monroe* consideration is "the applicant's legislative grant of authority." The County acted pursuant to County Law § 217 which requires every county in the State to maintain a county jail.

The seventh element is "alternative locations for the facility in less restrictive zoning areas." The site was in a zoning district which permitted jails prior to the recent amendment. No less restrictive zoning designation existed in the Village which would permit the jail. All of the other sites extensively analyzed by the County were found to be unsuitable for valid reasons.

Related to the eighth consideration, the parties agreed that there was no "alternative methods of providing the

needed improvement."

The final consideration is "intergovernmental participation in the project development process and an opportunity to be heard." The County provided numerous opportunities for intergovernmental participation and an opportunity to be heard, both with respect to public comment opportunities and other opportunities to be heard before the County Legislature and meetings, including outreach with the Village.

As a result, the Court concluded that the County was immune from the Village's zoning restrictions. In reaching that conclusion, it found that "the public safety concerns inherent in operating a safe and functional county jail are analogous to wider public interests, and the extent of the public interest to be served must be weighed in favor of the County." *Id.* at 537-38, 25 N.Y.S.3d at 855. Although the Village's concern regarding losing a tax ratable was legitimate, the financial impact on the Village in locating the jail at the abandoned shopping center lot did not outweigh the County's need to satisfy its statutory obligation to maintain a safe and functional county jail. In addition, the financial impact in continuing to board out inmates would be more detrimental to the Village than losing the parcel as taxable property. Further, although there were alternative sites, the difficulty in obtaining water and sewer services made other alternative locations infeasible.

The decision, more than any prior decision, provides an excellent illustration of application of the *County of Monroe* considerations.

Spot Zoning

Town Law § 263, which authorizes towns to adopt zoning regulations, specifically requires that "[s]uch regulations shall be made in accordance with a comprehensive plan ...." This mandate is consistent with the principle that "the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use." *Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893-94, 235 N.E.2d 897, 900-01 (1968). In implementing a community's planning goals, "[a] comprehensive plan has as its underlying purpose the control of land uses for the benefit of the whole community based upon consideration of its problems and applying the enactment or a general policy to obtain a uniform result not enacted in a haphazard or piecemeal fashion." *Kravetz v. Plenge*, 84 A.D.2d 422, 429, 446 N.Y.S.2d 807, 811 (4th Dept. 1982).

To be contrasted with rational planning for the benefit of a community, "spot zoning" is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. *See Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951). "[T]he real test for spot zoning is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." *Collard v. Village of Flower Hill*, 52 N.Y.2d 594, 600, 439 N.Y.S.2d 326, 329, 421 N.E.2d 818, 821 (1981).

The petitioners in *Itzler v. Town Bd. of the Town of Huntington*, 2015 WL 7871369 (Sup. Ct. Suffolk Co. 2015), sought to annul the rezoning of a 37-acre parcel from a R-40 zoning district (one acre residential) to R-RM (retirement community), contending that it constituted spot zoning. Although the R-RM zoning designation would have permitted a maximum of 538 units, the proposal was reduced to 256 units following the public hearing and the preparation of a Supplemental Environmental Assessment Form ("EAF") to reflect the changes generated by the reduction. The amendment was adopted subject to a number of conditions, including that the property be limited to 256 senior units; that affordable units be provided in accordance with the town code; that the improvements listed in the expanded EAF/Traffic study be provided by the applicant at its own expense; that

it install other traffic improvements, if required, by the County of Suffolk; that a soil management plan be provided; and that the open space area located on the northeast portion of the property be enhanced during site plan review.

The Court rejected the contention that the amendment constituted spot zoning. A party challenging a decision of a local legislative board bears the heavy burden of establishing that the enactment is not justified by any reasonable interpretation of the facts. *See Town of Bedford v Village of Mount Kisco*, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 134-35, 306 N.E.2d 155, 158-59 (1973) (*quoting Shepard v Village of Skaneateles*, 300 NY 115, 118, 89 N.E.2d 619, 620 (1949)). If the validity of a legislative zoning classification is considered to be "fairly debatable," it must be sustained upon judicial review. *See id*. As a result, if a litigant fails to demonstrate a "clear conflict" with a community's comprehensive plan, the zoning classification must be confirmed. *See Hart v. Town Board of Town of Huntington*, 114 A.D.3d 680, 980 N.Y.S.2d 128 (2d Dept. 2014); *Nicholson v. Village of Garden City*, 112 A.D.3d 893, 978 N.Y.S.2d 288 (2d Dept. 2013); *Infinity Consulting Group, Inc. v. Town of Huntington*, 49 A.D.3d 813, 814, 854 N.Y.S.2d 524, 526 (2d Dept.), *appeal dismissed*, 11 N.Y.3d 781, 866 N.Y.S.2d 604, 896 N.E.2d 89 (2008); *Taylor v. Village of Mead of Harbor*, 104 A.D.2d 642, 645, 480 N.Y.S.2d 21, 23-24 (2d Dept. 1984), *lv. denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 478 N.E.2d 210 (1985). If a land use regulation conforms with a community's comprehensive plan, it does not constitute *ad hoc* or "spot" zoning. *See Bergami v. Town Board of the Town of Rotterdam*, 97 A.D.3d 1018, 1019, 949 N.Y.S.2d 245, 247 (3d Dept. 2012); *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 685, 642 N.Y.S.2d 164, 174, 664 N.E.2d 1226, 1236 (1996); *Udell v. Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 893, 469, 235 N.E.2d 897, 900 (1968).

The amendment did not constitute illegal spot zoning simply because it involved a single parcel nor was it *ad hoc* zoning legislation affecting the land of a few without appropriate regard for the needs of the community as a whole. Although the development which the amendment facilitated would increase the density of the neighborhood, it also would preserve a significant portion of the property as open land, provide senior housing and provide a number of affordable units. Consequently, the rezoning of the property was consistent with the overall policies contained in the comprehensive plan. The record demonstrated that the amendment was part of "a well-considered and comprehensive plan to serve the general welfare or the community." Because the rezoning was consistent with the comprehensive plan, it did not constitute impermissible spot zoning. The Court sustained the zoning amendment because the petitioner had failed to demonstrate a clear conflict with the comprehensive plan.

Preemption

The State Constitution confers on all local governments the authority "to adopt and amend local laws not inconsistent with the provisions of [the] constitution or any general law relating to its property, affairs or government." Const., art. IX, § 2(c). To implement this express grant of authority, the Legislature enacted a series of statutes establishing a wide range of local powers including the authority to regulate land use through the enactment of zoning laws. *See* Municipal Home Rule Law § 10(1)(ii)(a)(11); Statute of Local Government § 10(6), (7). However, the doctrine of preemption "represents a fundamental limitation on home rule powers." *Albany Area Builders. Assn. v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 629, 546 N.E.2d 920, 922 (1989).

It was contended in *Smoke v. Planning Board of Town of Greig*, 138 A.D.3d 143, 731 N.Y.S.3d 707 (4th Dept. 2016), that the Water Resources Law, Environmental Conservation Law article 15, preempted a planning board's imposition of conditions. The planning board granted a special permit to install 7,600 feet of underground pipeline for the purpose of transporting water from an aquifer under the petitioners' property to a facility for bulk sale in another town. Among the conditions of the approval was that no construction on the pipeline could commence until the use of wells on the applicants' other property was approved for commercial uses by the

town. The petitioners challenged the condition, asserting that the planning board lacked the authority to regulate the use of water resources or to require petitioners to secure any additional approval related to water extraction from their property.

The Court determined that the Water Resources Law does not preempt local zoning laws regarding land use. Instead, it preempts only those local laws that attempt "to regulate withdrawals of groundwater," which "includes all surface and underground water within the state's territorial limits." *Id*. at 1438, 31 N.Y.S.3d at 709 (*quoting Woodbury Heights Estates Water Co., Inc. v. Village of Woodbury*, 111 A.D.3d 699, 702, 975 N.Y.S.2d 101, 105 (2d Dept. 2013)); *see also* ECL 15-0103(1). The Water Resources Law does not preempt the authority of local governments to "regulate the use of land through the enactment of zoning laws." *Id*. at 1438-39, 31 N.Y.S.3d at 710 (*quoting Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 30, 964 N.Y.S.2d 714, 718 (3d Dept. 2013), *aff'd*, 23 N.Y.3d 728, 992 N.Y.S.2d 710, 16 N.E.3d 1188 (2014)). Based on the language of the statute, the statutory scheme as a whole and the legislative history of the Water Resources Law, the intent of the legislation was to regulate water extraction "for commercial and industrial purposes" in order to "preserv[e] and protect[ ]" the natural resource (Assembly Introducer Mem in Support, Bill Jacket, L 2011, ch. 401 at 5), "to conserve and control the State's water resources" (Division of the Budget Bill Mem, L 2011, ch. 401 at 12), "to manage the State's water resources to promote economic growth and address droughts" (New York State Dept. of Envtl. Conservation Mem, Bill Jacket, L 2011, ch. 401 at 14), and to "assure compliance with the Great Lakes Compact which requires that New York regulate all water withdrawals occurring in the New York portion of the Great Lakes Basin" (Adirondack Council Mem in Support, Bill Jacket, L 2011, ch. 401 at 20; see Williams, 115 A.D.2d at 205, 495 N.Y.S.2d 288). There is nothing in the legislation or legislative history that suggests any intent to preempt a local government's power to regulate "land use within its borders." Instead, "the statute regulates how a natural resource may be extracted but does not regulate where in the Town such extraction may occur." *Smoke*, 138 A.D.3d at 1439, 31 N.Y.S.3d at 710.

Restrictive Covenants

In *Blue Island Development, LLC v. Town of Hempstead*, 131 A.D.3d 497, 15 N.Y.S.3d 807 (2d Dept. 2015), the plaintiffs had purchased land which had formerly been used as an oil storage facility with the objective of remediating the environmental contamination and developing the property into 172 waterfront condominium units. The town board rezoned the property for such use, subject to a restrictive covenant, including a provision mandating that all units be sold as condominium units, but which permitted subsequent owners of the units to lease them to the extent otherwise permissible under town law. At the developer's subsequent request, the town board modified the covenant to allow the developer to lease up to 17 of the 172 units for a period of five years after the issuance of the certificate of occupancy or until the delivery of title to the 155th unit, whichever occurred first. The town board denied a subsequent request for a further modification that would have permitted the developer to sell 32 units and maintain the remaining 140 units as rentals. The developer's proceeding/action sought relief pursuant to article 78, invalidation of the restrictive covenant pursuant to RPAPL § 1951 and damages pursuant to the takings clauses of the state and federal constitutions.

"It is a 'fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it.' " *Id*. at 500, 15 N.Y.S.3d at 810 (*quoting BLF Assoc., LLC v. Town of Hempstead*, 59 A.D.3d 51, 55, 870 N.Y.S.2d 422, 426 (2d Dept. 2008), *lv. denied*, 12 N.Y.3d 714, 883 N.Y.S.2d 797, 911 N.E.2d 860 (2009)) (*quoting Dexter v. Town Board of Town of Gates*, 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870, 871 (1975)). "[A] zoning ordinance will be struck down if it bears no substantial relation to the police power objective of promoting the public health, safety, morals or general welfare." *Id*. (*quoting Nicholson v. Village of Garden City*, 112 A.D.3d 893, 894, 978 N.Y.S.2d 288, 290 (2d Dept. 2013)) (*quoting Trustees of Union College v. Members of Schenectady City Council*, 91 N.Y.2d 161, 165-66, 667 N.Y.S.2d 978, 981, 690 N.E.2d 862, 865 (1997)). "[R]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy." *Id*. at 500, 15 N.Y.S.3d at 811 (*quoting Chambers v. Old Stone*

Hill Road Assoc., 303 A.D.2d 536, 537, 757 N.Y.S.2d 70, 71 (2d Dept. 2003), *aff'd*, 1 N.Y.3d 424, 774 N.Y.S.2d 866, 806 N.E.2d 979 (2004)). In addition, the "[p]urchase of property with knowledge of [a] restriction does not bar the purchaser from testing the validity of the zoning ordinance [because] the zoning ordinance in the very nature of things has reference to land rather than to owner." *Id*. (*quoting BLF Assoc.*, 59 A.D.3d at 56, 870 N.Y.S.2d at 426) (*quoting Vernon Park Realty, Inc. v. City of Mount Vernon*, 307 N.Y. 493, 500, 121 N.E.2d 517, 520 (1954)).

The developer sufficiently alleged that the restrictive covenant was improper because it regulated its capability as the owner of the property to rent the units, rather than the use of the land itself. In light of the provision allowing future owners to lease units in the development, the restrictive covenant "bears no substantial relation to ... the public health, safety, morals or general welfare." *Id*. Supreme Court properly declined to dismiss the cause of action seeking to declare the restrictive covenant invalid.

With respect to the challenge to the enforceability of the covenant, RPAPL § 1951(1), provides that "a restrictive covenant shall not be enforced if, at the time enforceability of the restriction is brought into question, it appears that 'the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.' " *Id*. (*quoting New York City Economic Development Corp. v. T.C. Foods Import & Export Co., Inc.*, 19 A.D.3d 568, 569, 797 N.Y.S.2d 549, 551 (2d Dept. 2005)) (*quoting* RPAPL 1951(1)). The complaint stated a cause of action pursuant to RPAPL § 1951 because it asserted that, assuming that a benefit existed by requiring that the units to be sold rather than rented, because the rental restriction imposed by the restrictive covenant applied only to the plaintiff and not to any subsequent owner of any of the units, it would be no substantial benefit to the town.

The Court also declined to dismiss the taking claim which was premised on "denial of development, as opposed to excessive exactions," *see Smith v. Town of Mendon*, 4 N.Y.3d 1, 11, 789 N.Y.S.2d 696, 700, 822 N.E.2d 1214, 1218 (2004), finding the analysis of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to be applicable. Pursuant to *Agins*, "a zoning law effects a regulatory taking if either: (1) 'the ordinance does not substantially advance legitimate state interests' or (2) the ordinance 'denies an owner economically viable use of his land.' " *Id*. (*quoting Bonnie Briar Syndicate v. Town of Mamaroneck*, 94 N.Y.2d 96, 105, 699 N.Y.S.2d 721, 724), 721 N.E.2d 971, 974 (1999) (*quoting Agins*, 447 U.S. at 260). However, "[a] reasonable land use restriction imposed by the government in the exercise of its police power characteristically diminishes the value of private property, but is not rendered unconstitutional merely because it causes the property's value to be substantially reduced, or because it deprives the property of its most beneficial use." *Id*. (*quoting Putnam County National Bank v. City of New York*, 37 A.D.3d 575, 577, 829 N.Y.S.2d 661, 663 (2d Dept.), *lv. denied*, 8 N.Y.3d 815, 839 N.Y.S.2d 454, 870 N.E.2d 695 (2007)). As a result, a court evaluating a taking claim must consider "(1) '[t]he economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Id*. (*quoting New Creek Bluebelt, Phase 4*, 122 A.D.3d 859, 861, 997 N.Y.S.2d 447, 450 (2d Dep't 2014)) (*quoting Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). The complaint stated a cognizable cause of action because it contended that the restrictive covenant did not promote any legitimate governmental interest and that it denied any economically viable use of the land. It should be noted that the Supreme Court determined in *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 548 (2005), that "the 'substantially advances' formula is not a valid takings test, and ... has no proper place in our takings jurisprudence."

Amortization of Nonconforming Uses

Although it was initially assumed that nonconforming uses would disappear over time, the opposite often is true,

with nonconforming uses persisting. *See Harbison v. City of Buffalo*, 4 N.Y.2d 553, 560, 176 N.Y.S.2d 598, 603, 152 N.E.2d 42, 45 (1958). Because nonconforming uses are antagonistic to a community zoning scheme, the Court of Appeals has characterized the law's allowance of such uses as a "grudging tolerance" and has sanctioned the right of municipalities to adopt reasonable measures to eliminate them, *see Pelham Esplanade v. Board of Trustees*, 77 N.Y.2d 66, 71, 563 N.Y.S.2d 759, 761, 565 N.E.2d 508, 511 (1990), including amortization periods, at the conclusion of which the nonconforming use must cease. An "amortization period" is a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements. *See Village of Valatie v. Smith*, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994). It is, in effect, a grace period, putting owners on fair notice of the law and giving them a fair opportunity to recoup their investment. *See Modjeska Sign Studios v. Berle*, 43 N.Y.2d 468, 479, 402 N.Y.S.2d 359, 366, 373 N.E.2d 255, 261 (1977). "The validity of an amortization period depends on its reasonableness. We have avoided any fixed formula for determining what constitutes a reasonable period. Instead, we have held that an amortization period is presumed valid, and the owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power." *Village of Valatie*, 83 N.Y.2d at 400-401, 610 N.Y.S.2d at 944, 632 N.E.2d at 1267 (1994); *see also Harbison*, 4 N.Y.2d at 562-563, 176 N.Y.S.2d at 605, 152 N.E.2d at 47; *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 561, 542 N.Y.S.2d 139, 148, 540 N.E.2d 215, 244, (1989).

The property owner in *Suffolk Asphalt Supply, Inc. v. Board of Trustees of Village of Westhampton Beach*, 51 Misc.3d 303, 25 N.Y.S.3d 809 (Sup. Ct. Suffolk Co. 2016), sought a declaration that an amendment to the zoning law which rendered the use of its property as an asphalt plant nonconforming was invalid and unconstitutional. The property had been used as an asphalt plant since 1945. In 1985, the board of trustees amended the zoning law such that the use of the property as an asphalt plant became nonconforming. The board of trustees subsequently adopted a local law in 2000 which provided that the plaintiff's right to operate and maintain the nonconforming asphalt plant would terminate within one year unless the plaintiff applied to the zoning board of appeals for an extension of the termination date, which was not to exceed five years from the date the law was adopted. The zoning board of appeals granted the maximum extension permitted and directed that the asphalt operation cease by July 2, 2005. The plaintiff commenced an action for a judgment declaring the local law to be invalid and unconstitutional. The Court was faced with various significant issues regarding the application of the amortization provisions in deciding a motion *in limine*.

First, the plaintiff contended that in determining the reasonableness of the amortization period, the Court's inquiry should be limited to the five-year period from July 2000 to July 2005, which is the maximum period of amortization for which the law provides. The defendants argued that because the action was an as-applied challenge, the Court should also consider the period of time after 2005 during which litigation had been pending. In calculating whether a property owner has recouped its investment, the Court of Appeals has taken into account the continued operation of a nonconforming use after the maximum period of amortization. In *Caviglia*, 73 N.Y.2d at 561, 542 N.Y.S.2d at 148, 540 N.E.2d at 224, for example, the Court of Appeals considered that the property owner had continued to operate well past the maximum five-year amortization period provided in the challenged law. Relatedly, in *Philanz Oldsmobile v. Keating*, 51 A.D.2d 437, 381 N.Y.S.2d 916 (4th Dept. 1976), in reviewing the reasonableness of a three-year abatement period, the Court considered that the Town had not taken any enforcement for several years after the abatement period had expired, in effect, providing a 10-year abatement period.

The Court concluded that it is permissible to take into account the fact that a property owner has had more than the maximum amount of time for which the law provides to amortize its investment in a nonconforming use. In addition, because the action was an as-applied challenge to the local law which is dependent on the specific circumstances of each particular case, the fact that the plaintiff had had many more years than the drafters of the legislation intended to recoup its investment in the nonconforming asphalt plant is a relevant consideration in considering whether the plaintiff has recouped its investment.

Second, the defendants contended that the Court should be limited to whether the plaintiff has been able to recoup its investment in the nonconforming asphalt plant and should not consider the value of the continued operation of the business. On the other hand, the plaintiff asserted that the Court should consider a myriad of factors including the value of the buildings and equipment and the ability to relocate the plant. The Court noted that it had previously determined that:

In determining what constitutes a substantial loss, a court will consider the nature of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which the owner may relocate the business, the cost of such relocation, as well as any other reasonable costs that bear on the kind and amount of damages the owner may sustain.

The Appellate Division affirmed that determination, finding that it has avoided any fixed formula for determining what constitutes a reasonable period and that reasonableness is a question which must be answered in light of the facts of each particular case. The Appellate Division further related that relevant considerations include: the length of the amortization period in relation to the investment and the nature of the use; the nature of the business; the improvements erected on the land; the character of the neighborhood, and the detriment caused to the property owner.

In reaching a determination on whether the plaintiff had been provided a fair opportunity to recoup its investment in the nonconforming asphalt plant, a Court possesses broad authority to consider a variety of factors including the nature of the business and of the surrounding neighborhood, the value and condition of the improvements on the property, the closest area to which the owner may relocate the business and the cost of such relocation, the initial capital investment, investment realization to date, life expectancy of the investment, and the existence or nonexistence of a lease obligation. *See Harbison*, 4 N.Y.2d at 563-564, 176 N.Y.S.2d at 606, 152 N.E.2d at 47; *Modjeska Sign Studios*, 43 N.Y.2d at 480, 402 N.Y.S.2d at 367, 373 N.E.2d at 262. Determining the reasonableness of an amortization period is an inherently factual inquiry with a balance to be struck between an individuals' interest in maintaining the nonconforming use and the general welfare of the community sought to be advanced by the zoning law. Consequently, the germane question is whether, considering the amounts invested in the plant, the value of the buildings and equipment, and the ability and cost of relocating the plant, among other things, the appropriate balance has been struck and the plaintiff has been given an opportunity to recoup its investment and avoid substantial financial loss.

Last, the defendants sought to preclude the plaintiff from including its litigation expenses as a factor to be considered in ascertaining whether the plaintiff has suffered a substantial financial loss. Although no prior decisions have dealt with the issue, the Court concluded that the plaintiff's reasonable litigation expenses are costs which bear upon the kind and amount of damages that the plaintiff has sustained, particularly because the plaintiff would not have been able to stay in business had it not challenged the local law. Accordingly, evidence of reasonable litigation expenses was relevant in order to determine the plaintiff's investment in the nonconforming asphalt plant and to ascertain whether it has suffered a substantial financial loss.

2014

Preemption-Correctional Facilities

As is discussed in the Main Commentary to Town Law § 264 (p. 266-274), in a series of decisions, a number of appellate decisions concluded that the Oil, Gas and Solution Mining Law ("OGSML"), Environmental Conservation Law § 23-0303, did not preempt local zoning regulations which prohibited "oil and gas production

activities," that is, hydrofracking, throughout a municipality or limited the zoning districts in which hydrofracking may be conducted. *See Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dept.), *lv. granted*, 21 N.Y.3d 863, 972 N.Y.S.2d 535, 995 N.E.2d 851 (2013) and *Cooperstown Holstein Corp. v. Town of Middlefield*, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (3d Dept.), *lv. denied*, 21 N.Y.3d 863, 972 N.Y.S.2d 535, 995 N.E.2d 851 (2013). The Court of Appeals affirmed that principle in *Wallach v. Town of Dryden*, 23 N.Y.3d 728, ___ N.E.3d ___, ___ N.Y.S.2d ___, 2014 WL 2921399 (2014), a decision involving the zoning regulations of two municipalities.

The plaintiffs asserted that the energy policy of New York, as embodied in the OGSML, mandates a uniform approach which cannot be supplanted by local regulation. They contended that the suppression provision of the OGSMLconsequently expressly preempts all local zoning laws which ban or restrict oil and gas operations.

Article IX § 2(c)(ii) of the State Constitution provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law ... except to the extent that the legislature shall restrict the adoption of such a local law." Municipal Home Rule Law § 10(1)(ii)(11) implement this authority and empowers local governments to adopt laws both for the "protection and enhancement of [their] physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein." Municipalities additionally may "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community]." *Id.* at ___ (*citing Trustees of Union College v. Members of Schenectady City Council*, 91 N.Y.2d 161, 667 N.Y.S.2d 978, 980, 690 N.E.2d 862, 864 (1997)). Nevertheless, a municipality may not enact laws that conflict with the State Constitution or any general law. *See* Municipal Home Rule Law § 10[1)(i), (ii). However, the courts "do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake. Rather, we will invalidate a zoning law only where there is a 'clear expression of legislative intent to preempt local control over land use.' " *Id.* at ___ (*Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 682, 642 N.Y.S.2d 164, 172, 664 N.E.2d 1226, 1234 (1996)).

The plaintiffs asserted that the State Legislature clearly expressed its intent to preempt local zoning regulations by virtue of the suppression provision of the OGSML which provides that "The provisions of [the OGSML] shall supersede *all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." ECL 23-0303(2) (emphasis added in decision). The court's analysis was based, in large part, on the nearly identical suppression provision of the Mined Land Reclamation Law reviewed in *Frew Run Gravel Prods. v. Town of Carroll*, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987). In *Frew Run*, the court related three considerations relevant to the issue of preemption, that is: the plain language of the supersession clause; the statutory scheme as a whole; the relevant legislative history.

The supersession clause in the MLRL construed in *Frew Run* provided: "For the purposes stated herein, this title shall supersede all other state and *local laws relating to the extractive mining industry*; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein." ECL 23-2703 (former (2) (emphasis added in decision)). The *Frew Run* court concluded that the suppression clause did not preempt the zoning law's prohibition of mining because the plain language of the phrase "local laws relating to the extractive mining industry" did not encompass zoning provisions. To the contrary, the zoning law "relates not to the extractive mining industry but to an entirely different subject matter and purpose ... the use of land in the Town...." *Frew Run*, 71 N.Y.2d at 131, 524 N.Y.S.2d at 27-28, 518 N.E.2d at 922. Drawing a distinction between local regulations addressing "the actual operation and process of mining" and zoning laws regulating land use generally, the *Frew Run* court concluded that only those relating to the actual operation and process of mining was preempted by the MLRLs supersession provision. *Id.* at 133, 524 N.Y.S.2d at 29, 518 N.E.2d at 923. "In effect, local laws that purported to regulate the 'how' of mining activities

and operations were preempted whereas those limiting 'where' mining could take place were not." *Wallach*, 2014 WL 2921399 at ___. The court further opined that the supersession clause was consistent with the MLRL as a whole and with its legislative history. The objectives of the MLRL were "to foster a healthy, growing mining industry" and to "aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition." *Frew Run*, 71 N.Y.3d at 132, 524 N.Y.S.2d at 28, 518 N.E.2d at 923). The legislative history further indicated a purpose of promoting the "mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing patchwork system of local ordinances" *Id.* The "sole purpose" of the supersession clause was to preclude municipalities from adopting regulations "dealing with the actual operation and process of mining" because such laws would "frustrate the statutory purpose of encouraging mining through standardization of regulations pertaining to mining operations." *Id.* at 133, 524 N.Y.S.2d at 29, 518 N.E.2d at 923. On the other hand, zoning laws limiting the location of mining operations were found to be outside the preemptive ambit of the clause because "nothing in the Mined Land Reclamation Law or its history ... suggests that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands." *Id.*

The first consideration of the three-part test, that is, the language of the supersession clause, "is the clearest indicator of legislative intent" and the most important element. 2014 WL 2921399 at ___ (*quoting DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660, 827 N.Y.S.2d 88, 860 N.E.2d 705 (2006)). Because of the similarity of the suppression provisions utilized in the MLRL and the OGSML, the distinction announced in *Frew Run* applied to ECL § 23-0303(2) such that it should be construed as preempting only local laws that intend to regulate the actual operations of oil and gas activities and not to zoning regulations that limit the location of or prohibit particular land uses a community. The zoning laws construed in *Wallach* were directed at regulating land use generally and did not endeavor to control "the details, procedures or operations" of the oil and gas industries. 2014 WL 2921399 at ___. Although the zoning regulations will effect oil and gas enterprises, "this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the [oil, gas and solution mining industries] which the Legislature could have envisioned as being within the prohibition of the statute. " 2014 WL 2921399 at ___ (*quoting Frew Run*, 71 N.Y.2d at 131, 524 N.Y.S.2d at 28, 518 N.E.2d at 922).

The court noted that unlike ECL § 23-0303(2), other statutes that preempt local zoning regulation often explicitly include zoning in the preemptive language. *See e.g.*, ECL § 27-1107; Mental Hygiene Law § 41.34(f); Racing, Pari-Mutuel Wagering and Breeding Law § 1366. In addition, the legislative programs of which those preemption clauses are a part normally include procedures that implicate concerns that otherwise would have been considered by traditional municipal zoning review. *See e.g.*, ECL § 27-1103(2)(g]); Mental Hygiene Law § 41.34(c); Racing, Pari-Mutuel Wagering and Breeding Law § 1320(2). Consequently, the plain language of ECL § 23-0303(2) does not support preemption of the zoning laws.

The second issue in determining whether a zoning law is preempted necessitates an evaluation of the clause's purpose in the statutory scheme as a whole. The goals of the OGSML are: "to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste"; (ii) "to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had"; (iii) to protect the "correlative rights of all owners and the rights of all persons including landowners and the general public"; and (iv) to regulate "the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells." ECL § 23-0301. In order to implement these objectives, the OGSML includes a comprehensive scheme by which the Department of Environmental Conservation is authorized to regulate oil, gas and solution mining activities and to adopt and enforce regulations regarding the safety, technical and operational aspects of oil and gas activities. The supersession clause is consistent with this legislative framework because it abrogates local regulations that would encroach upon the DEC'S regulatory supervision of the industry's operations in order to ensure standardized exploratory and extraction practices. As in the comparable provision construed in *Frew Run*, nothing in the provisions of the OGSML imply that the supersession clause was intended to be more

comprehensive than required to preempt incompatible local regulations directed at the technical operations of the industry.

Lastly, the OGSML's legislative history confirms that the Legislature's principal concern was with averting wasteful oil and gas practices and ensuring that DEC possessed the authority and procedures to regulate the technical operations of the industry.

The court also rejected the contention that even if the OGSML's supersession clause does not preempt all local zoning regulations, it preempts those that prohibit hydrofracking throughout a community, a claim that was rejected by the Court of Appeals *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996). The court in *Gernatt Asphalt* held that "zoning ordinances are not the type of regulatory provision the Legislature foresaw as preempted by the Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities." *Id.* at 681-682, 642 N.Y.S.2d at 172, 664 N.E.2d at 1234. "A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole." 2014 WL 2921399 at ___ (*quoting Gernatt Asphalt*, 87 N.Y.2d at 684, 642 N.Y.S.2d at 173, 664 N.E.2d at 1235).

Consequently, consistent with the decisions construing the preemption provision of the MLRL, *Wallach* confirms that the OGSML does not prohibit a municipality from banning hdrofracking from certain or all zoning districts in a municipality.

Preemption-Correctional Facilities

In *County of Herkimer v. Village of Herkimer*, 109 A.D.3d 1166, 971 N.Y.S.2d 764 (4th Dept. 2013), when the county sought to establish a correctional facility in an abandoned shopping center located within the village, the village amended its zoning law to removed "correctional facilities" from the uses allowed in a number of the its zoning districts. The court rebuffed the county's claim that the zoning regulation was preempted by Correction Law § 45(10) and County Law § 216. Instead, "the New York State Legislature has not 'enacted a comprehensive and detailed regulatory scheme' with respect to the siting of County correctional facilities." *Id.* at 1167, 971 N.Y.S.2d at 765. Relatedly, the State also has not "otherwise 'demonstrated its intent to preempt [the] entire field and preclude any further local regulation' in that area." *Id.* (*quoting Village of Nyack v. Daytop Village, Inc.*, 78 N.Y.2d 500, 505, 577 N.Y.S.2d 215, 217, 583 N.E.2d 928, 930 (1991)). The state legislation regarding the siting of county correctional facilities is limited to requiring approval of the State Commission of Corrections of the site. "The New York State Legislature has not directly or impliedly expressed any intent 'to trump local efforts to regulate the location of [correctional] facilities through the application of [the] zoning laws.' " *Id.* (*quoting Daytop Village*, 78 N.Y.2d at 507, 577 N.Y.S.2d at 218, 583 N.E.2d at 931).

The court additionally rejected the county's claim that the zoning amendment contravened the principle that zoning is concerned with the use of land, not with the identity of the user, because the goal of the amendment was addressed to land use, not to the person or entity that owns or occupies the land. Further, the amendment did not constitute exclusionary zoning by barring correction facilities from the community. Lastly, the court remanded the matter to Supreme Court for the development of a record to ascertain whether the county might be exempt from the village's zoning laws by virtue of the balancing of public interests analysis of *County of Monroe v. City of Rochester*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988)).

Preemption-Cemeteries

In *Oakwood Cemetery v. Village/Town of Mount Kisco*, 115 A.D.3d 749, 981 N.Y.S.2d 786 (2d Dept. 2014), the court rejected the contention that the Not-For-Profit Corporation Law preempted the provisions of a zoning law which barred crematoriums from the community. The plaintiff, a not-for-profit cemetery corporation that operated a cemetery in the town, intended to build a crematory on its property. The challenged amendment defined the term "cemetery" to exclude cremation facilities. The plaintiff asserted that the zoning law's prohibition was preempted by Not-For-Profit Corporation Law § 1502(d), which provides that a "[a] public mausoleum, crematory or columbarium shall be included within the term 'cemetery.' " The plaintiff further contended that operation of a crematory was included within its permissible, nonconforming use of its property as a cemetery.

The court concluded that Not-for-Profit Corporation Law article 15 did not preempt local regulation of cemeteries under the doctrine of "field preemption." Field preemption may be applicable when: an express declaration in a state statute explicitly declares an intent to preempt all local laws on the same subject matter; a declaration of state policy manifests the intent of the Legislature to preempt local laws on the same subject matter; and a legislative adoption of a comprehensive and detailed regulatory scheme in an area establishes an intent to preempt local laws. *See Chwick v. Mulvey*, 81 A.D.3d 161, 169-170, 915 N.Y.S.2d 578, 585 (2d Dept. 2010); *Vatore v. Commissioner of Consumer Affairs of City of New York*, 83 N.Y.2d 645, 649, 612 N.Y.S.2d 357, 358, 634 N.E.2d 958, 959 (1994).

Not-for-Profit Corporation Law § 1501 declares that: "[t]he people of this State have a vital interest in the establishment, maintenance and preservation of public burial grounds and the proper operation of the corporations which own and manage [them]. This article is determined an exercise of the police powers of this state to protect the well-being of our citizens, to promote the public welfare and to prevent cemeteries from falling into disrepair and dilapidation and becoming a burden upon the community, and in furtherance of the public policy of this State that cemeteries shall be conducted on a non-profit basis for the mutual benefit of plot owners therein." Although article 15 of the Not-for-Profit Corporation Law regulates corporations which own and manage cemeteries, it does not explicitly preempt zoning regulations relating to land use by cemeteries. Moreover, neither Not-for-Profit Corporation Law article 15 nor the rules and regulations promulgated pursuant to it evinces any State preemptive policy. Lastly, the regulatory scheme does not manifest the Legislature's desire to preempt local zoning authority. *See Beverly Hills Cemetery Corp. v. Town of Putnam Valley*. 136 A.D.2d 669, 670, 524 N.Y.S.2d 47, 48 (2d Dept.), *lv. denied*, 72 N.Y.2d 828, 530 N.Y.S.2d 547, 526 N.E.2d 38 (1988). As a result, the Not-for-Profit Corporation Law does not preempt the field of cemetery regulation.

In addition, more restrictive definition of "cemetery" in the zoning law was not invalid pursuant to the doctrine of conflict preemption. Not-for-Profit Corporation Law § 1502(d) regulates the management of cemetery corporations and the applicability of definition contained therein is limited to that law. The zoning law challenged definition of "cemetery" concerns a separate and discrete substantive area-land use. The definitions are not in direct conflict because they relate to different substantive concerns.

Legitimate Purpose of Zoning Designations

A local law was challenged in *Nicholson v. Village of Garden City*, 112 A.D.3d 893, 978 N.Y.S.2d 288 (2d Dept. 2013), *appeal dismissed*, 23 N.Y.3d 947, 987 N.Y.S.2d 600, 10 N.E.3d 1156 (2014), which rezoned the corner lots on four streets, including the plaintiffs' 62,500 square-foot corner lot, from R-20, a residential zoning designation requiring a minimum lot size of 20,000 square feet, to R-20C, a residential zoning classification prohibiting subdivision unless the resulting corner lot has a minimum lot size of 40,000 square feet.

In determining that the amendment was constitutional, the court reiterated that legislative enactments are accorded an "exceedingly strong presumption of constitutionality." *Id*. at 894, 978 N.Y.S.2d at 289-90 (*quoting Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7, 11, 390 N.Y.S.2d 827, 830, 359 N.E.2d 337, 341 (1976)). "With the police power as the predicate for the State's delegation of municipal zoning authority, a zoning ordinance will be struck down if it bears no substantial relation to the police power objective of promoting the public health, safety, morals or general welfare." *Id.* at 894, 978 N.Y.S.2d at 290 (*quoting Trustees of Union College v. Schenectady City Council*, 91 N.Y.2d 161, 165, 667 N.Y.S.2d 978, 980, 690 N.E.2d 862, 864 (1997); (*citing Village of Euclid v. Ambler Realty Co*., 272 U.S. 365, 395 (1926); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 107, 378 N.Y.S.2d 672, 678, 341 N.E.2d 236, 240 (1975)).

The delegation of authority to municipalities to employ zoning authority necessitates that it be implemented consistent with a comprehensive plan intended to plan for the future development of the community. A zoning classification will be invalidated only in instances of a "clear conflict" with a community's comprehensive plan. *See Infinity Consulting Group, Inc. v. Town of Huntington*, 49 A.D.3d 813, 814, 854 N.Y.S.2d 524, 526 (2d Dept.), *appeal dismissed*, 11 N.Y.3d 781, 866 N.Y.S.2d 604, 896 N.E.2d 89 (2008); *Taylor v. Village of Head of Harbor*, 104 A.D.2d 642, 644-645, 480 N.Y.S.2d 21, 23 (2d Dept. 1984), *lv. denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 478 N.E.2d 210 (1985); *Blumberg v. City of Yonkers*, 41 A.D.2d 300, 306-308, 341 N.Y.S.2d 977, 983-94 (2d Dept.), *lv. denied*, 33 N.Y.2d 514, 348 N.Y.S.2d 1025, 301 N.E.2d 869 (1973). The amendment challenged in *Nicholson* was not inconsistent with the village's comprehensive plan because the local law was reasonably related to the valid identified goal of preserving larger corner lots on the broader boulevard-style streets. The amendment was consistent with the authority of municipalities to "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Nicholson*, 112 A.D.3d at 895, 978 N.Y.S.2d at 290 (*quoting Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978)). Furthermore, the legislation was preceded by a planning review of the subdivision of various large corner lots in that portion of the village, which considered various options, including the enactment of the legislation.

The court also rejected the contention that the amendment constituted impermissible reverse spot zoning. "Reverse spot zoning" is "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." *C/S 12th Avenue LLC v. City of New York*, 32 A.D.3d 1, 9, 815 N.Y.S.2d 516, 524 (1st Dept. 2006). The plaintiffs' property had not been arbitrarily singled out for disparate, less advantageous treatment than neighboring properties in a manner that was contrary to a well-considered land-use plan. A well-considered land-use plan can be established by "evidence, from wherever derived," that "establish[es] a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole", ensuring that the public good will not be undetermined by "special interest, irrational *ad hocery*." *Nicholson*, 112 A.D.3d at 895, 978 N.Y.S.2d at 291 (*quoting Taylor*, 104 A.D.2d at 644, 480 N.Y.S.2d at 23; *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 188, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136 (1973)). The record in Nicholson confirmed that the local law affected 20 corner lots and that the local law was consistent with the village's comprehensive plan.

Comprehensive Plan/Spot Zoning

"Spot zoning" is "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners ..." *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951). "[S]pot zoning is the very antithesis of planned zoning." *Id*. However, zoning regulations that are consistent with a community's comprehensive plan are not, by definition, "spot zoning." *See Rye Citizens Committee v. Board of Trustees of the Village of Port Chester*, 249 A.D.2d 478, 671 N.Y.S.2d 528 (2d Dept. 1998), *lv. denied*, 92 N.Y.2d 808, 678

N.Y.S.2d 593, 700 N.E.2d 1229 (1998).

In *Restuccio v. City of Oswego*, 114 A.D.3d 1191, 979 N.Y.S.2d 749 (4th Dept. 2014), the plaintiffs challenged the rezoning of property to accommodate the construction of a hotel, contending that the amendment did not comply with the city's comprehensive plan. A zoning amendment is entitled to a "strong presumption of validity." *Restuccio*, 114 A.D.3d at 1191, 979 N.Y.S.2d at 750 (*citing Morgan v. Town of West Bloomfield*, 295 A.D.2d 902, 903, 744 N.Y.S.2d 274, 276 (4th Dept. 2002); *Rayle v. Town of Cato Board*, 295 A.D.2d 978, 978, 743 N.Y.S.2d 784, 785, *lv. denied*, 747 N.Y.S.2d 851 (4th Dept. 2002)). Consequently, one who challenges such a legislative act bears a heavy burden of proof. *See id.* (*citing Bergstol v. Town of Monroe*, 15 A.D.3d 324, 325, 790 N.Y.S.2d 460, 461 (2d Dept. 2005), *lv. denied*, 5 N.Y.3d 701, 799 N.Y.S.2d 772, 832 N.E.2d 1188 (2005); *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 134, 306 N.E.2d 155, 158-59 (1973), *rearg. denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 (1974)). "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 1192, 979 N.Y.S.2d at 750 (*citing Shepard v. Village of Skaneateles*, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949) (*quoting Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)); *De Sena v. Gulde*, 24 A.D.2d 165, 169, 265 N.Y.S.2d 239, 244 (1965)). As a result, a zoning classification must be sustained unless the plaintiff demonstrates a "clear conflict" with the comprehensive plan. *See id.* (*citing Bergstol*, 15 A.D.3d at 325, 790 N.Y.S.2d at 461; *Infinity Consulting Group, Inc. v. Town of Huntington*, 49 A.D.3d 813, 814, 854 N.Y.S.2d 524, 526 (2d Dept.), *appeal dismissed*, 11 N.Y.3d 781, 866 N.Y.S.2d 604, 896 N.E.2d 89, *reconsideration denied*, 11 N.Y.3d 852, 872 N.Y.S.2d 65, 900 N.E.2d 547 (2008)).

The city in *Restuccio* demonstrated that the rezoning of the property was consistent with the city's comprehensive plan, that the rezoned classification corresponded more closely to the comprehensive plan than did the existing zoning and that the rezoning was approved only after a thorough review. Because the rezoning was consistent with the comprehensive plan, it did not amount to impermissible spot zoning. *See Little Joseph Realty, Inc.*, 52 A.D.3d 478, 479, 859 N.Y.S.2d 696, 697-98 (2d Dept.), *lv. denied*, 11 N.Y.3d 706, 866 N.Y.S.2d 609, 896 N.E.2d 95 (2008); *Rayle v. Town of Cato Board*, 295 A.D.2d 978, 979-980, 743 N.Y.S.2d 784, 786 (4th Dept.), *lv. denied*, 747 N.Y.S.2d 851 (2002); *Infinity Consulting Group, Inc. v. Town of Huntington*, 49 A.D.3d at 814, 854 N.Y.S.2d at 526. Further, the rezoning was reasonably related to a legitimate governmental purpose, that is, advancement of the city's planned development, and is thus constitutional.

The court also rejected the contention that the city council's adoption of the amendment was arbitrary because it denied the rezoning petition and than approved it at the next meeting. The plaintiff asserted that the adoption under those circumstances violated the principle that an administrative decision which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary. However because the challenged enactment was legislative rather than an administrative "[n]o showing of a change of circumstances must be made for a legislative body to rezone property." *Restuccio*, 114 A.D.3d at 1193, 979 N.Y.S.2d at 751 (*quoting Blumberg v. City of Yonkers*, 41 A.D.2d 300, 305, 341 N.Y.S.2d 977, 982 (2d Dept.), *appeal dismissed*, 32 N.Y.2d 896, 346 N.Y.S.2d 814, 300 N.E.2d 154, *lv. denied*, 33 N.Y.2d 514, 348 N.Y.S.2d 1025, 301 N.E.2d 869 (1973).

Similarly, a challenge to the rezoning of property as inconsistent with the town's comprehensive plan was rejected in *Hart v. Town Bd. of Town of Huntington*, 114 A.D.3d 680, 980 N.Y.S.2d 128 (2d Dept. 2014). The challenged amendment rezoned property from an R-40 designation, which permitted one single-family dwelling per acre, to an R-RM Retirement Community District. Despite its R-40 zoning, the property had been utilized for years as a nonconforming horse farm and stables, which included tree cutting, wood chipping, and wood carving businesses. The owner proposed the construction of 66 townhouses on the property, as a part of a larger project comprised of 80 townhouses and 3 single-family homes.

While the rezoning petition was pending, the town board adopted a comprehensive plan which recommended the preservation of open spaces and the promotion of a diverse, affordable housing stock. Although the property had been designated as an "Open Space Index Parcel" in the town's 1974 open space plan, the Environmental Open Space Advisory Committee observed in 2007 that the natural features of the property had been disturbed and concluded that the town should not pursue the acquisition of the property for parkland.

Applying the standards related above, the court found that the petitioners had failed to raise a triable issue of fact as to whether a "clear conflict" existed between the zoning amendment and the master plan. Although the master plan related, among its concerns, the desire to preserve the low-density character of the town, it also recognized that because the demographics of the population were changing, a need existed for a diverse housing stock, including senior and affordable housing, while preserving preserve open spaces. The proposed development would increase the density of the neighborhood, but would also preserve a substantial portion of the property as open land and provide senior and affordable housing. Consequently, the zoning amendment was in compliance with the overall planning policies related in the master plan and did not constitute impermissible spot zoning.

Adequacy of Notice

Although Town Law § 264 does not direct the substance of the obligatory notice of public hearing on a zoning amendment, other than relating that it shall provide the time and place of the hearing, case law provides that notice must "fairly apprise the public of the fundamental character of the proposed zoning change * * * [and] not mislead interested parties into foregoing attendance at the public hearing." *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 678, 642 N.Y.S.2d 164, 170, 664 N.E.2d 1226, 1232 (1996).

The adequacy of the notice for a amendment which added a Planned Unit Development provision to a zoning law was challenged in *Dawley v. Town of Tyre*, 43 Misc.3d 1222(A), 2014 WL 1910168 (Sup. Ct. Seneca Co. 2014). Initially, "the issue of adequate notice of a public hearing prior to enactment of a zoning ordinance has no statute of limitations, but may be asserted at any time after such legislation is enacted." 2014 WL 1910168 at 2 (*citing Town of Lima v. Slocum*, 38 A.D.2d 503, 331 N.Y.S.2d 51 (4th Dept. 1972) (11 years); *Coutant v. Town of Poughkeepsie*, 69 A.D.2d 506, 419 N.Y.S.2d 148 (2d Dept. 1979) (20 years).

The plaintiffs alleged that notice was insufficient because it failed to explain what a planned unit development is. A substantial departure from the notice requirements affects the regularity of a hearing and results in the invalidity a law. When a significant deviation from the notice requirements is established, a party challenging the enactment need not demonstrate that he was among those not given notice, that the law would not have passed if proper notice had been given or any other form of specific prejudice.

The challenged notice provided that the public hearing is "regarding proposed Local Law No.1 of 2014 in relation to enacting new Article 11.A Planned Unit Development." The notice further related the hearing is "for the purpose of hearing public comments on the adoption of a proposed local law to amend the Town of Tyre Zoning Law in relation to enacting new Article 11.A ... " It also advised that a copy of the proposed PUD local law was available for public review at the town clerk's office and provided the office address. The notice further related that the local law was available on the town's website. The court opined that although it may have been "prudent" to include information to indicate that the proposed law would be effective in the entire town and not in any specific existing zones and to define a "planned unit development," it was not misleading. Moreover, the fact that more than 100 people attended the public hearing substantiated the conclusion that the notice was sufficient to fairly apprise the public of the purpose of the public hearing. Further, the notice informed the public that a copy of the proposed law was available at the town clerk's office and on the town's website. "In today's society, the general public is used to accessing information on the internet and the notice as published allowed

the public to read the full proposed law via the Town's website." *Dawley*, 2014 WL 1910168 at 5. The court also noted that any claimed deficiencies in a subsequent notice were not germane because the second public hearing and notice of it were not required by Town Law § 264, which only requires one public hearing and notice.

SPECIAL FACTS EXCEPTION

A court generally must apply the provisions of a zoning law in effect at the time it renders a decision. *See Jul-Bet Enters., LLC v. Town Board of Town of Riverhead*, 48 A.D.3d 567, 567, 852 N.Y.S.2d 242, 243 (2d Dept. 2008). Consequently, a court must apply the current version of a zoning law when reviewing a decision on a land use application even if it renders a proposed use impermissible *See id.* However, a court must apply the law in effect at the time a land use application is made if a board unduly delayed proceedings and acted in bad faith. *See BBJ Assoc., LLC v. Zoning Board of Appeals of Town of Kent*, 65 A.D.3d 154, 158-159, 881 N.Y.S.2d 496, 500 (2d Dept. 2009). The special facts exception may apply only if the applicant was entitled to the relief sought as a matter of right prior to the amendment of the law. *See Nathan v. Zoning Bd. of Appeals of Village of Russell Gardens*, 95 A.D.3d 1018, 1019, 943 N.Y.S.2d 615, 618 (2d Dept. 2012); *Jamaica Recycling Corp. v. City of New York*, 38 A.D.3d 398, 400, 832 N.Y.S.2d 40, 43 (1st Dept.), *lv. denied*, 9 N.Y.3d 801, 872 N.E.2d 252, 840 N.Y.S.2d 566 (2007).

Illustrating the application of the special facts standard, the Court of Appeals determined in *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 21 N.Y.3d 729, 977 N.Y.S.2d 719, 999 N.E.2d 1164 (2013), that the special facts exemption did not apply therein because the proposed land use was not a permitted use pursuant to the zoning law in effect when the application was submitted. The plaintiff owned a 17-acre parcel on which it sought to establish a 152,000 square foot Lowe's Home Improvement Center. The town previously had adopted a comprehensive plan in establishing a new "commercial recreation" ("CR") zoning classification which was intended to attract new types of private recreation uses, such as sports complexes, amusement and theme parks, ice hockey and ice skating rinks. The property had been zoned as "J Business 2" ("J-2"), which allowed retail stores as of right, but did not permit "commercial centers," which were defined as "[a]ny building or buildings ... used by one (1) or more enterprises for a commercial purpose ... where the proposed use occupies a site of five (5) acres or more."

The town did implement the CR classification until February 2000, when the town board discussed rezoning the parcel to CR for the first time. Shortly before a scheduled public hearing on the proposed CR amendment, the petitioner submitted a site plan application for the Lowe's Center use which would not have been permissible in the proposed CR zone. In opposing the amendment, the owner filed a protest petition pursuant to Town Law § 265, thereby invoking the "super majority" requirement. Although only five of the seven board members voted in favor of the rezoning amendment, the town declared the parcel to be rezoned to a CR designation and refused to process the site plan application. After Supreme Court invalidated the amendment because of an insufficient vote for approval, the town board again voted to rezone the property to CR without the required super majority, which amendment also was invalidated for the same reason.

In June 2002, the town board amended the zoning law to allow for a simple majority vote for approval of zoning amendments, rather than a "super majority," despite the filing of protests petitions. In October 2002, the town board voted for the third time to rezone the property to a CR designation. The property owner commenced an action seeking a declaration that its site plan application should be reviewed pursuant to previously applicable J-2 zoning classification because the town had improperly delayed the review of the application. At trial, the plaintiff introduced numerous site plan applications submitted to the town between 1986 and 2003 which it claimed established that the town had selectively applied the CR classification.

Supreme Court concluded that the town had treated the application differently from other applications and had caused a substantial delay in the review process. Therefore, it determined that the special facts exception justified the application of the earlier zoning designation to the application. The Second Department reversed because the trial evidence did not support the lower court's conclusion.

The Court of Appeals first restated that "As a general matter, a case must be decided upon the law as it exists at the time of the decision." *See id.* at 736, 977 N.Y.S.2d at 722, 999 N.E.2d at 1167 (*citing Pokoik v. Silsdorf*, 40 N.Y.2d 769, 772, 390 N.Y.S.2d 49, 51, 358 N.E.2d 874, 876 (1976)). "In land use cases, the law in effect when the application is decided applies, regardless of any intervening amendments to the zoning law." *Id.* (*citing Pokoik*, 40 N.Y.2d at 772, 390 N.Y.S.2d at 51, 358 N.E.2d at 876). If a landowner establishes that he is "entitled as a matter of right to the underlying land use application," the special facts exception dictates that the application should be assessed pursuant to the zoning law in effect at the time the application was submitted. *Id.* (*citing Pokoik*, 40 N.Y.2d at 772, 390 N.Y.S.2d at 51, 358 N.E.2d at 876 (*citing Boardwalk & Seashore Corp. v. Murdock*, 286 N.Y. 494, 36 N.E.2d 678 (1941); *Rosano v. Town Bd. of Town of Riverhead*, 43 A.D.2d 728, 350 N.Y.S.2d 697 (2d Dept. 1973))). However, a landowner is entitled to approval as a matter of right only if the use and application are in "full compliance with the requirements at the time of the application" such that "proper action upon the permit would have given [the land owner] time to acquire a vested right." *Id.* at 737, 977 N.Y.S.2d at 722 , 999 N.E.2d 1164 at 1167 (*citing Pokoik*, 40 N.Y.2d at 773, 390 N.Y.S.2d at 51, 358 N.E.2d at 876 (*citing Marsh v. Town of Huntington*, 39 A.D.2d 945, 333 N.Y.S.2d 990 (2d Dept. 1972); *Golisano v. Town Board of Town of Macedon*, 31 A.D.2d 85, 296 N.Y.S.2d 623 (4th Dept. 1968))). In addition to demonstrating entitlement to approval as a matter of right, a land owner must also establish "extensive delay indicative of bad faith," "unjustifiable actions" by municipal officials, or "abuse of administrative procedures." *Id.* (*quoting Alscot Inv. Corp. v. Village of Rockville Ctr.*, 64 N.Y.2d 921, 922, 488 N.Y.S.2d 629, 629, 477 N.E.2d 1083, 1083 (1985); *Pokoik*, 40 N.Y.2d at 773, 390 N.Y.S.2d at 51, 358 N.E.2d at 876).

The plaintiff did not satisfy the threshold requirement that it demonstrate entitlement to the land use approval pursuant to the law as it existed when it filed its application because the proposed use was not permitted pursuant to the zoning classification in effect when it filed the application.

The plaintiff also alleged that because the town historically had ignored the zoning requirements, the special facts exception should apply despite the fact that it did not satisfy the prior J-2 standards for the use. However, the properties upon which the plaintiff relied were not similarly situated because they either satisfied an exception or complied with the J-2 zoning classification requirements.

PRACTICE COMMENTARIES

by Terry Rice

I INTRODUCTION

Town Law §§ 264 and 265 provide the mandatory procedure for the adoption and amendment of zoning regulations. Town Law § 264 is directed to procedural requirements for the initial adoption of zoning regulations and to subsequent amendments, while Town Law § 265 deals primarily deals with protest petitions to amendments to zoning regulations. *See North Shore Beach Owners Ass'n v. Town of Brookhaven*, 129 N.Y.S.2d 697, 702 (Sup. Ct. Suffolk Co. 1954), *aff'd*, 1 A.D.2d 1043, 153 N.Y.S.2d 579 (2d Dept. 1956). Under early versions of the statutes, the distinction was meaningful because different procedures were prescribed for the initial adoption and

for the amendment of zoning regulations. However, such procedural distinctions have been eliminated and, with but one significant exception, that is, the requirement of a zoning commission for the adoption of a town's first zoning law, the statutory procedures for adoption and amendment now are identical. Confirming that the same procedural requisites apply to amendments as well as to the initial adoption of a zoning law, Town Law § 265, entitled "Changes," provides that "[t]he provisions of the previous section [Town Law § 264] relative to public hearings and official notice shall apply equally to all proposed amendments."

The doctrine of legislative equivalency mandates that existing legislation may only be amended or repealed by utilization of the same procedures as were used to enact it initially. *See New York Public Interest Research Group v. Dinkins*, 83 N.Y.2d 377, 384, 610 N.Y.S.2d 932, 935, 632 N.E.2d 1255, 1258 (1994); *Gallagher v. Regan*, 42 N.Y.2d 230, 234, 397 N.Y.S.2d 714, 716, 366 N.E.2d 804, 806 (1977); *Naftal Associates v. Town of Brookhaven*, 221 A.D.2d 423, 633 N.Y.S.2d 798 (2d Dept. 1991), *appeal dismissed*, 79 N.Y.2d 849, 580 N.Y.S.2d 195, 588 N.E.2d 93 (1992). Consequently, for example, a resolution is ineffective to amend a local law. *See JEM Realty Co. v. Town Board of the Town of Southold*, 297 A.D.2d 278, 746 N.Y.S.2d 41 (2d Dept.), *lv. denied*, 99 N.Y.2d 504, 754 N.Y.S.2d 203, 784 N.E.2d 76 (2002); *Paradis v. Town of Schroeppel*, 289 A.D.2d 1027, 735 N.Y.S.2d 278 (4th Dept. 2001), *reargument denied*, 289 A.D.2d 1027, 742 N.Y.S.2d 592 (4th Dept. 2002); *Noghrey v. Town of Brookhaven*, 214 A.D.2d 659, 660, 625 N.Y.S.2d 268, 269 (2d Dept. 1995). Although a practice to be avoided, the courts have refused to invalidate an amendment of a zoning ordinance by the adoption of a "resolution" when the procedural requisites of procedural formalities of Town Law §§ 264 and 265 have been observed. *See Miller v. Kozakiewicz*, 289 A.D.2d 494, 495, 735 N.Y.S.2d 176, 178 (2d Dept. 2001); *Inland Western Coram Plaza, LLC v. Town of Brookhaven*, 14 Misc.3d 1225(A), 836 N.Y.S.2d 493 (Table), 2007 WL 308559 at 4 (Sup. Ct. Suffolk Co. 2007). On the other hand, a resolution repeatedly has been held to be ineffective to amend a town's zoning local law despite the fact that the procedure followed for the passage of the resolution substantially complies with the requirements for the passage of a local law. *See Noghrey v. Town of Brookhaven*, 214 A.D.2d 659, 625 N.Y.S.2d 268 (2d Dept. 1995); *Rockland Properties Corp. v. Town of Brookhaven*, 205 A.D.2d 518, 519, 612 N.Y.S.2d 673, 674 (2d Dept. 1994); *Naftal Associates v. Town of Brookhaven*, 221 A.D.2d 423, 424, 633 N.Y.S.2d 798, 800 (2d Dept. 1991), *appeal dismissed*, 79 N.Y.2d 849, 580 N.Y.S.2d 195, 588 N.E.2d 93 (1992).

A provision in a zoning local law which permitted amendment of such local law by a method other than adoption of a local law is inconsistent with the doctrine of legislative equivalency as set forth in § 10(1)(ii)(e)(3) of the Municipal Home Rule Law and is ineffective. *See Paradis v. Town of Schroeppel*, 289 A.D.2d 1027, 735 N.Y.S.2d 278 (4th Dept. 2001), *reargument denied*, 289 A.D.2d 1027, 742 N.Y.S.2d 592 (4th Dept. 2002); *Naftal Associates v. Town of Brookhaven*, 221 A.D.2d 423, 424, 633 N.Y.S.2d 798, 800 (2d Dept. 1991), *appeal dismissed*, 79 N.Y.2d 849, 580 N.Y.S.2d 195, 588 N.E.2d 93 (1992).

II STATUTORILY REQUIRED NOTICE

a Publication of Notice

The statute requires notice of the time and place of a public hearing on proposed zoning provisions to be published in a newspaper of general circulation at least 10 days prior to the hearing; for notice to various other specified municipal entities; and for the manner in which an enactment must be entered in the town's minutes and notice of adoption published. Town Law § 264(1), (2). Zoning authority, not being an inherent power of local governments, is delegated to towns by the State Legislature. Consequently, the authority to enact zoning laws only may be exercised in "strict compliance with the statutory procedures prescribed." *Vizzi v. Town of Islip*, 71 Misc.2d 483, 485, 336 N.Y.S.2d 520, 523 (Sup. Ct. Nassau Co. 1972); *see also Barry v. Town of Glenville*, 8 N.Y.2d 1153, 209 N.Y.S.2d 834, 171 N.E.2d 907 (1960); *Town of Lima v. Robert Slocum Enterprises*, 38 A.D.2d 503, 331 N.Y.S.2d 51 (4th Dept. 1972); *Keeney v. Village of LeRoy*, 22 A.D.2d 159, 254 N.Y.S.2d 445 (4th Dept. 1964). Substantial compliance with those procedures is required. *See Cohn v. Town of Cazenovia*, 42 Misc.2d 218, 247 N.Y.S.2d 919 (Sup. Ct. Madison Co. 1964). A substantial departure from the notice requirements affects the regularity of a

hearing and requires invalidation of an enactment. *See Town of Lima v. Robert Slocum Enterprises*, 38 A.D.2d 503, 331 N.Y.S.2d 51 (4th Dept. 1972); *Bohan v. Town of Southampton*, 227 N.Y.S.2d 712 (Sup. Ct. Suffolk Co. 1962); *Atiyeh v. Village of North Hills*, 91 Misc.2d 365, 398 N.Y.S.2d 105 (Sup. Ct. Nassau Co. 1977); *Marcus v. Village of Spring Valley*, 24 A.D.2d 1021, 265 N.Y.S.2d 985 (2d Dept. 1965). Clearly, if no notice is provided, an enactment is invalid. *See Lincoln Avenue Associates v. Town of Islip*, 96 A.D.2d 946, 466 N.Y.S.2d 399 (2d Dept. 1983); *Schierloh v. Wood*, 230 A.D. 788, 244 N.Y.S. 651 (2d Dept. 1930). If notice is not published or otherwise provided as required at least the mandated number of days prior to a hearing, it is ineffective. *See Avelli v. Town of Babylon*, 54 Misc.2d 662, 283 N.Y.S.2d 261 (Sup. Ct. Suffolk Co. 1967); *Village of Island Park v. J.E.B. Associates*, 21 Misc.2d 249, 190 N.Y.S.2d 77 (Sup. Ct. Nassau Co. 1959).

Town Law § 264 does not dictate the content of the required notice of public hearing, other than stating that it shall provide the time and place of the hearing. "The published notice is the fundamental vehicle for communicating to the public any local legislative changes...." *Vizzi v. Town of Islip*, 71 Misc.2d 483, 485, 336 N.Y.S.2d 520, 523 (Sup. Ct. Nassau Co. 1972). As a result, a notice of hearing must apprise the public of the "essence of the regulations to be adopted." *Village of Sands Point v. Sands Point Country Day School*, 2 Misc.2d 885, 888, 148 N.Y.S.2d 312, 315 (Sup. Ct. Nassau Co. 1955), *aff'd*, 2 A.D.2d 769, 154 N.Y.S.2d 428 (2d Dept. 1956). The requisite notice must "fairly apprise the public of the fundamental character of the proposed zoning change * * * [and] not mislead interested parties into foregoing attendance at the public hearing." *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 678, 642 N.Y.S.2d 164, 170, 664 N.E.2d 1226, 1232 (1996); *see also Long Island Pine Barrens Society, Inc. v. Town of Brookhaven Town Board*, 31 Misc.3d 1213(A), 927 N.Y.S.2d 817 (Table), 2011 WL 1459202 at 10 (Sup. Ct. Suffolk Co. 2011). A notice must "definitively set out the nature of the zone change, and, particularly when two zoning classifications are mentioned, must identify the zoning which is being proposed to replace the present classification." *Vizzi v. Town of Islip*, 71 Misc.2d 483, 485, 336 N.Y.S.2d 520, 523 (Sup. Ct. Nassau Co. 1972). The properties affected by a proposed zoning enactment also must be described definitely enough to inform individuals of the parcels that may be affected by the enactment. *See Blumberg v. City of Yonkers*, 41 A.D.2d 300, 341 N.Y.S.2d 977 (2d Dept.), *appeal dismissed*, 32 N.Y.2d 896, 346 N.Y.S.2d 814, 300 N.E.2d 154, *appeal dismissed*, 32 N.Y.2d 966, 347 N.Y.S.2d 1029, 300 N.E.2d 743, *appeal denied*, 33 N.Y.2d 514, 348 N.Y.S.2d 1025, 301 N.E.2d 869 (1973). Illustrating the necessary components of adequate notice, the court in *Olish v. Heaney*, 2003 WL 21276342 at 5 (Sup. Ct. Suffolk Co. 2003), determined that the notice of public hearing set forth in sufficient detail the subject of the proposed change of zone because it stated "with reasonable precision the location of the proposed change; the type of zoning contemplated; the contemplated use; the fact that the parcel included components in both the Core and Compatible Growth Areas of the Central Pine Barrens, as well as the accessory uses."

A notice must be clear and unambiguous and must be readily intelligible to the average citizen at large. The language of the notice must inform the layman, who is presumed to lack the technical knowledge of a zoning expert, of the nature of the proposed enactment. *See Gernatt Asphalt Products v. Town of Sardinia*, 208 A.D.2d 139, 144, 622 N.Y.S.2d 395, 398 (4th Dept. 1995), *rev'd on other grounds*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996); *Vizzi v. Town of Islip*, 71 Misc.2d 483, 485, 336 N.Y.S.2d 520, 523 (Sup. Ct. Nassau Co. 1972). If any doubt exists as to the sufficiency of a particular notice of hearing, it must be resolved against the adequacy of the notice. *See Gernatt Asphalt Products v. Town of Sardinia*, 208 A.D.2d 139, 144, 622 N.Y.S.2d 395, 398 (4th Dept. 1995), *rev'd on other grounds*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996); *Gardiner v. Lo Grande*, 92 A.D.2d 611, 612, 459 N.Y.S.2d 804, 807 (2d Dept.), *aff'd*, 60 N.Y.2d 673, 468 N.Y.S.2d 104, 455 N.E.2d 663 (1983); *Paliotto v. Town of Islip*, 31 Misc.2d 447, 224 N.Y.S.2d 466 (Sup. Ct. Queens Co. 1962), *rev'd on other grounds*, 22 A.D.2d 930, 256 N.Y.S.2d 58 (2d Dept. 1964), *appeal dismissed*, 16 N.Y.2d 484, 264 N.Y.S.2d 1026, 211 N.E.2d 654 (1965).

In *Amodeo v. Town Board of the Town of Marlborough*, 249 A.D.2d 882, 672 N.Y.S.2d 439 (3d Dept. 1998), the town amended its zoning law to permit affordable senior citizen housing as a special permit use in the R and R-1 zoning districts. However, the legal notice provided that such use was to be permitted in the R-1 district and failed to mention the R district. Thereafter, a number of owners of property in the R district commenced a combined

article 78 proceeding/declaratory judgment action challenging the enactment and the sufficiency of the notice. With respect to the timeliness of the challenge, the court concluded that the four-month statute of limitations generally applicable to article 78 proceedings against town boards did not apply to the insufficient notice claim. While procedural defects and errors are reviewable in an article 78 proceeding and governed by a four-month statute of limitations, "the alleged defect in the published notice constitutes a substantive error which could not have been resolved in a CPLR article 78 proceeding." *Id*. at 883-84, 672 N.Y.S.2d at 441. Consequently, the proceeding was timely commenced.

b Notice to Adjoining Municipal Entities

The statute also requires notice of a proposed zoning enactment to be personally served or mailed to various municipalities if the enactment would affect property within 500 feet of property under the jurisdiction of specified municipal entities. Such notice must be provided if a proposed enactment affects property within 500 feet of the boundary of a city, village, town, county, state park or parkway or a housing project owned by a housing authority. *See* Town Law § 264(2). The failure to comply with this requirement renders the adoption of a zoning law invalid. *See Cipperley v. Town of East Greenbush*, 213 A.D.2d 933, 623 N.Y.S.2d 967 (3d Dept. 1995); *Dalrymple Gravel and Contracting Co. v. Town of Erwin*, 305 A.D.2d 103, 758 N.Y.S.2d 755 (4th Dept. 2003). Although the statute requires notice of a hearing to be furnished to such municipal entities and a right to be heard at such hearing, the statute provides that such municipalities do not thereby have the right of court review of the action taken by the town board. Town Law § 264(4). Consequently, the provision of such notice does not accord standing in and of itself. *See City of Plattsburg v. Mannix*, 77 A.D.2d 114, 432 N.Y.S.2d 910 (3d Dept. 1980). However, if a charter or other statutory provision accords standing, *see Town of Bedford v. Village of Mount Kisco*, 34 A.D.2d 687, 312 N.Y.S.2d 617 (2d Dept.), *aff'd in part, vacated in part*, 27 N.Y.2d 483, 314 N.Y.S.2d 1025, 262 N.E.2d 555, *appeal dismissed*, 27 N.Y.2d 725, 314 N.Y.S.2d 533, 262 N.E.2d 673 (1970), or if a municipality can otherwise demonstrate an independent foundation for standing, it may possess standing to litigate approval of such an enactment despite the provisions of Town Law § 264(4). As is discussed below, despite the preclusive directive of Town Law § 264(4) and the comparable provision in Village Law § 7-706(3), it was determined in *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 841 N.Y.S.2d 321, (2d Dept. 2007), *lv. dismissed*, 12 N.Y.3d 793, 879 N.Y.S.2d 38, 906 N.E.2d 1072 (2009), *lv. dismissed*, 15 N.Y.3d 817, 908 N.Y.S.2d 149, 934 N.E.2d 882 (2010), that a village could challenge certain aspects of an adjoining town's amendment of its zoning local law pursuant to the State Environmental Quality Review Act ("SEQRA") based on its claimed effect on "community character." *See also Village of Pomona v. Town of Ramapo*, 94 A.D.3d 1103, 943 N.Y.S.2d 146 (2d Dept. 2012).

Although the statute mandates notice to specified municipal entities, a failure to provide such notice may be raised by an individual or entity interested in the enactment-not just the municipality which did not receive notice. In *Cipperley v. Town of East Greenbush*, 213 A.D.2d 933, 623 N.Y.S.2d 967 (3d Dept. 1995), the Third Department determined that a landowner possessed standing to challenge a zoning amendment as a consequence of a claimed lack of notice to adjoining municipalities, even though he was not prejudiced by such lack of notice. In *Town of Lima v. Robert Slocum Enterprises*, 38 A.D.2d 503, 331 N.Y.S.2d 51 (4th Dept. 1972), the Fourth Department arrived at the same conclusion, holding that "[w]hen a substantial departure from such notice requirements is shown, the party attacking the ordinance need not show that he was among those not given notice, that the ordinance would not have passed if proper notice had been given, or any other form of specific prejudice." *Id*. at 506, 331 N.Y.S.2d at 55. The court further concluded that "[w]e are not persuaded that the provision of section 264 of the Town Law precluding an adjoining municipality from seeking review of an enacted ordinance implies that the Legislature intended that the failure to comply with the notice requirements as to such entities should be treated as a mere irregularity or that a person affected by the enactment could not contest its validity on such ground." *Id*. at 506-07, 331 N.Y.S.2d at 55.

c Notice for Amended Proposed Enactment

Once a hearing has been held, amendment or modification of an initial proposal may be suggested. New notice and another public hearing are required if the new proposal varies substantially from the proposal considered at the original hearing. *See Village of Mill Neck v. Nolan*, 259 N.Y. 596, 182 N.E. 196 (1932); *Gernatt Asphalt Products v. Town of Sardinia*, 208 A.D.2d 139, 622 N.Y.S.2d 395 (4th Dept. 1995), *rev'd on other grounds*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996); *Callanan Road Improvement Company v. Town of Newburgh*, 6 Misc.2d 1071, 167 N.Y.S.2d 780 (Sup. Ct. Ulster Co. 1957), *aff'd* 5 A.D.2d 1003, 173 N.Y.S.2d 780 (2d Dept. 1958); *Schaus v. Town Board of the Town of Clifton Park*, 83 Misc.2d 726, 372 N.Y.S.2d 952 (Sup. Ct. Saratoga Co. 1975).

A number of decisions have concluded that a zoning law may be amended without an additional public hearing or notice when an amendment is substantially the same as one recently adopted and rescinded. *See Caruso v. Town of Oyster Bay*, 250 A.D.2d 639, 672 N.Y.S.2d 418 (2d Dept. 1998); *Marcus v. Village of Spring Valley*, 24 A.D.2d 1021, 265 N.Y.S.2d 985 (2d Dept. 1965); *Iannarone v. Caso*, 59 Misc.2d 212, 298 N.Y.S.2d 350 (Sup. Ct. Nassau Co. 1969), *aff'd*, 33 A.D.2d 658, 306 N.Y.S.2d 404 (2d Dept. 1969), *appeal denied*, 26 N.Y.2d 610, 309 N.Y.S.2d 1027, 258 N.E.2d 103 (1970).

In *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996), the Court of Appeals analyzed in detail when addition notice is required. Amendments were proposed and noticed for a public hearing to repeal provisions which permitted mines in the town as a matter of right and which required town board approval for excavation. The proposal also sought to amend the zoning ordinance to permit quarries as a special permit use, but only with respect to sites previously approved by the State Department of Environmental Conservation ("DEC"). After the close of the hearing, the town board adopted the portion of the proposal which affected the foregoing repeals. However, the board tabled that portion of the amendment which would have allowed mines previously approved by the DEC as special permit uses.

The notice in *Gernatt Asphalt* advised the public that the amendments would delete the foregoing two provisions, thereby eliminating mining as a permitted use anywhere within the town. The notice further provided that a new section entitled "Special Use Permits for Certain Mines" would designate those mines permitted by the Mined Land Reclamation Law ("MLRL") and in operation at the time of adoption of the new section as permissible special permit uses in the district in which they were located.

In assessing the validity of the board's action without having renoticed the matter for a public hearing, the Court of Appeals reaffirmed the principle that "[t]he sufficiency of the notice is tested by whether it fairly apprises the public of the fundamental character of the proposed zoning change." *Id*. at 678, 642 N.Y.S.2d at 170, 664 N.E.2d at 1232. A notice which describes a proposed change "with reasonable precision" satisfies the notice requirement. *Id*. When a change is proposed subsequent to publication of the notice, "where the amendment as adopted is embraced within the public notice, the notice has satisfied its purpose of alerting the public to potential and contemplated revisions of the local ordinance, and the notice will generally be deemed sufficient." *Id*. at 679, 642 N.Y.S.2d at 170, 664 N.E.2d at 1232.

The Appellate Division had determined that the legislation had been invalidly enacted in that:

the proposed Special Use Permit Amendments were indeed different from the adopted Prohibition of Mining Amendments. Whereas the former would have generally banned mining in the Town but for permissible uses in certain districts subject to special use permit requirements, the latter succinctly and completely banned mining throughout the Town. Accordingly, Supreme Court should have annulled the adopted amendments, inasmuch as interested parties such as Gernatt neither had proper notice of those amendments nor an opportunity to debate them at a public hearing. It was manifestly unfair for the Town to ban all mining ... when it had appeared that nonconforming uses could be maintained by special use permits.

Gernatt Asphalt Products v. Town of Sardinia, 208 A.D.2d 139, 145, 622 N.Y.S.2d 395, 398-99 (4th Dept. 1995), *rev'd*, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996).

However, the Court of Appeals reversed, essentially finding that no effective difference existed between the proposed amendments and the ones adopted. The court found that the only difference between the two versions related to the status of currently operating mines. While existing mines became nonconforming uses pursuant to the version adopted, they would have constituted special permit uses under the initial proposal. Second, in any event, new mining would not have been allowed in the town under the initial proposed law, since it would have authorized special permits only for existing, approved mines. The court concluded that the public had been sufficiently advised that "three separate, though related, amendments were contemplated." 87 N.Y.2d at 679, 642 N.Y.S.2d at 171, 664 N.E.2d at 1233. In the opinion of the court, the notice was neither inaccurate nor misleading.

The court also concluded that because the county and town planning boards had received notice of the proposed amendments, it was not necessary to again refer the revised proposal to the respective planning boards pursuant to General Municipal Law § 239-m and the referral provisions of the local zoning law. The Court of Appeals opined that "[t]he only functional difference between the amendments as proposed and as enacted related to the legal status of the currently operating mine sites. While the legal status of the existing mine sites was significant to the landowner and the Town Board, it was of little relevance to traffic, population density, community appearance and facilities, and other matters within the domain and concern of the Planning Boards." *Id*. at 680, 642 N.Y.S.2d at 171, 664 N.E.2d at 1233.

The *Gernatt Asphalt* decision does not diminish the mandate of strict compliance with the notice requirements for zoning amendments. The difference between the Appellate Division and Court of Appeals decisions rests upon differing views of the facts and conflicting interpretations of the effect of the proposed laws. The Appellate Division rigorously applied the black letter law in that there was indeed a significant change in the text of the law. However, the Court of Appeals construed the adopted law as having no practical difference from the one initially proposed. In effect the courts arrived at differing views as to the substantiality of the change. Of course, despite the Court of Appeals' lack of credence in the difference in the status of the properties subject to the law, whether a use is classified as a special permit use or a nonconforming use may result in significantly different impacts for the property owner, even considering the unusual case law applicable to the expansion of nonconforming mines, *see e.g.*, *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 434 N.Y.S.2d 150, 414 N.E.2d 651 (1980).

In *Benson Point Realty Corp. v. Town of East Hampton*, 62 A.D.3d 989, 880 N.Y.S.2d 144 (2d Dept.), *lv. dismissed*, 13 N.Y.3d 788, 887 N.Y.S.2d 537, 916 N.E.2d 431 (2009), the petitioner had applied to the planning board to subdivide into nine lots its 13-acre parcel, located in a residential district requiring a minimum lot size of one acre. While the application was pending, the town board adopted a draft comprehensive plan and draft generic Environmental Impact Statement ("EIS") regarding a town-wide reclassification of properties which suggested that the petitioner's property be rezoned to a minimum lot size of five acres. The petitioner received timely notice of the proposed rezoning and of the public hearing, and submitted a letter objecting to the proposed amendment and suggesting that its property be rezoned to require a minimum lot size of two acres. The generic Final Environmental Impact Statement responded to the petitioner's comments and recommended that its property be rezoned to a designation requiring a minimum lot size of three acres, and the three-acre designation subsequently was adopted as a part of the zoning revisions. The petitioner challenged the amendments contending that the town had failed to comply with the notice requirements of Town Law § 264 and of the zoning law, and that it had not complied with General Municipal Law § 239-m.

The court observed that notice of a public hearing on a proposed zoning amendment must "fairly apprise the public

of the fundamental character of the proposed change [and] not mislead interested parties into foregoing attendance at the public hearing." *Benson Point Realty*, 62 A.D.3d at 991, 880 N.Y.S.2d at 146 (*quoting Gernatt Asphalt*, 87 N.Y.2d at 678, 642 N.Y.S.2d at 170, 664 N.E.2d at 1232). However, "[w]here changes are made to a proposed zoning amendment following the conclusion of a properly-noticed public hearing, new notice and another public hearing are not required if the 'amendment as adopted is embraced within the public notice' (citation omitted) or if the amendment as adopted is not substantially different from the amendment as noticed (citations omitted)." *Id.* at 991, 880 N.Y.S.2d at 146-47. Because, according to the court, the amendment rezoning petitioner's property from a minimum lot size of one-acre to three-acres was "embraced within the original notice," the adopted law did not substantially differ from the amendment as noticed. The court concluded that the town had complied with the notice requirements of Town Law § 264 because the town had modified the initially-proposed amendment based on the petitioner's objections and the provision adopted was more favorable to the petitioner's interests that that originally proposed.

In *Kuhn v. Town of Johnstown*, 248 A.D.2d 828, 669 N.Y.S.2d 757 (3d Dept. 1998), the local zoning law provided that "[w]here an amendment ... is proposed, the town clerk shall serve ... a notice ... at least 30 days prior to the date set for the public hearing to consider the proposed amendment(s). Said notice shall contain a description of the proposed change, including the existing zoning and the proposed change(s) together with a map depicting the properties whose zoning classification will be amended with the proposed changes noted thereon." The Appellate Division concluded in *Benson Point Realty* that the provision did not require the town to provide notice and a hearing on every modification to a proposed zoning amendment made after the conclusion of a properly-noticed public hearing. "Under the circumstances of this case, no purpose is served by requiring the Town to expend the resources to renotice the amendment and hold a new hearing since the Petitioner was fully aware of the nature of the proposed amendment and had ample opportunity to voice its objections." *Benson Point Realty*, 62 A.D.2d at 992, 880 N.Y.S.2d at 147.

d Waiver of Insufficient Notice by Appearance

Although not well settled, less than complete adherence to statutory notice requirements or the provision of notice to an incorrect municipal official may be considered to be an insubstantial error or to constitute a waiver of the defect if notice actually has been received, generally evidenced by an appearance at the hearing. *See Cipperley v. Town of East Greenbush*, 213 A.D.2d 933, 623 N.Y.S.2d 967 (3d Dept. 1995); *Avelli v. Town of Babylon*, 54 Misc.2d 662, 283 N.Y.S.2d 261 (Sup. Ct. Suffolk Co. 1967); *Brechner v. Village of Lake Success*, 25 Misc.2d 920, 208 N.Y.S.2d 365 (Sup. Ct. Nassau Co. 1960), *aff'd*, 14 A.D.2d 567, 218 N.Y.S.2d 1017 (2d Dept. 1961), *motion denied*, 11 N.Y.2d 875, 227 N.Y.S.2d 913, 182 N.E.2d 403, *appeal dismissed*, 11 N.Y.2d 929, 228 N.Y.S.2d 678, 183 N.E.2d 81 (1962) (Nassau County charter). "Objections raised at the particular hearing go a long way toward minimizing subsequent arguments based upon improper notice in the first place, the rationale being one of waiver through actual notice and action, against which a technical jurisdictional defect would serve no real purpose." *Avelli*, 54 Misc.2d at 665, 283 N.Y.S.2d at 265.

Although the decision in *McGrath v. Town Board of the Town of North Greenbush*, 254 A.D.2d 614, 678 N.Y.S.2d 834 (3d Dept. 1998), *lv. denied*, 93 N.Y.2d 803, 688 N.Y.S.2d 493, 710 N.E.2d 1092 (1999), fails to describe the applicable notice requirement violated or the nature of the breach, the court determined that since the petitioner had received actual notice of the proposed zoning amendment and had attended the public hearing, she was not aggrieved by claimed deficiencies in the published notice. The court further determined that, in any event, the notice was sufficient in that it "fairly apprise[d] the public of the fundamental character of the proposed zone change * * * [and did] not mislead interested parties into foregoing attendance at the public hearing." *Id.* at 617, 678 N.Y.S.2d at 837 (*quoting Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 678, 642 N.Y.S.2d 164, 170, 664 N.E.2d 1226, 1232 (1996)); *see also Interlaken Homeowners' Ass'n v. City of Saratoga Springs*, 267 A.D.2d 842, 846, 700 N.Y.S.2d 293, 297 (3d Dept. 1999).

In *John P. Krupski & Bros., Inc. v. Town Board of the Town of Southold*, 54 A.D.3d 899, 901, 864 N.Y.S.2d 149, 151 (2d Dept. 2008), the Second Department concluded that receipt of actual notice of the public hearing and appearance at the hearing on a proposed zone change constitute a waiver of the requirement that notice be given in strict accordance with the local zoning law (*citing Woodside Estates Civic Ass'n, Inc. v. Town of Brookhaven*, 105 A.D.2d 744, 481 N.Y.S.2d 178 (2d Dept. 1984)); *cf. Jones v. Zoning Board of Appeals of the Town of Oneonta*, 61 A.D.3d 1299, 879 N.Y.S.2d 592 (3d Dept. 2009).

While the case law unambiguously requires strict compliance with the notice requirements for zoning enactments and amendments, the decisions depict that in limited circumstances some degree of flexibility and common sense may be considered in reviewing allegations of insufficient notice. However, because the enactment of or amendment to a zoning law often has more far-reaching implications for a community than an individual land use application, intentional deviations or substantial breaches of the required procedures will be fatal to the validity of an enactment. Moreover, if an interested party can credibly assert a lack of notice or knowledge of a zoning enactment because of a failure of a municipality to comply with statutory or locally required notice requirements, invalidation will be the result. Lastly, although the few decisions mentioned above have excused strict compliance with the notice requirements under the guise of a waiver when the complaining party has received notice and appeared at a hearing on a zoning enactment, such a conclusion is not a foregone conclusion when dealing with zoning amendments and one cannot count on such judicial leniency.

III POST-ENACTMENT PROCEDURES

Town Law § 264(1) requires that the text of a zoning ordinance be entered in the minutes of the town board following its adoption. It is no longer necessary that a map which is the subject of a zoning enactment be entered in the minute book. However, any such map must be described and referred to in the minutes sufficiently so that it may be identified with certainty. The full text of a zoning law need not necessarily be physically printed in the minutes of the meeting at which a zoning regulation was adopted. At least in the absence of doubt as to the correctness of the text, it is sufficient if a copy of the zoning law is physically attached to or inserted in the minutes. *See Alscot Investing Corp. v. Laibach*, 109 A.D.2d 718, 486 N.Y.S.2d 37 (2d Dept. 1985), *aff'd*, 65 N.Y.2d 1042, 494 N.Y.S.2d 295, 484 N.E.2d 658 (1985); *Town of Schroeppel v. Spector*, 43 Misc.2d 290, 251 N.Y.S.2d 233 (Sup. Ct. Oswego Co. 1963) (*cf. Keeney v. Village of LeRoy*, 22 A.D.2d 159, 254 N.Y.S.2d 445 (4th Dept. 1964); *People v. Barry*, 32 Misc.2d 200, 228 N.Y.S.2d 106 (Albany Co. Ct. 1961)). The Court of Appeals has held that "[i]t would be sheer exaltation of form over substance to strike down an ordinance enacted within the legal jurisdiction of a legislative body, the text of which is not in dispute, which has been publicly on file and duly published and posted, merely because a clerk omitted to physically staple a copy promptly in the ordinance book which she must keep." *Northern Operating Corp. v. Town of Ramapo*, 26 N.Y.2d 404, 409, 311 N.Y.S.2d 286, 290, 259 N.E.2d 723, 726 (1970). Indeed, although contrary to the language of the statute and certainly not the recommended method of procedure, the courts have sustained zoning laws which have not been entered into the minute book, but have been on file and readily available in the clerk's office, at least if there is no question as to the accuracy of the text thereof. *See Village of Savona v. Soles*, 84 A.D.2d 683, 446 N.Y.S.2d 639 (4th Dept. 1981).

Supplanting the previous statutory requirement of publication of the entire text of a zoning ordinance following its adoption, Town Law § 264(1) merely requires the publication of a copy, summary or abstract thereof, excluding any map which may have been adopted therewith, in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate. The statute directs that an affidavit of publication be filed with the town clerk.

The filing of affidavits of compliance with the procedural prerequisites for adoption of zoning laws is considered to be an evidentiary matter and the failure to do so does not invalidate the approval of an otherwise valid zoning law. *See Coutant v. Town of Poughkeepsie*, 69 A.D.2d 506, 419 N.Y.S.2d 148 (2d Dept. 1979); *Town of Lima v. Robert Slocum Enterprises*, 38 A.D.2d 503, 331 N.Y.S.2d 51 (4th Dept. 1972). Pursuant to Town Law § 134, the filing of

affidavits by a town clerk certifying compliance with the required procedural steps constitutes presumptive evidence of proper publication, posting and adoption. *See People v. Hawk Sales Co.*, 17 N.Y.2d 504, 267 N.Y.S.2d 505, 214 N.E.2d 784 (1966); *Lobrutto v. Top Job Sanitation Co.*, 187 A.D.2d 853, 589 N.Y.S.2d 973 (3d Dept. 1992); *Scott v. Manillia*, 144 A.D.2d 1001, 534 N.Y.S.2d 621 (4th Dept. 1988), *appeal dismissed*, 73 N.Y.2d 917, 539 N.Y.S.2d 301, 536 N.E.2d 630 (1989). Such certification must be accepted as establishing proper passage unless a question of fact is established as to its proper passage. *See Scott v. Manillia*, 144 A.D.2d 1001, 534 N.Y.S.2d 621 (4th Dept. 1988), *appeal dismissed*, 73 N.Y.2d 917, 539 N.Y.S.2d 301, 536 N.E.2d 630 (1989).

If a town defaults in complying with the foregoing procedural requirements and the defect is considered to be substantial, the result is invalidation of the enactment and, if a zoning regulation was intended to repeal and replace an existing zoning law, the prior zoning provisions would again become effective. *See Lincoln Avenue Associates v. Town of Islip*, 96 A.D.2d 946, 466 N.Y.S.2d 399 (2d Dept. 1983); *Town of Lima v. Robert Slocum Enterprises*, 38 A.D.2d 503, 331 N.Y.S.2d 51 (4th Dept. 1972); *Vizzi v. Town of Islip*, 71 Misc.2d 483, 485, 336 N.Y.S.2d 520, 523 (Sup. Ct. Nassau Co. 1972); *Village of Island Park v. J.E.B. Associates*, 21 Misc.2d 249, 190 N.Y.S.2d 77 (Sup. Ct. Nassau Co. 1959).

In *Preble Aggregate Inc. v. Town of Preble*, 247 A.D.2d 697, 668 N.Y.S.2d 751 (3d Dept. 1998), prior to adopting a local law which prohibited mining in a designated area of the town, three amendments were made to the law. A supplemental map, which more clearly defined the new zone, was attached. An exemption was provided for previously permitted mines and a provision was added which provided that the local law would take effect immediately upon filing with the Secretary of State. The certified copy of the law local law filed with the Secretary of State pursuant to Municipal Home Rule Law § 27(3) failed to include the three amendments. The plaintiff challenged the validity of the amendment, contending that the clerical error in filing the original text of the local law without the complete and corrected text invalidated the enactment in its entirety.

The court sustained the validity of the local law since the attachment of a map and the inclusion of the effective date were considered to be inconsequential. The text and map which were filed sufficiently identified the area in which mining was prohibited so that the supplemental map was superfluous. The failure to include an effective date in the filed law invoked the provisions of Municipal Home Rule Law § 27(4) which provides for an effective date of 20 days after filing if no effective date is specified. Lastly, examining the consequences of the failure to include the "grandfather" provision, the court concluded that its omission was of no consequence since no property owner possessed a mining permit which would entitle it to an exemption.

Consequently, the court viewed the plaintiff's contentions as technical, at best, and insufficient to invalidate the local law. The court also found that the failure to file the local law with the amendments was not so substantial a defect as to frustrate the policy underlying the filing requirements of Municipal Home Rule Law § 27(3) so as to prejudice the public or a party. Because the public received notice of the existence and general contents of the law, the plaintiff was not prejudiced by the "technical" error.

The *Preble Aggregate* decision evidences a judicial philosophy amenable to excusing technical and inconsequential errors and to looking, not exclusively at the face of apparent noncompliance, but at the actual effect of a procedural oversight. However, such a deferential judicial approach cannot be counted on, particularly if a party can credibly assert prejudice or subterfuge.

IV ADDITIONAL NOTICE PURSUANT TO ZONING LAW

The procedures set forth in Town Law § 264 are the minimum prerequisite requirements for adoption of zoning regulations. As is frequently the case, a local zoning law may provide for additional requirements for the adoption

of zoning regulations. For example, the customary requirement that a proposed amendment be referred to a town's planning board for a recommendation does not originate in the Town Law, but may be dictated by a town's zoning law. Similarly, posting and additional notice to property owners within a specified distance of property affected by a proposed zoning amendment may be imposed by local regulations. A failure to comply with such additionally required local procedures will result in invalidation of the action. *See Dalrymple Gravel and Contracting Co. v. Town of Erwin*, 305 A.D.2d 1036, 758 N.Y.S.2d 755 (4th Dept. 2003); *Kuhn v. Town of Johnstown*, 248 A.D.2d 828, 830, 669 N.Y.S.2d 757, 759 (3d Dept. 1998); *Cipperley v. Town of East Greenbush*, 213 A.D.2d 933, 934, 623 N.Y.S.2d 967, 968 (3d Dept. 1995).

If a zoning law requires the mailing of notices to property owners within a certain distance of property subject to a zone change petition, the use of a town's assessment rolls to ascertain the identity of property owners is constitutionally adequate. *See Anthony v. Town of Brookhaven*, 190 A.D.2d 21, 596 N.Y.S.2d 459 (2d Dept.), *appeal dismissed*, 82 N.Y.2d 747, 602 N.Y.S.2d 805, 622 N.E.2d 306 (1993).

V MUNICIPAL HOME RULE LAW

Although towns primarily rely on the authority and procedures of Town Law §§ 264 and 265, towns are not confined to the authority contained in those sections in enacting zoning regulations. The provisions of the Municipal Home Rule Law and the Statute of Local Governments provide an alternate basis of authority and different procedural requirements for the enactment of zoning local laws. A town may validly enact zoning regulations by local law pursuant to the Municipal Home Rule Law, rather than Town Law § 264. *See Yoga Society of New York v. Town of Monroe*, 56 A.D.2d 842, 392 N.Y.S.2d 81 (2d Dept. 1977); *Schilling v. Dunne*, 119 A.D.2d 179, 506 N.Y.S.2d 179 (2d Dept. 1986); *Village of Savona v. Soles*, 84 A.D.2d 683, 446 N.Y.S.2d 639 (2d Dept. 1981). Municipal Home Rule Law §§ 10(1)(ii)(a)(12), 10(1)(ii)(a)(14) and 10(1)(ii)(d)(3) have been construed to authorize towns to adopt zoning local laws. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144, 547 N.E.2d 346 (1989); *Sherman v. Fraizer*, 84 A.D.2d 401, 446 N.Y.S.2d 372 (2d Dept. 1982); *Schilling v. Dunne*, 119 A.D.2d 179, 506 N.Y.S.2d 179 (2d Dept. 1986); *Weinstein Enterprises v. Town of Kent*, 135 A.D.2d 625, 522 N.Y.S.2d 204 (2d Dept. 1987), *appeal denied*, 72 N.Y.2d 801, 530 N.Y.S.2d 553, 526 N.E.2d 44 (1988).

Moreover, the Municipal Home Rule Law permits towns to act in ways that are not specifically authorized by the provisions of article 16 of the Town Law. Municipal Home Rule Law § 10(1)(ii)(d)(3) authorizes towns to amend or supersede the application of provisions of the Town Law in relation to various matters, which generally include zoning enactments. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144, 547 N.E.2d 346 (1989); *Sherman v. Frazier*, 84 A.D.2d 401, 446 N.Y.S.2d 372 (2d Dept. 1982); *Schilling v. Dunne*, 119 A.D.2d 179, 506 N.Y.S.2d 179 (2d Dept. 1986).

The provision authorizing supersession of the Town Law has been held to authorize numerous imaginative local enactments which tailor zoning laws to the peculiar needs of a community and which supplant the often archaic or insufficient provisions of the zoning enabling legislation. For example, the utilization of the supersession provision of the Municipal Home Rule was sanctioned to create a "Two-Family Review Board" in *Sherman v. Frazier*, 84 A.D.2d 401, 446 N.Y.S.2d 372 (2d Dept. 1982), for the purpose of entertaining special permit applications for the conversion of single-family dwellings into two-family dwellings and to legalize those previously converted illegally. *See also Torsoe Brothers Construction Corp. v. Architectural and Community Appearance Board of the Review Board of the Town of Orangetown*, 120 A.D.2d 738, 502 N.Y.S.2d 787 (2d Dept. 1986). (Village Law § 7-725-b now permits a board of trustees to authorize the planning board "or such other administrative body that it shall designate" to grant special permits.) The potentially broad scope of such suppression authority was recognized in *North Bay Associates v. Hope*, 116 A.D.2d 704, 497 N.Y.S.2d 757 (2d Dept.), *lv. denied*, 68 N.Y.2d 603, 506 N.Y.S.2d 1026, 497 N.E.2d 706 (1986), wherein the court affirmed the validity of a local law which authorized a town board to adopt zoning regulations by a simple majority despite the filing of an appropriate protest petition pursuant to Town Law § 265(1). Moreover, the enactment of zoning regulations allegedly not in compliance with a

comprehensive plan was sustained because of the suppression authority in *Sherman* and *Weinstein Enterprises v. Town of Kent*, 135 A.D.2d 625, 522 N.Y.S.2d 204 (2d Dept. 1987), *appeal denied*, 72 N.Y.2d 801, 530 N.Y.S.2d 553, 526 N.E.2d 44 (1988).

When a zoning local law is enacted pursuant to the Municipal Home Rule Law, the publication and posting requirements of Town Law § 264 need not be complied with. *See Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 84, 841 N.Y.S.2d 321, 331 (2d Dept. 2007) (The grant of authority pursuant to the Municipal Home Rule Law "includes the authority to adopt zoning changes by local law, without regard to the procedures required by the Town Law."); *Village of Savona v. Soles*, 84 A.D.2d 683, 446 N.Y.S.2d 639 (4th Dept. 1981). Similarly, if the Municipal Home Rule Law is utilized as the source of authority instead of the Town Law, compliance with the requirement of Town Law § 264(2), discussed above, that adjoining municipalities receive notice of the public hearing, is unnecessary. *See Dalrymple Gravel and Contracting Co. v. Town of Erwin*, 305 A.D.2d 1036, 758 N.Y.S.2d 755 (4th Dept. 2003); *Pete Drown, Inc. v. Town Board of the Town of Ellenburg*, 229 A.D.2d 877, 646 N.Y.S.2d 205 (3d Dept.) , *lv. denied*, 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 (1996). However, the procedural requirements of § 20 of the Municipal Home Rule Law must be fulfilled. To comply with the requirements of Municipal Home Rule Law § 20, a public hearing on a proposed local law must be held on five days published notice or, if a local law so providing has been adopted, three days notice. *See* Municipal Home Rule Law § 20(5). Other requirements regarding procedures and form are set forth in § 20 of the Municipal Home Rule Law. Significantly, a local law which intends to utilize the supersession authority of Municipal Home Rule Law § 10(1)(ii)(e)(3) must specifically recite the section, subsection and clause of the Town Law which it seeks to amend or supersede and must unambiguously declare its intent to do so. *See* Municipal Home Rule Law § 22(1); *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144, 547 N.E.2d 346 (1989); *Turnpike Woods v. Town of Stony Point*, 70 N.Y.2d 735, 519 N.Y.S.2d 960, 514 N.E.2d 380 (1987). Indeed, as *Kamhi* and *Turnpike Woods* illustrate, it is advisable, if not mandatory, to set forth the text of the provisions of the Town Law sought to be amended or superseded in any local law exercising the suppression authority.

VI MUNICIPAL STANDING

Both statute and case law had for many decades apparently precluded an adjoining municipality from challenging the zoning decisions of its neighboring communities. Indeed, Town Law § 264(4), pertaining to the adoption of zoning regulations, explicitly provides that "[t]he public, including those served notice pursuant to subdivision two of this section, shall have an opportunity to be heard at the public hearing. Those parties set forth in paragraphs (a), (b), (c) and (d) of subdivision two of this section, however, shall not have the right of review by a court as hereinafter provided." Nevertheless, in a lengthy decision, the Second Department determined in *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 841 N.Y.S.2d 321, (2d Dept. 2007), *lv. dismissed*, 12 N.Y.3d 793, 879 N.Y.S.2d 38, 39, 906 N.E.2d 1072 (2009), *lv. dismissed*, 15 N.Y.3d 817, 908 N.Y.S.2d 149, 934 N.E.2d 882 (2010), that villages within the town possessed the capacity and standing to challenge certain aspects of town zoning amendments which rezoned parcels adjacent to the villages despite an identical prohibition in Town Law § 264(4).

In *Village of Chestnut Ridge*, four villages located within the town challenged the town's enactment of a zoning amendment permitting adult student housing as a special permit use in certain residential zones adjacent to the four petitioner villages. The petition alleged that the town failed to comply with SEQRA in adopting the zoning law and comprehensive plan; that the zoning constituted impermissible spot zoning; that the procedures employed did not comply with the Municipal Home Rule Law and the General Municipal Law; and that the town had discriminated on the basis of familial status because of the exclusion of unmarried adult student housing from the new zoning district. Supreme Court granted the respondents' motion to dismiss the petition/complaint, finding that the villages did not have legal capacity to sue and lacked standing.

Supreme Court had concluded that Town Law § 264 deprived the villages of capacity to sue the town based on its

zoning and SEQRA determinations. However, in reversing that conclusion, the Appellate Division first reiterated the principle that capacity to sue can be derived from an express statutory grant or, in the absence of statutory authority, can be inferred where the power to sue and be sued is a necessary incident of an entity's responsibilities. In the absence of explicit statutory authority and where authority is not necessarily implied from an entity's other essential powers, capacity is lacking. "Being artificial creatures of statute, [governmental] entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate" *Id*. at 80, 841 N.Y.S.2d at 328 (*quoting Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155-156, 615 N.Y.S.2d 644, 647, 639 N.E.2d 1, 5 (1994)). The decision concluded that the necessary statutory predicate is provided by an express grant of legislative authority in Village Law § 1-102(5), which authorizes villages "to sue and be sued, to complain and defend and to institute, prosecute, maintain, defend and intervene in, any action or proceeding in any court."

Nevertheless, even where the Legislature has conferred capacity to sue, it may rescind it in particular areas. "A general power to sue necessarily yields to a 'clear legislative intent negating review.' " *Id*. (*quoting Community Board 7*, 84 N.Y.2d at 156, 615 N.Y.S.2d at 647, 639 N.E.2d at 4). The respondents asserted that Town Law § 264, which specifically provides that an adjoining municipality "shall not have the right of review by a court as hereinafter provided," is a legislative revocation of standing. The court noted that although statutory language expressly depriving a party of a right of judicial review apparently raises an issue of capacity, the Court of Appeals has addressed the corresponding provision of Village Law § 7-706(3) as raising an issue of standing. *See Town of North Hempstead v. Village of North Hills*, 38 N.Y.2d 334, 379 N.Y.S.2d 792, 342 N.E.2d 566 (1975). Consequently, the court opined that Town Law § 264(4) may be germane in addressing the issue of the villages' standing, but does not restrict their capacity to sue as a consequence of the authorization of Village Law § 1-102(5).

The legislative history of Town Law § 264(4) evidences a clear legislative intent that zoning amendments made pursuant to the Town Law be insulated from judicial review instituted by neighboring municipalities. However, the court opined that Town Law § 264(4) was not controlling because, it believed, the amendment was not a product of the town's authority under Town Law § 264, but was, instead, adopted pursuant to the Municipal Home Rule Law.

Rather, the adult student housing law ... was, as its name implies, adopted as a local law pursuant to the authority provided by the Municipal Home Rule Law (*see* Municipal Home Rule Law § 20). To hold that the Villages' claims with respect to the adult student housing law are barred by Town Law § 264(4) would thus require not merely that we enforce the statutory bar and adhere to its interpretation as established by the Court of Appeals, as is our obligation, but that we extend the effect of the statute to preclude all claims by one municipality with respect to the zoning enactments of its neighbors, without regard to the source of the authority by which that action is taken. Moreover, even if we were to conclude that the restriction imposed by Town Law § 264(4) applies to judicial review of a local law adopted pursuant to the Municipal Home Rule Law, we would further have to hold, in order to reach the result urged by the defendants, that the statute bars review of statutory claims, including claims under SEQRA, that did not exist at the time when Town Law § 264(4) was adopted. We conclude that such an extension of its effect is not warranted.

Village of Chestnut Ridge, 45 A.D.3d at 83-84, 841 N.Y.S.2d at 331.

The court related that despite the expansive, preclusive scope of Town Law § 264(4), the Court of Appeals determined in *Town of North Hempstead v. Village of North Hills*, *supra*, that the prohibition imposed by Town Law § 264 is not absolute and must yield when a contrary legislative intent is apparent. Although neither the Municipal Home Rule Law nor the statutes upon which the villages' causes of action were predicated expressly accorded standing to an adjoining municipality to challenge the adoption of a "local law," the court concluded that their history and purpose provide a basis for inferring such a legislative intent.

According to the court, the case for refusing to extend the prohibition of Town Law § 264(4) to SEQRA claims is more compelling. By defining the term "agency" to include the governing body of any political subdivision of the state, *see* ECL § 8-0105(1), and the term "action" to include any project or activity "directly undertaken by any agency," *see* ECL § 8-0105(4)(i), or "involving the issuance to a person of a ... permit," *see* ECL § 8-0105(4)(i), SEQRA applies to most local zoning determinations. See 6 NYCRR 617.1(c). The court noted that SEQRA does not expressly define the role of neighboring municipalities in the SEQRA review process. The SEQRA regulations define an "involved agency" as "an agency that has jurisdiction by law to fund, approve or directly undertake an action," *see* 6 NYCRR 617.2(s), and an "interested agency," as "an agency that lacks the jurisdiction to fund, approve or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action." *See* 6 NYCRR 617.2(t). The regulations do not authorize an interested agency to seek judicial review of a SEQRA determination. However, the regulations provide that "[a]n 'interested agency' has the same ability to participate in the review process as a member of the public." *Id*. Based on those provisions, the court opined that such "ability to participate, of course, includes the right, in accordance with the applicable principles of the doctrine of standing, to seek judicial review of the SEQRA determination. SEQRA thus contemplates that an adjoining municipality that has a concern about an action would have the same right to judicial review as any other interested party." *Village of Chestnut Ridge*, 45 A.D.3d at 86, 841 N.Y.S.2d at 333. The court concluded that the bar to judicial review of zoning amendments by adjoining municipalities established by Town Law § 264(4) does not apply to challenges under SEQRA, and that the right of a municipality to challenge the acts of its neighbors must be determined on the basis of the same rules of standing that apply to litigants generally.

With respect to standing, the appropriate inquiry is whether, "the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute" *Id*. (*quoting Gernatt Asphalt Products. v. Town of Sardinia*, 87 N.Y.2d 668, 687, 642 N.Y.S.2d 164, 177, 664 N.E.2d 1226, 1238 (1996)). The court concluded that the villages possessed standing to assert the SEQRA and General Municipal Law § 239-m claims with respect to the adoption of the adult student housing law and the revised comprehensive zoning law.

"To establish standing under SEQRA, the petitioners must show (1) that they will suffer an environmental 'injury that is in some way different from that of the public at large,' and (2) that the alleged injury falls within the zone of interest sought to be protected or promoted by SEQRA." *Id.* at 89-90, 841 N.Y.S.2d at 335 (*quoting Barrett v. Dutchess County Legislature*, 38 A.D.3d 651, 653, 831 N.Y.S.2d 540, 543 (2d Dept. 2007)). Although an inference of proximity may support the standing of an individual or non-governmental entity, proximity does not support municipal standing. The court related that:

> The residents near a road that will receive substantial additional traffic from a significant development, or the neighbors of an industrial facility that will give rise to smoke or noise, are clearly affected directly by those impacts in a way that others are not (citations omitted). A municipality, however, does not suffer from that traffic or noise in the same way. A municipality, as such, neither breathes foul air, nor hears loud noises, nor waits in traffic. As a result, since a municipality is limited to asserting rights that are its own (citation omitted), and is not permitted to assert the collective individual rights of its residents (citations omitted), it cannot be presumed to have suffered environmental injury by reason of its proximity to the source of the impacts. A municipality thus cannot establish its standing merely on that basis.

Id. at 91, 841 N.Y.S.2d at 336.

However, the court opined that although a municipality is not presumed to suffer environmental injury in the same way as an individual, it may possess standing in an appropriate case where it has "a demonstrated interest in the potential environmental impacts of the project." *Id*. at 91, 841 N.Y.S.2d at 336 (*quoting Town of Babylon v. New York State Dept. of Transportation*, 33 A.D.3d 617, 618-619, 822 N.Y.S.2d 138, 140 (2d Dept. 2006), *lv. denied*, 8

N.Y.3d 302, 830 N.Y.S.2d 698, 862 N.E.2d 790 (2007)). A municipality that has permitting authority, that is, an involved agency, possesses standing to challenge a SEQRA determination. However, the court related that direct authority over an application is not necessarily required. Municipalities may have interests to protect such as property interests (*citing Town of Riverhead v. New York State Department of Environmental Conservation*, 193 A.D.2d 667, 669, 598 N.Y.S.2d 14, 16 (2d Dept. 1993); *Town of Coeymans v. City of Albany*, 284 A.D.2d 830, 728 N.Y.S.2d 797 (3d Dept.), *lv. denied*, 97 N.Y.2d 602, 735 N.Y.S.2d 491, 760 N.E.2d 1287 (2001)).

The petition alleged that land use in the villages primarily consists of low to medium density residential dwellings and that significant parcels of land adjoining the villages could be developed pursuant to the challenged law. The petition also asserted that the villages share much of their infrastructure with the town and that development under the adult student housing law will generate substantial increases in water and sewage system usage and traffic. Those allegations were found to be insufficient to establish a property interest because the villages themselves do not own or otherwise have responsibility for these facilities.

However, the court opined that "a municipality is more than the collection of pavement, pipes, and other improvements that make up its infrastructure." *Id*. at 93, 841 N.Y.S.2d at 338. Instead, it possesses broad authority, including a broad array of powers with respect to the nature of the community, including the power to protect and enhance the physical and visual environment and to enact zoning regulations. "It is through the exercise of these powers that they define the character of the community for the benefit of its residents." *Id*. (*citing Curtiss-Wright Corp. v. Town of East Hampton*, 82 A.D.2d 551, 556, 442 N.Y.S.2d 125, 129 (2d Dept. 1981)). Community character is one of the concerns protected by SEQRA. In addition, "Environment," is defined as including "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL § 8-0105(6). The criteria by which the significance of an action is determined include "the creation of a material conflict with a community's current plans or goals as officially approved or adopted" and "the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character." 6 NYCRR 617.7(c)(1)(iv), (v)). "The impact that a project may have on ... existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis." *Id*. at 94, 841 N.Y.S.2d at 339 (*quoting Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 366, 509 N.Y.S.2d 499, 503, 502 N.E.2d 176, 180 (1986)).

The decision relates that "[t]he power to define the community character is a unique prerogative of a municipality acting in its governmental capacity. All of the other incidents of local government ... are ultimately aimed at determining and maintaining the community that its residents desire. It is the right to continue to exercise that authority which the Villages assert here, in the face of the potential threat posed by the town's action with respect to the property along the Villages' borders." *Id*. As a result, the court concluded that the villages alleged an interest in the potential environmental impacts of the adult student housing law sufficient to support standing to challenge its SEQRA compliance.

The court found that the villages did not possess standing to assert claims of noncompliance with the procedural requirements of the Municipal Home Rule Law. The purpose of the notice, hearing, voting, filing, and publication requirements of Municipal Home Rule Law § 20 is to ensure that when a town exercises the police power that has been granted to it, it does so in a manner that provides "a reasonable opportunity ... for the presentation to and consideration by the [town's board or] council of complete data and arguments for and against the proposed local law." *Id*. (*quoting Martin v. Flynn*, 19 A.D.2d 653, 654, 241 N.Y.S.2d 883, 885 (2d Dept. 1963)). The village petitioners possessed no cognizable interest in the town board's compliance with its comprehensive plan or the procedural requirements of Municipal Home Rule Law § 20.

Because the purpose of General Municipal Law § 239-m is to "bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and

agencies having jurisdiction" (General Municipal Law § 239-l) and by so doing to facilitate regional review of land use proposals that may be of regional concern, the villages were found to possess standing to allege violation of General Municipal Law § 239-m. The villages also were found to lack the requisite personal interest to raise an equal protection or due process claim.

Whether couched in terms of capacity or standing, the court concluded that the legislative exclusion of the right of a municipality to challenge the legislative determinations of an adjoining municipality found in Town Law § 264 was inapplicable because the town had adopted the amendment by local law, purportedly pursuant to the Municipal Home Rule Law. Although an issue exists as to whether a municipality need exclusively depend on the provisions of the Municipal Home Rule Law in adopting a local law pursuant to Town Law § 264, a municipality cannot act pursuant to the Municipal Home Rule Law if the legislature has evidenced its intent to preempt the field. *See Jancyn Manufacturing Corp. v. County of Suffolk*, 71 N.Y.2d 91, 524 N.Y.S.2d 8, 518 N.E.2d 903 (1987). Regardless of the source of a town or village's authority, it would seem that Village Law § 7-706(3) and Town Law § 264(4) represent a clear legislative declaration that an adjoining community may not institute a judicial challenge to the legislative land use decisions of its neighbors. Moreover, in according standing to an adjoining municipality based on its interest in the "character of the community," the decision does not credit the consistent body of case law that a plaintiff must demonstrate that it would suffer direct harm and an injury that is in some way different from that of the public at large. *See Society of the Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761, 774, 570 N.Y.S.2d 778, 785, 573 N.E.2d 1034, 1041-42 (1991); *Mobil Oil Corp. v. Syracuse Indus. Development Agency*, 76 N.Y.2d 428, 559 N.Y.S.2d 947, 559 N.E.2d 641 (1990); *Sun-Brite Car Wash v. Board of Zoning & Appeals of the Town of North Hempstead*, 69 N.Y.2d 406, 413, 515 N.Y.S.2d 418, 421, 508 N.E.2d 130, 133 (1987); *Little Joseph Realty v. Town of Babylon*, 41 N.Y.2d 738, 741-742, 395 N.Y.S.2d 428, 431, 363 N.E.2d 1163, 1166 (1977); *Cord Meyer Development Co. v. Bell Bay Drugs*, 20 N.Y.2d 211, 216, 282 N.Y.S.2d 259, 263, 229 N.E.2d 44, 47, *reargument denied*, 20 N.Y.2d 970, 286 N.Y.S.2d 1027, 233 N.E.2d 863 (1967).

Similarly, in *Village of Pomona v. Town of Ramapo*, 94 A.D.3d 1103, 943 N.Y.S.2d 146 (2d Dept. 2012), although concluding that the village lacked standing to assert spot zoning and lack of compliance with the town's comprehensive plan in the adoption of a zoning amendment, the court found that the village had standing to assert its SEQRA claims and claim of insufficient compliance with General Municipal Law § 239-m. The challenged local law amended the town's zoning map by changing the zoning designation of a portion of a parcel of property along the town-village border from R-40, which permits only single-family residences on lots with a minimum area of 40,000 square feet, to MR-8, which permits multi-family dwellings of eight units per acre.

The Appellate Division confirmed that the village did not have standing to assert the claims that the rezoning constituted improper and unconstitutional spot zoning that was inconsistent with the town's comprehensive plan. Villages " 'have no interest in [a] Town Board's compliance with ... its comprehensive plan,' since, unlike individuals who reside within the Town, '[villages] are beyond the bounds of the mutuality of restriction and benefit that underlies the comprehensive plan requirement." *Village of Pomona*, 94 A.D.3d at 1104, 943 N.Y.S.2d at 149 (*quoting Village of Chestnut Ridge*, 45 A.D.3d at 88, 841 N.Y.S.2d at 334).

The Appellate Division also concluded that the claim that the rezoning violated General Municipal Law § 239-nn also was properly dismissed. That provision provides that a legislative body having jurisdiction must provide notice to an adjacent municipality of hearings regarding various proposed zoning actions affecting land located within five hundred feet of the adjacent municipality, and that "[s]uch adjacent municipality may appear and be heard" at the hearings. General Municipal Law § 239-nn(5); *see also* General Municipal Law § 239-nn(3). The objective of the statute is to provide "an opportunity for abutting municipalities to participate in a public hearing held by the municipality [undertaking planning and zoning actions which may impact on those neighboring municipalities] and provide their input on the proposed planning or zoning action [so as to] encourage intergovernmental cooperation and area planning for land use among neighboring municipalities in New York state." *Village of Pomona*, 94 A.D.3d at 1105, 943 N.Y.S.2d at 149 (*quoting* Senate Introducer Mem. in Support, Bill Jacket, L.2005, ch. 658, at

3). Notice had been provided to the village and it participated in the public hearings on the zoning amendment. The claim was properly dismissed because the statute does not create a right of action based on an alleged disregard of the public policy of encouragement of the spirit of cooperation articulated in the statute.

However, the court found that the village possessed standing to assert a claim pursuant to SEQRA. "To establish standing under SEQRA, the petitioner[ ] must show (1) that [it] will suffer an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interest sought to be protected or promoted by SEQRA." *Village of Pomona*, 94 A.D.3d at 1105, 943 N.Y.S.2d at 150 (*quoting Village of Chestnut Ridge*, 45 A.D.3d at 89-90, 841 N.Y.S.2d at 335). "[V]illages may have standing to sue in appropriate cases ... where they have a demonstrated interest in the potential environmental impacts of the project." *Id*. (*quoting Village of Chestnut Ridge*, 45 A.D.3d at 91, 841 N.Y.S.2d at 336). Such a "demonstrated interest" sufficient to give a municipality SEQRA standing may be established based on a potential threat to community character. *Id*. The court reiterated the holding of *Village of Chestnut Ridge* that "community character" is specifically protected by SEQRA. Consequently, according to the Appellate Division, "[t]he power to define the community character is a unique prerogative of a municipality acting in its governmental capacity ... Substantial development in an adjoining municipality can have a significant detrimental impact on the character of a community ... thereby limiting the ability of the affected municipality to determine its community character." *Id*. at 1106, 943 N.Y.S.2d at 150 (*quoting Village of Chestnut Ridge*, 45 A.D.3d at 94-95, 841 N.Y.S.2d at 339). The court concluded that the village established an interest in the potential environmental impacts of the town's rezoning law sufficient to give it SEQRA standing.

The court further determined that the village possessed standing to assert a violation of General Municipal Law § 239-m. The purpose of the statute is to " 'bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction' (General Municipal Law § 239-l[2]) and by so doing to facilitate regional review of land use proposals that may be of regional concern." *Village of Pomona*, 94 A.D.3d at 1108, 943 N.Y.S.2d at 151 (*quoting Village of Chestnut Ridge*, 45 A.D.3d at 88-89, 841 N.Y.S.2d at 334).

VII DISCRETION TO CONSIDER ZONING AMENDMENT PETITION

A petition seeking to amend a town's zoning law is addressed to the legislative discretion of the town board. *See Norman v. Town Board of the Town of Orangetown*, 118 A.D.2d 839, 500 N.Y.S.2d 324 (2d Dept. 1986); *Southern Dutchess Country Club v. Town Board of the Town of Fishkill*, 25 A.D.2d 866, 270 N.Y.S.2d 165 (2d Dept.), *aff'd*, 18 N.Y.2d 870, 276 N.Y.S.2d 121, 222 N.E.2d 739 (1966). As a result, a town board is not required to consider or vote on a zone change petition. *See Structural Technology, Inc. v. Foley*, 56 A.D.3d 677, 678, 868 N.Y.S.2d 228, 229 (2d Dept. 2008); *Wolff v. Town/Village of Harrison*, 30 A.D.3d 432, 816 N.Y.S.2d 186 (2d Dept. 2006); *Society of New York Hospital v. Del Vecchio*, 123 A.D.2d 384, 506 N.Y.S.2d 596 (2d Dept. 1986), *aff'd*, 70 N.Y.2d 634, 518 N.Y.S.2d 781, 512 N.E.2d 302 (1987).

A mandamus proceeding to compel a board or official to act is cognizable only to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought. *See Klostermann v. Cuomo*, 61 N.Y.2d 525, 539, 475 N.Y.S.2d 247, 254, 463 N.E.2d 588, 595 (1984); *Wolff v. Town/Village of Harrison*, 30 A.D.3d 432, 816 N.Y.S.2d 186 (2d Dept. 2006). Because an amendment to a zoning law is a purely legislative function, a town board possesses the discretion not to entertain or act upon a zone change petition and, as a result, mandamus does not lie to compel it to act.

VIII STATUTE OF LIMITATIONS

The time within which to challenge a zoning enactment generally is determined by whether the issue relates to a procedural or substantive issue. However, the applicable statute of limitations for challenging an amendment enacted after inadequate notice is less clear.

a. Substantive Complaints

Because a zoning enactment or amendment is legislative in nature, a declaratory judgment action is the proper vehicle to challenge the substance of the enactment, as opposed to claimed procedural irregularities, for which a six-year statute of limitations applies. *East Suffolk Development Corp. v. Town Board of the Town of Riverhead*, 59 A.D.3d 661, 874 N.Y.S.2d 216 (2d Dept. 2009). *See also Almor Associates v. Town of Skaneateles*, 231 A.D.3d 863, 863, 647 N.Y.S.2d 316, 317 (4th Dept. 1996), and *Stoneridge Properties, Ltd. v. Town of Skaneateles*, 231 A.D.2d 863, 647 N.Y.S.2d 316 (4th Dept. 1996); *Schiener v. Town of Sardinia*, 48 A.D.2d 1253, 852 N.Y.S.2d 528 (4th Dept. 2008).

b. Procedural Irregularities

On the other hand, as a general principle, a challenge to the procedures utilized in the adoption of a zoning law or amendment must be made in an article 78 proceeding which is governed by a four-month statute of limitations. *See P & N Tiffany Properties, Inc. v. Village of Tuckahoe*, 33 A.D.3d 61, 817 N.Y.S.2d 345 (2d Dept.), *lv. granted*, 7 N.Y.3d 713, 824 N.Y.S.2d 606, 857 N.E.2d 1137 (2006), *appeal dismissed*, 8 N.Y.3d 943, 834 N.Y.S.2d 720, 866 N.E.2d 1049 (2007); *Connell v. Town Board of the Town of Wilmington*, 67 N.Y.2d 896, 501 N.Y.S.2d 813, 492 N.E.2d 1229 (1986); *Schiener, supra*; *Caruso v. Town of Oyster Bay*, 172 Misc.2d 93, 656 N.Y.S.2d 809 (Sup. Ct. Nassau Co. 1997), *aff'd*, 250 A.D.2d 639, 672 N.Y.S.2d 418 (2d Dept. 1998); *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943, 512 N.E.2d 526 (1987); *Llana v. Town of Pittstown*, 234 A.D.2d 881, 883, 651 N.Y.S.2d 675, 677 (3d Dept. 1996) (an article 78 proceeding is the proper vehicle when claims "concern matters 'of procedure only, eschewing any intrusion into the substance of the matter voted on.' " (*quoting Voelckers v. Guelli*, 58 N.Y.2d 170, 177, 460 N.Y.S.2d 8, 12, 446 N.E.2d 764, 768 (1983)); *Allens Creek/Corbetts Glen Preservation Group v. Town of Penfield Planning Board*, 224 A.D.2d 979, 637 N.Y.S.2d 557 (4th Dept.), *lv. denied*, 88 N.Y.2d 804, 646 N.Y.S.2d 984, 670 N.E.2d 225 (1996); *Andrasko v. Board of Trustees of the Village of Hamburg*, 169 Misc.2d 1047, 647 N.Y.S.2d 926 (Sup. Ct. Erie Co. 1996). Such procedural claims include alleged noncompliance with SEQRA or with the requirements of General Municipal Law § 239-m. *See Llana v. Town of Pittstown*, 234 A.D.2d 881, 651 N.Y.S.2d 675 (3d Dept. 1996).

The four-month statute of limitations applicable to a challenge to procedural compliance in the adoption of a zoning local law begins to run not at the time of adoption of a local law but only when it is filed with the Secretary of State because Municipal Home Rule Law § 27(3) provides that a local law does not become effective until it is filed with the Office of the Secretary of State. *See Marcus v. Board of Trustees of the Village of Wesley Hills*, 62 A.D.3d 799, 878 N.Y.S.2d 779 (2d Dept. 2009).

c. Inadequate Notice

The issue of the appropriate statute of limitations when mandatory notice is lacking or inadequate is not entirely clear. For example, the plaintiff in *P & N Tiffany Properties, Inc. v. Village of Tuckahoe*, 33 A.D.3d 61, 817 N.Y.S.2d 345 (2d Dept.), *lv. granted*, 7 N.Y.3d 713, 824 N.Y.S.2d 606, 857 N.E.2d 1137 (2006), *appeal dismissed*, 8 N.Y.3d 943, 834 N.Y.S.2d 720, 866 N.E.2d 1049 (2007), instituted a declaratory judgment action challenging the adoption of a local law based on the insufficiency of the notice some four years after its adoption. In order to determine what statute of limitations governs a particular declaratory judgment action, a court is required to look to the substance of an action "to identify the relationship out of which the claim arises and the relief sought." *Id.* at 63,

817 N.Y.S.2d at 347 (*quoting Solnick v. Whalen*, 49 N.Y.2d 224, 229, 425 N.Y.S.2d 68, 71, 401 N.E.2d 190, 193 (1980)). If the dispute can be, or could have been, commenced in a form of action or proceeding for which a specific statute of limitations is provided by statute, that limitations period must govern the action, regardless of the form in which the matter is commenced. If no specific statutory period applies to the relief sought, the six-year "catch-all" provision related in CPLR § 213(1) applies. *See id*. (*citing American Independent Paper Mills Supply Co. v. County of Westchester*, 16 A.D.3d 443, 791 N.Y.S.2d 618 (2d Dept. 2005)).

In ascertaining the appropriate "substance of the action," the *P & N Tiffany Properties* court relied on the decision of the Court of Appeals in *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943, 512 N.E.2d 526 (1987), in which it was determined that a challenge to the enactment of a local law premised on a failure to comply with the SEQRA should be instituted as an article 78 proceeding and governed by the four-month statute of limitations. The court noted that an article 78 proceeding generally is inappropriate to challenge the substance of a legislative act, such as a zoning law. However, an article 78 proceeding is a proper vehicle to challenge the procedures utilized in the adoption of legislation. *Save the Pine Bush* "is thus understood to have established a dichotomy between issues addressed to the substance of the law or its constitutionality, as to which a declaratory judgment action is appropriate, and issues that arise from the procedures by which the law was enacted, which may be raised in a CPLR article 78 proceeding." *P & N Tiffany Properties*, 33 A.D.3d at 64, 817 N.Y.S.2d at 347 (*citing Llana v. Town of Pittstown*, 234 A.D.2d 881, 883-884, 651 N.Y.S.2d 675, 677 (3d Dept. 1996)). As a result, where the issue is not the "wisdom or merit" of a legislative act, review may be had in an article 78 proceeding in which the four-month statute of limitations is applicable.

In comparing the allegations of failure to comply with SEQRA in *Save the Pine Bush*, the court concluded that "[c]onsidering the substantive nature of the required [SEQRA] findings, if compliance with SEQRA is procedural for the purpose of determining the availability of article 78 review, a failure of notice, however egregious it may be, must be procedural as well, and therefore falls within the category of cases in which article 78 review is available." *Id*. at 65, 817 N.Y.S.2d at 348. As a result, a challenge to a legislative act based on a failure to comply with notice requirements is not a substantive challenge and the procedural challenge must be commenced as an article 78 proceeding which is subject to a four-month statute of limitations. The Third Department previously had reached the same conclusion in *Llana v. Town of Pittstown*, 234 A.D.2d 881, 651 N.Y.S.2d 675 (3d Dept. 1996). *See also Baker v. Town of Wallkill*, 84 A.D.3d 1134, 923 N.Y.S.2d 872 (2d Dept. 2011);

On the other hand, the Third Department reached a contrary result in *Amodeo v. Town Board of the Town of Marlborough*, 249 A.D.2d 882, 672 N.Y.S.2d 439 (3d Dept. 1998). The town had amended its zoning law to permit affordable senior citizen housing as a special permit use in the R and R-1 zoning districts. However, the legal notice provided that such use was to be permitted in the R-1 district and failed to mention the R district. A number of owners of property in the R district commenced a combined article 78 proceeding/declaratory judgment action challenging the enactment and the sufficiency of the notice. With respect to the timeliness of the challenge, the court concluded that the four-month statute of limitations generally applicable to article 78 proceedings against town boards did not apply to the insufficient notice claim. While procedural defects and errors are reviewable in an article 78 proceeding and governed by a four-month statute of limitations, "the alleged defect in the published notice constitutes a substantive error which could not have been resolved in a CPLR article 78 proceeding." *Id*. at 883-84, 672 N.Y.S.2d at 441. Consequently, the proceeding was timely commenced.

The decision in *Allens Creek/Corbetts Glen Preservation Group* demonstrates that an effort to avoid the preclusive effect of the four-month statute of limitations in the guise of a declaratory judgment action will fail and that a court is likely to convert the matter to an article 78 proceeding and dismiss it. On the other hand, if the adoption of an amendment is tainted by a jurisdictional defect, such as the failure to adopt the same by a proper majority, a board's action is *ultra vires* and the shorter statute of limitations may not be applied to bar a challenge. *See Home Depot USA v. Baum*, 226 A.D.2d 725, 641 N.Y.S.2d 707 (2d Dept. 1996).

In *Kuhn v. Town of Johnstown*, 248 A.D.2d 828, 669 N.Y.S.2d 757 (3d Dept. 1998), the town had adopted a new zoning law which, among other things, reclassified the petitioners' land and adjacent properties from residential to industrial manufacturing. However, the town failed to comply with the requirement of its own zoning law that notice be provided to all property owners affected by a proposed amendment. The petitioners did not learn of the amendment until more than a year later when they received notice of an application for an industrial park adjoining their property. The town moved to dismiss their subsequent action challenging the amendment, contending that it was barred by the statute of limitations and laches.

The court reaffirmed the principle that municipalities are required to follow their own notice requirements. "Furthermore, an ordinance which is adopted without following the required notice procedures is a voidable ordinance (citation omitted) and proof that actual notice never occurred may void it (citations omitted)." *Id*. at 830, 669 N.Y.S.2d at 759. The court concluded that the noncompliance was grievous and that the statute of limitations did not bar the action/proceeding. *Id*.

d. Accrual of Claim

In *Eadie v. Town Board of the Town of North Greenbush*, 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464 (2006), the Court of Appeals reiterated the relationship between SEQRA and the enactment of a zoning amendment for purposes of determining when the four-month statute of limitations commences. As posed by the Court, the issue was whether the petitioners suffered a "concrete injury" necessary to commence the statute of limitations when the SEQRA process was completed with the issuance of a SEQRA findings statement or when the zoning amendment was subsequently enacted.

Pursuant to CPLR § 217(1), an article 78 proceeding to review a determination by a municipal agency or officer must be commenced within four months after the determination becomes "final and binding" upon the petitioner. The period of limitations begins to run when the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action." *City of New York (Grand Lafayette Props. LLC)*, 6 N.Y.3d 540, 548, 814 N.Y.S.2d 592, 596, 847 N.E.2d 1166, 1170 (2006); *see also Best Payphones, Inc. v. Dept. of Info. Tech. & Telecom. of the City of New York*, 5 N.Y.3d 30, 34, 799 N.Y.S.2d 182, 184, 832 N.E.2d 38, 40 (2005). As a result, the issue in *Eadie* was whether the petitioners suffered a "concrete injury" by virtue of claimed SEQRA violations when the findings statement was adopted or when the town board subsequently adopted a zoning amendment. The Court concluded that no concrete injury was inflicted until the rezoning was enacted.

The conclusion also was based on the holding in *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 200, 518 N.Y.S.2d 943, 944, 512 N.E.2d 526, 527 (1987), in which it was determined that a proceeding alleging SEQRA violations in the enactment of legislation must be commenced within four months after the date of enactment of the ordinance. In *Eadie*, the petitioners did not suffer a concrete injury until the town board approved the zone change. Until the zoning amendment was adopted, the petitioners' injury was only speculative and contingent because they would have suffered no injury if the legislation was not adopted.

Confusing what otherwise would have been a clear conclusion, the Court opined that "[t]his does not mean that, in every case where a SEQRA process precedes a rezoning, the statute of limitations runs from the latter event, for in some cases it may be the SEQRA process, not the rezoning, that inflicts the injury of which the petitioner complains. This might be a different case if, for example, the plaintiffs or others were contending that mitigation measures required by the Final Environmental Impact Statement and adopted in the Findings Statement unlawfully burdened their right to develop their property. In that hypothetical case, the injury complained of would not be a consequence of the rezoning, but of the SEQRA process, and it would make little sense either to require or to permit the person injured to await the enactment of zoning changes before bringing a proceeding." *Eadie*, 7 N.Y.3d

at 317, 821 N.Y.S.2d at 147, 854 N.E.2d at 469.

As a result, a challenge to the procedures utilized in the adoption of a zoning law or zoning amendment is governed by a four-month statute of limitations, regardless of the form of the action. In addition, the statute of limitations generally will begin to run upon the adoption of a zoning enactment and, under the ordinary scenario, not upon completion of the SEQRA process.

IX LACHES

Application of the doctrine of laches requires: 1) conduct by an offending party giving rise to the situation complained of; 2) delay by the complainant in asserting a claim despite the opportunity to do so; 3) lack of knowledge or notice on the part of the offending party that the complainant would assert a claim; and 4) injury or prejudice to the offending party in the event relief were to be afforded to the complainant. *See Kuhn v. Town of Johnstown*, 248 A.D.2d 828, 830, 669 N.Y.S.2d 757, 759 (3d Dept. 1998); *Cohen v. Krantz*, 227 A.D.2d 581, 643 N.Y.S.2d 612 (2d Dept. 1996). For example, in *Point Lookout Civic Ass'n v. Town of Hempstead*, 22 Misc.2d 757, 200 N.Y.S.2d 925 (Sup. Ct. Nassau Co.), *aff'd*, 11 A.D.2d 731, 205 N.Y.S.2d 890 (2d Dept. 1960), *aff'd*, 9 N.Y.2d 961, 217 N.Y.S.2d 227, 176 N.E.2d 203 (1961), an action seeking to invalidate a zoning amendment adopted four years earlier was dismissed because there has been a tremendous change in position on the part of at least six landowners in the interim.

On the other hand, because the petitioners in *Kuhn*, discussed above, promptly notified respondents of their complaints and concerns upon learning of the rezoning of their property, assertively sought resolution of the matter and commenced litigation only when those efforts were unavailing, laches was inapplicable, particularly given the absence of substantial prejudice, such as the commencement of construction by a developer. Although the hearing was held and the new zoning law adopted in September, 1994, the petitioners apparently did not learn of the amendment until November, 1995. They promptly complained to the town about the rezoning and the procedures utilized and urged a rezoning of the properties back to residential. The petitioners commenced the litigation shortly after the town board rezoned the petitioners' property to its prior residential zoning but failed to rezone the adjoining site of the proposed industrial park in April, 1996. *See also Dougherty v. City of Rye*, 63 N.Y.2d 989, 991, 483 N.Y.S.2d 999, 1000-01, 473 N.E.2d 249, 250 (1984) (rejecting claim of laches where 16 months elapsed between enactment of the zoning amendment and the commencement of an action because there had been no showing of any substantial prejudice resulting from the delay).

X SPOT ZONING

Zoning regulations must be adopted in compliance with a community's comprehensive plan. *See* Town Law § 263; *Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 684, 642 N.Y.S.2d 164, 174, 664 N.E.2d 1226, 1236 (1996); *Udell v. Haas*, 21 N.Y.2d 463, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968). A comprehensive plan is intended to reflect "a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole." *Taylor v. Village of Head of the Harbor*, 104 A.D.2d 642, 644, 480 N.Y.S.2d 21, 23 (2d Dept. 1984), *lv. denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 478 N.E.2d 210 (1985); *see also Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973), *reargument denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 (1974). The failure to comply with the mandate that zoning regulations comply with a community's comprehensive plan renders the enactment of a zoning law unauthorized and *ultra vires*. *See Lake Illyria Corp. v. Town of Gardiner*, 43 A.D.2d 386, 352 N.Y.S.2d 54 (3d Dept. 1974).

The antithesis of such comprehensive and rational planning is "spot zoning." "Spot zoning" is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the

benefit of the owner of such property and to the detriment of other owners. *See Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951). Similarly, "reverse spot zoning" is "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." *C/S 12th Avenue LLC v. City of New York*, 32 A.D.3d 1, 9, 815 N.Y.S.2d 516, 524 (1st Dept. 2006) (*quoting Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132, 98 S.Ct. 2646, 2663, 57 L.Ed.2d 631, ___ (1978)).

A community's comprehensive plan and zoning are not static but may and must change to comply with changing conditions in the area. *See Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973); *Kravetz v. Plenge*, 84 A.D.2d 422, 430, 446 N.Y.S.2d 807, 812 (4th Dept. 1982). "Although stability and regularity are essential to the operation of zoning plans, zoning is not static; the obligation is the support of comprehensive planning with recognition of the dynamics of change, not slavish servitude to any particular plan." *Kravetz v. Plenge*, 84 A.D.2d 422, 430, 446 N.Y.S.2d 807, 812 (4th Dept. 1982); *see also Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973). If a need for the betterment of a community exists, an amendment which implements that need is consistent with and, indeed, an integral part of the comprehensive plan. *See Kravetz v. Plenge*, *supra*; *Gilmer v. Fritz*, 28 A.D.2d 804, 281 N.Y.S.2d 154 (3d Dept. 1967). Consequently, "[e]nactments to change zoning plans should be analyzed in terms of consistency and rationality, with the requirement they not conflict with the fundamental land use policies and development plans of the community, keeping in mind that a comprehensive plan must be flexible and subject to some changes." *Kravetz*, 84 A.D.2d at 429, 446 N.Y.S.2d at 811-12. An amendment that adjusts a community's zoning law "in light of changing, newly-discovered or newly important conditions, situations or knowledge is, by definition, consistent with a municipality's comprehensive plan." *Id.* at 430, 446 N.Y.S.2d 812.

The Court of Appeals has determined that in assessing a zoning amendment a court assesses "if it is in accordance with a well-considered plan ... by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole...." *Asian Americans for Equality*, 72 N.Y.2d at 131, 531 N.Y.S.2d at 787, 527 N.E.2d at 270. The primary consideration is "whether forethought has been given to a community's land use problems." Practice Commentaries, McKinney's Consolidated Laws of New York Annotated, Book 61, Town Law § 272-a; *see also Kravetz*, 84 A.D.2d at 429, 446 N.Y.S.2d at 811. Indeed, the case law reflects that "the existence of almost any form of planning analysis" is sufficient to satisfy the requirement of consistency with a community's comprehensive plan. Practice Commentaries, McKinney's Consolidated Laws of New York Annotated, Book 61, Town Law § 272-a; *see also Town of Bedford*, *supra; Lazore v. Board of Trustees of the Village of Massena*, 191 A.D.2d 764, 594 N.Y.S.2d 400 (3d Dept. 1993). Moreover, "[t]o satisfy the statutory requirement that zoning legislation be in accord with a comprehensive plan (citation omitted), respondents need only show that the zoning amendment was 'adopted for a legitimate governmental interest and that there is * * * a reasonable relationship between the end sought to be achieved by it and the means used to achieve that end.' " *McGrath v. Town Board of the Town of North Greenbush*, 254 A.D.2d 614, 618, 678 N.Y.S.2d 834, 838 (3d Dept. 1998), *lv. denied*, 93 N.Y.2d 803, 688 N.Y.S.2d 493, 710 N.E.2d 1092 (1999) (*quoting Village Board of the Village of Malone v. Zoning Board of Appeals of the Village of Malone*, 164 A.D.2d 24, 28, 562 N.Y.S.2d 973, 975 (3d Dept. 1990)); *see also Asian Americans for Equality*, 72 N.Y.2d at 131-32, 531 N.Y.S.2d at 787, 527 N.E.2d at 270.

For example, in *Baumgarten v. Town Board of the Town of Northampton*, 35 A.D.3d 1081, 826 N.Y.S.2d 811 (3d Dept. 2006), the rezoning of an 18-acre parcel from rural residential to a planned unit development district in order to construct six rental units was challenged as constituting spot zoning. The record substantiated that sufficient consideration had been given to the zoning amendment and that the petitioners had failed to overcome the strong presumption of validity that attaches to zoning enactments. The town board had undertaken a broad evaluation of the proposed project. The project fell within the guidelines for a planned unit development district, was located in an appropriate area with a mix of residential, commercial and recreational properties and there was no demonstration of any adverse impact to the surrounding properties. Although the amendment benefited the owners, it also benefited the general welfare of the community by creating seasonal housing to accommodate tourism in the area.

In *Peck Slip Associates LLC v. City Council of the City of New York*, 26 A.D.3d 209, 809 N.Y.S.2d 56 (1st Dept.), *lv. denied*, 7 N.Y.3d 703, 819 N.Y.S.2d 870, 853 N.E.2d 241 (2006), the plaintiff had sought to construct a high-rise mixed use building on a parking lot site owned by it in the South Street Seaport area. The City enacted a zoning amendment which rezoned a 10-block area including plaintiff's property to a designation permitting "contextual medium-density" commercial development and thereby repealed the existing high-density zoning. The plaintiff brought an action asserting "reverse spot zoning," contending that it had been specifically targeted for discriminatory down zoning.

A reverse spot zoning claim requires proof both that the zoning is site-specific and that it is inconsistent with the well-considered land-use plan for the area. *Id.* at 210, 809 N.Y.S.2d at 58 (*citing FGL & L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 113-114, 495 N.Y.S.2d 321, 322-23, 485 N.E.2d 986, 987-88 (1985)). If zoning is consistent with a community's comprehensive plan, it does not constitute spot zoning of any nature. *See Taylor v. Village of Head of the Harbor*, 104 A.D.2d 642, 480 N.Y.S.2d 21 (2d Dept. 1984), *lv. denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 478 N.E.2d 210 (1985).

A well-considered plan may be demonstrated by "evidence, from wherever derived," that "establish[s] a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole," ensuring that the public good will not be undermined by "special interest, irrational ad hocery." *Peck Slip*, 26 A.D.3d at 210, 809 N.Y.S.2d at 58 (*quoting Taylor*, 104 A.D.2d at 644, 480 N.Y.S.2d at 23). Even if the wisdom or validity of a zoning enactment is fairly debatable, the judgment of the municipality with respect to its necessity must control *See id.* at 210, 809 N.Y.S.2d at 58 (*citing Stringfellow's of New York, Ltd. v. City of New York*, 91 N.Y.2d 382, 396, 671 N.Y.S.2d 406, 413, 694 N.E.2d 407, 414 (1998)).

The evidence demonstrated that since 1972, the city had consistently avoided high-rise development in the Seaport subdistrict and favored "contextual" development intended to preserve the original historic character of the neighborhood, emphasizing density on a scale consistent with 19th century historic antecedents. Additionally, the allegation that the plaintiff's property alone was adversely affected by the amendment was not supported by the record.

The decision in *Peck Slip Associates* confirms that the history of zoning and zoning actions and the historic context of a challenged zoning amendment are critical in assessing a claim of spot zoning or lack of compliance with a comprehensive plan. If an amendment is consistent with a municipality's historic actions and consistent legislative determinations, it is not likely to violate the comprehensive plan or to be considered spot zoning. However, the fact that an amendment departs from such historical context is an indication that it may violate the comprehensive plan.

Therefore, if an amendment is supported by a rational planning strategy to advance the welfare of the community at large, it does not constitute spot zoning. The board in *Baumgarten* undertook an examination of the land use implications of its action and concluded that it did, indeed, benefit the community. As a result, the spot zoning challenge was baseless.

XI EXCLUSIONARY ZONING

"Exclusionary zoning" is defined as "land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the zoning municipality." *Continental Building Co., Inc. v. Town of North Salem*, 211 A.D.2d 88, 95, 625 N.Y.S.2d 700, 704 (3d Dept. 1995), *appeal dismissed, lv. denied*, 86 N.Y.2d 818, 634 N.Y.S.2d 432, 658 N.E.2d 209 (1995). In *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110, 378 N.Y.S.2d

672, 681-82, 341 N.E.2d 236, 242 (1975), the Court of Appeals enunciated a two part test to examine the validity of an ordinance challenged as exclusionary: first, whether the municipality has provided a properly balanced and well ordered plan for the community; and second, whether consideration was given to the present and future housing requirements of the region. With respect to the first portion of the analysis, the court observed that what may be appropriate for one community may differ substantially from what is appropriate for another. Recognizing that such differences exist between communities, the court stated that although "it may be impermissible in an undeveloped community to prevent entirely the construction of multiple-family residences anywhere in the locality ... it is perfectly acceptable to limit new construction of such buildings where such units already exist...." *Id*. at 110, 378 N.Y.S.2d at 680, 341 N.E.2d at 242. Accordingly, a trial court must ascertain what types of housing exist in a municipality, their quantity and quality, whether the supply satisfies the present needs of the community, whether new construction is required to fulfill the future requirements of the municipality, and, if so, the form of such new development.

Although zoning has traditionally been considered to affect only land within the community, zoning activities have a substantial impact beyond the borders of the municipality. Accordingly, in examining whether a community has considered regional needs, "there must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met." *Id*. at 110, 378 N.Y.S.2d at 681, 341 N.E.2d at 242. If the regional and local need for such housing is met by the local community or by other accessible areas in the community at large, an ordinance may not be held to be invalid on its face.

In *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 434 N.Y.S.2d 180, 414 N.E.2d 680 (1980), *cert. denied*, 450 U.S. 1042, 101 S.Ct. 1761, 68 L.Ed.2d 240 (1981), the Court of Appeals found to be valid an ordinance which zoned certain areas of a village for a minimum lot area of five acres. Although emphasizing that it would not "countenance community efforts at exclusion under any guise," *id*. at 344-45, 434 N.Y.S.2d at 183, 414 N.E.2d at 683, the court further found that large-lot zoning is, under appropriate circumstances, a legitimate means to advance the public welfare of preservation of open spaces and the protection of the ill-effects of urbanization. The decision added an additional basis upon which a zoning ordinance could be found to be invalid, that is, if it is enacted for an improper purpose. As a result, "[o]nce 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." *Id*. at 345, 434 N.Y.S.2d at 183, 414 N.E.2d at 683-84.

In *Blitz v. Town of New Castle*, 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dept. 1983), the Second Department rejected the contention that zoning ordinances must affirmatively provide for the creation of all necessary housing and observed that "New York courts have consistently rejected any 'fair share' doctrine which would impose specific unit goals or quotas of housing on a municipality...." *Id*. at 98, 463 N.Y.S.2d at 836. Instead, the *Blitz* court related that it should assess "relevant data which may indicate whether New Castle's provisions for housing are at all commensurate with some general notion of its expected contribution to the regional housing need." *Id.* In ascertaining the housing needs of the region the court considered the report of a blue ribbon committee which was adopted by the county legislature as the county housing policy to be "the best possible estimate of the housing needs of Westchester County for the coming decade and that as a legislative finding it is entitled to great weight and the presumption of validity." *Id*. at 98, 463 N.Y.S.2d at 835.

The court rejected the plaintiff's contention that it is the number of housing units that will actually or probably be built that is determinative of whether the second portion of the *Berenson* analysis has been satisfied, and determined that the proper focus of its inquiry is limited to whether the ordinance allows the development of sufficient housing to satisfy any reasonable estimate of the town's proportionate anticipated contribution. The court reaffirmed the holding of *Berenson* that affirmative action is not required:

[Z]oning ordinances will go no further than determining what may or may not be built; market forces will decide what will

actually be built, ... our concern is to determine whether, on its face, the amended ordinance will allow the construction of sufficient housing to meet the town's share of the region's housing needs, particularly for multifamily housing, assuming that such construction be both physically and economically feasible.

Id. at 99, 463 N.Y.S.2d at 836.

In *Suffolk Housing Services v. Town of Brookhaven*, 109 A.D.2d 323, 491 N.Y.S.2d 396 (2d Dept. 1985), the Second Department in 1985 declined to "work a change of historic proportions in the development of New York zoning law," *id*. at 332, 491 N.Y.S.2d at 402, and determined that the Mount Laurel decisions' requirement of a constitutional obligation on the part of municipalities to zone for low and moderate income housing is inapplicable in New York. The plaintiffs alleged that the town, through its zoning ordinance, policies and practices, had prevented the development of sufficient housing to accommodate its low-to-moderate income population. Utilizing the *Berenson* analysis, the court found that the ordinance, by virtue of its wide variety of different types and densities of residential housing, provided a properly balanced and well ordered plan for the community, and satisfied the first prong of that inquiry. Because the multi-family housing which was permitted in numerous zones required the issuance of a special permit, the court examined the town's actions in order to determine whether the special permit provisions had been applied in a manner which allowed for the construction of different types of housing, or was merely subterfuge to impress the courts. Reviewing the statistics of permits granted, the court concluded that the procedure had not been employed as a ruse to prevent the construction of multi-family housing.

With respect to the question of satisfaction of regional housing needs, the court found that *Berenson* "merely requires that a town allow for the construction of different types of housing in sufficient numbers for those people who want and can afford it." *Id.* at 331, 491 N.Y.S.2d at 402. The court reiterated its holding in *Blitz* that its review was limited to whether the ordinance allows the construction of sufficient housing to meet the municipality's share of the regional need, assuming that the construction of the units is both physically and economically feasible. The decision repudiated the contention that a balanced and well-ordered community requires an array of housing sufficient to meet the legitimate needs of all the town's residents and others at prices they can afford. The court observed that *Berenson* approached the problem of exclusionary zoning solely in terms of traditional zoning and planning considerations, and did not address how such housing would be built, including issues of affordability and subsidies, "nor does it purport to mandate that a zoning ordinance make it possible for people of all classes to live in a given community. It merely requires that a town allow for the construction of different types of housing in sufficient numbers for those people who want and can afford it." *Id.* In affirming the validity of the zoning ordinance, the court noted that the Court of Appeals has not announced a constitutional obligation on the part of municipalities to zone for low-to-moderate income housing.

The Second Department utilized *Berenson* in *North Shore Unitarian Universalist Society v. Village of Upper Brookville*, 110 A.D.2d 123, 493 N.Y.S.2d 564 (2d Dept. 1985), *lv. denied*, 67 N.Y.2d 601, 499 N.Y.S.2d 1026, 490 N.E.2d 555, *appeal dismissed*, 67 N.Y.2d 646, 499 N.Y.S.2d 1029, 490 N.E.2d 557 (1986), to determine that an ordinance which excluded multifamily housing for the elderly was not exclusionary. First, the plaintiffs failed to prove that the ordinance did not provide for the present and future needs of the village's residents, that is, that it did not constitute a properly balanced and well-ordered plan. With respect to the second *Berenson* prong, the court relied upon the Nassau-Suffolk Comprehensive Development Plan in ascertaining whether the plaintiff had proved the existence of a regional need for high-density housing for the elderly, and whether such need was adequately satisfied. The Plan did not designate any high-density development for the village, but recommended low-density development to preserve the village's present open space. Similarly, low-density development was recommended for the village by a water management study which classified the area as a primary source of drinking water for both counties. In addition, the Plan provided for the development of sufficient housing elsewhere, and also provided that the ordinance served a regional need for open space and water preservation.

> The court also rejected the contention that the ordinance was insufficient because the Plan's projected number of apartments had not been constructed.
>
> [A] facially valid ordinance will not be invalidated simply because economic forces prevent construction of multi-family housing. Moreover, a requirement that those seeking to build either multi-family housing or age-restricted multi-family housing must first seek a permit to do so does not destroy the presumptive validity of zoning ordinances which do not premap to provide for such housing.

Id. at 128, 493 N.Y.S.2d at 567.

As a result, a zoning law is invalid if it: a) does not provide a properly and well-ordered plan for the community; or b) does not adequately consider regional needs and requirements. *See Berenson*, 38 N.Y.2d at 110, 378 N.Y.S.2d at 680-81, 341 N.E.2d at 242; *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 345, 434 N.Y.S.2d 180, 183, 414 N.E.2d 680, 683 (1980), *cert. denied* 450 U.S. 1042, 101 S.Ct. 1761, 68 L.Ed.2d 240 (1981); *Continental Building*, 221 A.D.2d at 92, 625 N.Y.S.2d at 703. "A zoning ordinance enacted for a statutorily permitted purpose will be invalidated ... if it is demonstrated that it was actually enacted for an improper purpose or it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect." *Robert E. Kurzius*, 51 N.Y.2d at 345, 434 N.Y.S.2d at 183, 414 N.E.2d at 683. Moreover, a municipality may not, by its zoning law, create obstacles to the production of a full array of housing including affordable housing. *Continental Building*, 211 A.D.2d at 95, 625 N.Y.S.2d at 704.

The decision in *Land Master Montg I, LLC v. Town of Montgomery*, 13 Misc.3d 870, 821 N.Y.S.2d 432 (Sup. Ct. Orange Co. 2006), *aff'd*, 54 A.D.3d 408, 863 N.Y.S.2d 692 (2d Dept.), *appeal dismissed*, 11 N.Y.3d 864, 872 N.Y.S.2d 69, 900 N.E.2d 551 (2008), is one of the very few instances where the courts have found a zoning law to be impermissibly exclusionary. As the facts disclose, the town's elimination of a long-standing multifamily zoning designation for the only area in the town in which that use was permissible, together with the history of a "no-growth" political campaign, were significant factors in the decision.

The town's first comprehensive plan, adopted in 1965, classified the area in which the property was located as a priority growth area and zoned the area as the only location in the town in which multifamily housing was permitted. The multifamily designations remained applicable to the area through several comprehensive plan revisions. In 1992 the town board established a sewer district covering the area. The petitioner applied for a mixed-use development in April, 2002 which proposed multiple and single-family dwellings, including 10% affordable housing, retail and office facilities. A comprehensive plan committee was formed at about the same time to review the town's 1988 comprehensive plan. One of the significant issues was the increased level of traffic in the area of the project, as well as the advice from the New York State Department of Transportation that funding for improvements to State roads in the area would be limited. In May, 2002, the town board adopted a moratorium on residential developments in excess of three dwelling units, which subsequently was extended to November, 2004. The comprehensive plan committee issued a draft report in September, 2003 which recommended the rezoning of the immediate area so as to reduce the density requirements to three units per acre but maintained the multifamily zoning designation. At the same time a campaign for supervisor was in progress in which the ultimately successful candidate, who took office on January 1, 2004, campaigned on a "no-growth" platform.

Numerous reports on affordable housing were presented to the town board during hearings on the comprehensive plan in February-July, 2004. The reports demonstrated that given the town's median household income of $49,422, a median income family could afford a residence valued at $145,000. None of the 43 houses then on the market were listed at or below that price, demonstrating a need for the development of affordable housing. Pursuant to General Municipal Law § 239-m, the Orange County Department of Planning criticized the plan's deletion of

sewer and/or water service "density bonuses" and the utilization of special use permits which, it contended, were contrary to the primary goal of the plan to promote the development of affordable housing options. In July, 2004, the town board adopted its revised version of the comprehensive plan. In October, 2004, the town board adopted amendments to the zoning law which rezoned the multifamily districts to single-family use, reduced density allowances and excluded certain environmental features from lot area calculations. Prior to the adoption of the amendments, the Orange County Department of Planning disapproved the amendments, finding that the amendments would effectively eliminate the possibility of multi-family homes in the town and thereby significantly impact the town's ability to address affordable housing needs. An additional local law granted to the town board discretionary approval authority of any new or expanded wastewater treatment facilities. In November, 2004, the town established an affordable housing committee, which rendered a report in July, 2005. The report found that no building permits had been issued for multifamily housing in the town since before 1999, and that a need existed for between 688 and 1,010 units in the town to remedy the current affordability shortfall.

The petition alleged, among other things, that in enacting the challenged local laws, the town failed to comply with the two-pronged test of *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975). As is related above, *Berenson* requires that a zoning law must provide a balanced and well-ordered plan for the community and must adequately consider regional needs and requirements. *Id*. at 110, 378 N.Y.S.2d at 680-81, 341 N.E.2d at 242. Although a zoning law is presumed to be constitutional, that presumption may be rebutted by proving beyond a reasonable doubt that the zoning law is not designed to accomplish a legitimate purpose. Pursuant to *Berenson*, a zoning law 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, the burden of justifying the zoning law shifts to the defendant. *See Kurzius*, 51 N.Y.2d at 345, 434 N.Y.S.2d at 183, 414 N.E.2d at 683-84. Applying those principles, the court concluded that the petitioners had made a prima facie showing that the challenged laws were enacted without giving proper regard to local and regional housing needs and that they had an exclusionary effect.

By acknowledging that a median income family could only afford a residence costing between $145,000 and $185,000 and that none of the homes on the market fell within that range, the town had recognized the existence of a local and regional need for affordable housing. Moreover, the town's affordable housing committee had found the existence of an "affordability shortfall" within the town and a need for 688 to 1,010 units. "Given these housing needs, the operative test becomes whether or not the zoning ordinances constitute a balanced and well-ordered plan for the community which adequately considers the acknowledged regional needs and requirements for affordable housing." The existing zoning structure did not satisfy that analysis.

The recommendations of the comprehensive plan and the zoning amendments constituted a conspicuous departure from the prior zoning structure. The property and immediate area had been the only area in the town in which multifamily housing was permitted by right since 1966. However, the amendments eliminated all multifamily zoning districts. Although multifamily housing does not necessarily produce affordable housing, multifamily housing has historically been recognized as a barometer in assessing exclusionary zoning claims. As a result, the zoning law was found to be exclusionary on its face.

Because the amendment so severely impacted the availability of multifamily housing, the burden of explanation shifted to the town. However, the court found that the town had failed to adequately justify the amendments. The town relied on a county traffic study to support the claim that the amendments were necessary to curb the high rate of growth in the immediate area in order to avoid future traffic congestion. Although traffic control constitutes a legitimate public purpose, the record did not establish any reasonable relationship between that purpose and the total elimination of dedicated multifamily housing districts. In addition, aside from a perfunctory reference to limited State funding, the town provided no evidence of prohibitive costs, inherent geographical limitations or other factors making it unreasonable to consider alternative traffic control methods.

The court rejected the town's reliance on zoning mechanisms which it claimed provided for multifamily housing opportunities, including: clustering by permit; relaxation of subdivision lot requirements by permit where provisions are made for affordable housing; incentive zoning measures; inter-municipal agreement programs; and multiple housing opportunities such as motor home courts and planned adult communities because such devices were subject to the "total discretion" of town officials or its potential affect was limited to only portions of the population. As a result, the zoning scheme created the illusion of affordable housing availability while limiting its reality to a few chosen sectors and according almost total control to the town. "[T]hese factors are intrinsically narrow in scope and do very little to address the established need for multifamily housing." *Land Master*, 13 Misc.3d at 879-80, 821 N.Y.S.2d at 440 (*quoting Continental Building*, 211 A.D.2d at 94, 625 N.Y.S.2d at 704). The court concluded that the town had not adequately acted to facilitate creation of its share of affordable housing needs within its own boundaries or the region.

As a result, the court invalidated the comprehensive plan and zoning amendments. By operation of law, the prior zoning designations, which zoned the parcels for multifamily use, remained in effect.

The case law reflects that a zoning amendment that is inconsistent with the historic zoning philosophy and land use decisions with respect to an area is suspect. *See West Branch Conservation Ass'n v. Town of Ramapo*, N.Y.L.J., March 6, 2000, p. 31, col. 3 (Sup. Ct. Rockland Co. 2000), *aff'd*, 284 A.D.2d 401, 726 N.Y.S.2d 137 (2d Dept. 2001). An amendment that eliminates the only, long-standing multifamily designation in a community and thereby precludes the possibility of multifamily housing is likely to be considered exclusionary on its face unless a compelling basis for the change is fully demonstrated. Pretextual excuses to eliminate the possibility of multifamily housing will be dismissed particularly when the exclusion of such use is the result of public or political reaction without a corresponding, demonstrated compelling reason.

The exclusionary zoning concept is inapplicable outside of the area of residential housing and, as a result, if consistent with other zoning precepts, a municipality may ban such uses. *See Gernatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668, 684, 642 N.Y.S.2d 164, 173-74, 664 N.E.2d 1226, 1235-36 (1966); *McGann v. Village of Old Westbury*, 256 A.D.2d 556, 682 N.Y.S.2d 433 (2d Dept. 1998).

XII SPECIAL FACTS EXCEPTION

Despite what is often a lengthy process, an applicant for a land use approval has no protection from modification of applicable regulations while an application is under review, thereby essentially mooting the application. Instead, a board or court must apply the law as it exists when it make a decision. *See, e.g., Jul-Bet Enterprises, LLC v. Town Board of the Town of Riverhead*, 48 A.D.3d 567, 852 N.Y.S.2d 242 (2d Dept. 2008); *Denton v. Town of Brookhaven*, 32 A.D.3d 395, 819 N.Y.S.2d 547 (2d Dept. 2006). However, in unusual instances when the bad faith of a board or municipality results in undue delay while superseding regulations are adopted, the applicant may be entitled to utilize the prior zoning regulations pursuant to the "special facts exception." *See Ronsvalle v. Totman*, 303 A.D.2d 897, 757 N.Y.S.2d 134 (3d Dept. 2003); *Hatcher v. Planning Board of the Village of Nelsonville*, 111 A.D.2d 812, 490 N.Y.S.2d 559 (2d Dept. 1985). The special facts exception may be applied if a municipality unduly delayed proceedings and acted in bad faith. *See Pokoik v. Silsdorf*, 40 N.Y.2d 769, 772-773, 390 N.Y.S.2d 49, 51-52, 358 N.E.2d 874, 876-77 (1976); *Mamaroneck Beach & Yacht Club, Inc. v. Zoning Board of Appeals of the Village of Mamaroneck*, 53 A.D.3d 494, 497, 862 N.Y.S.2d 81, 84-85 (2d Dept.), *lv. denied*, 11 N.Y.3d 712, 872 N.Y.S.2d 74, 900 N.E.2d 557 (2008); *Caruso v. Town of Oyster Bay*, 250 A.D.2d 639, 640, 672 N.Y.S.2d 418, 419 (2d Dept. 1998); *Figgie International, Inc. v. Town of Huntington*, 203 A.D.2d 416, 418, 610 N.Y.S.2d 563, 566 (2d Dept. 1994). To claim the benefit of the special facts exception, however, a petitioner must have been entitled to the relief sought as a matter of right before the law changed. *See Nathan v. Zoning Board of Appeals of the Village of Russell Gardens*, 95 A.D.3d 1018, 1019, 943 N.Y.S.2d 615, 618 (2d Dept. 2012).

The decision in *Downey Farms Development Corp. v. Town of Cornwall Planning Board*, 20 Misc.3d 566, 858 N.Y.S.2d 542 (Sup. Ct. Orange Co. 2008), illustrates the unusual facts that are necessary in order to establish a special facts exception to the application of newly adopted zoning regulations to an application. The town had amended its zoning law effective June 23, 2005, which rezoned the petitioner's 63-acre parcel from a minimum lot size for single family residences from one acre to two acres. The petitioner had filed a subdivision application fourteen months prior to the enactment of the zoning amendments.

While the application was pending before the planning board, the town began a review of its comprehensive plan which resulted in a recommendation for increasing the minimum lot size for the area in which petitioner's property was located. Despite the petitioner's appearances at multiple work sessions and planning board meetings, and submission of numerous plan revisions, three visual impact studies, an archeological study and a traffic study over more than 14 months, the subdivision had just received preliminary plat approval when the zoning was changed. The rezoning effectively nullified the petitioner's application.

The petitioner commenced an article 78 proceeding in which it alleged that because of the planning board's bad faith delays, it was entitled to continued review of its application pursuant to the prior one-acre zoning. The petitioner argued that the dilatory tactics of the planning board and its advisors established its entitlement to a "special facts exception" from the general rule that an application must be judged on the law as it exists at the time of a board's decision.

Initially, the court denied the town's motion to dismiss the petition, finding that sufficient factual issues had been raised to suggest at least the possibility of "bad faith" or of a combination of both deliberate and innocent administrative procrastination by the planning board to warrant a hearing.

The evidence adduced at the trial demonstrated that absent the planning board's bad faith, it was "possible under a best case scenario" for the petitioner to have obtained final approval and to have filed its subdivision plat with the county clerk prior to the effective date of the amended zoning law. An engineer also testified that, in his experience, a traffic study had never been required for a 24-lot subdivision or a visual impact study for a proposed drainage basin. He also testified that certain items, such as county health department approval and creation of a drainage district, routinely were deferred by a planning board as conditions of a preliminary subdivision approval, the implication being that excessive time was inappropriately required by the planning board to be expended on these issues by the petitioner prior to preliminary approval.

The court concluded that a public hearing could have been scheduled and preliminary subdivision approval granted with the various items imposed as conditions of approval rather than as pre-conditions to preliminary approval so that the petitioner could have satisfied those items between preliminary and final subdivision approval. Therefore, the court determined that it was possible for the petitioner to have obtained final approval before enactment of the zoning amendments in a "best case scenario."

Having satisfied the threshold issue of potential timely approval in a "best case scenario," the court next was required to determine whether the reason the application was not in a position to receive final approval on June 23, 2005, was deliberate dilatory tactics and/or negligence on the part of the planning board. If credible proof of such a nexus is provided, a final inquiry arises, that is, whether the evidence supports the further conclusion that any "bad faith" and/or innocent delays were in the aggregate so substantial that they effectively deprived the petitioner of a fair opportunity to obtain and file a final plat before the effective date of the amendments. The court found in favor of the petitioner on both issues.

With respect to the issue of delay, the court opined that although there were a number of factors which may have precluded an early vote on preliminary subdivision approval, the evidence did not support any valid reason for the planning board's "excessive delay" in the initial step of scheduling a public hearing. The court noted that Town Law § 276(5)(d)(i)(1) mandates that if an EIS is not required, a negative declaration must be adopted and a public hearing held within 62 days of receipt of a complete preliminary plat. Further, § 125-5(E) of the town code provided that the planning board shall fix a date for a public hearing on a preliminary subdivision application within 30 days of receipt of such documents in proper form. Although the planning board received the requisite documents "in proper form" in April, 2004, "without good cause," it did not schedule the hearing for ten months "by requiring near frivolous studies and then supplements thereof."

The court found that from the beginning of its review of the application the planning board was unwilling to act in a timely manner. For example, the planning board was obligated to refer the application to the Orange County Department of Planning pursuant to General Municipal Law § 239-n(2) "upon receipt of an application for preliminary and/or final approval." Nevertheless, the preliminary subdivision application was not referred to the County Department of Planning until ten months after the application was filed and not until after the public hearing had commenced. Moreover, although other factors also may have contributed to the public hearing remaining open from February to April, 2005, the lack of timely compliance with the mandate of General Municipal Law § 239-n(2) and then the failure to realize that a favorable recommendation had been received delayed preliminary approval for two to three months. Also contributing to the continuation of the public hearing was one member's desire for additional unnecessary studies, proclaiming that "I'm always thinking of things fun for consultants to do." Similarly, the town engineer delayed responding to the petitioner's request for a waiver for a 2 degree slope deviation for a portion of the interior roadway for 10 months. Once the public hearing was opened, other delays were caused by pointless consideration given by the planning board to such issues as the possible negative effect of the petitioner's decision to eliminate one of the original 25 lots by combining two contiguous lots. "The respondent Board appeared inclined to respond to any suggestion which would cause delay to the ... application...." 20 Misc.3d at 574, 858 N.Y.S.2d at 548.

Because the fundamental premise for a "special facts exemption" is a finding of bad faith, the motivation of the planning board was a vital issue. In the context of the whole scenario of the planning board's review of the application, its decision to delay scheduling a public hearing until the petitioner had retained experts to prepare first one, then another visual study depicting the potential effect of the proposed detention pond was considered by the court to be "highly suspect." Additionally, the remarks of certain planning board members indicated that they were motivated to delay the application until the zoning law was amended.

The court observed that review of a subdivision application "involve[s] a myriad of possible interplays among the provisions of article 16 of the Town Law, GML 239-n, SEQRA, local codes, etc. Those factors when added to the broad scope of a Planning Board's discretion make it difficult for a court to conclude that there was such unreasonable delay, innocent or otherwise, to support a 'special facts exception.' " 20 Misc.3d at 578, 858 N.Y.S.2d at 551. However, the court concluded that there was evidence of "enough dilatory actions" by the planning board and its consultants throughout the process to support a special facts exception finding.

The court found that at least four to five months of unnecessary delays were attributable to the failure to timely refer the application to the County Department of Planning pursuant to General Municipal Law § 239-n and to the visual and traffic studies, and that the other enumerated hindrances caused an additional one- to two-month delay. The evidence demonstrated "a discernable pattern" by the planning board and its consultants of "either intentional or innocent, perhaps a combination of both, delay of the progression of petitioner's application." The cumulative effect of their actions and inaction created a substantial delay which denied the petitioner a fair opportunity to at least attempt to obtain timely final subdivision approval and file its subdivision map before the effective date of the

zoning amendment. As a result of such improper delaying actions, the petitioner was entitled to vested rights to proceed with its subdivision under the provisions of the zoning law as it existed prior to the amendments.

It is not a common occurrence when a court finds that a municipality or reviewing agency has interfered with the normal and reasonable processing of an application so that zoning regulations that nullify the application may be adopted. However, the *Downey Farms* decision indicates that courts are receptive to scrutinizing such dilatory tactics to ascertain a board's intent and that, in the appropriate circumstances, such inequitable and abusive conduct will result in application of the special facts exemption.

In *Westbury Laundromat, Inc. v. Mammina*, 62 A.D.3d 888, 879 N.Y.S.2d 188 (2d Dept. 2009), the petitioner had applied for a building permit to renovate a laundromat which had been substantially destroyed by a fire. While the application was being considered by the building department, the town board prohibited laundromats in the zoning district. The building inspector thereafter erroneously issued a permit for the nonconforming use and, in reliance on the permit, the petitioner completed the renovations and requested a certificate of occupancy. The building department issued a notice of disapproval revoking the building permit on the ground that it was contrary to the zoning law. The petitioner challenged the disapproval and contended that he had a vested right to maintain a laundromat.

"In New York, a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development." *Id.* at 889-90, 879 N.Y.S.2d at 190-91 (*quoting Town of Orangetown v. Magee*, 88 N.Y.2d 41, 47, 643 N.Y.S.2d 21, 24, 665 N.E.2d 1061, 1064 (1996)). However, vested rights cannot be acquired in reliance on an invalid permit. Because the building permit was invalid when issued, vested rights could not be acquired in reliance upon it.

Moreover, the facts did not substantiate application of the "special facts" exception. "A court will apply the zoning ordinance currently in existence at the time a decision is rendered unless 'special facts' are present to demonstrate that the municipality acted in bad faith and unduly delayed acting upon an application while the zoning law was being changed." *Id.* at 890, 879 N.Y.S.2d at 191 (*quoting Greene v. Zoning Board of Appeals of the Town of Islip*, 25 A.D.3d 612, 612, 806 N.Y.S.2d 880, 880 (2d Dept. 2006)). The building permit had been issued approximately two months after an application was made and the petitioner failed to provide any evidence that the town had acted in bad faith or unduly delayed action on his permit application until after the enactment of the new zoning law. Consequently, petitioner failed to demonstrate application of the special facts exception.

XIII INDISPENSABLE PARTIES

Although a challenge to the validity of a zoning amendment historically was generally directed solely at a town board which adopted the law, case law now unambiguously directs that individuals or entities whose rights may be affected by invalidation of an amendment must be made parties to an action or proceeding seeking to invalidate the enactment. In *Llana v. Town of Pittstown*, 245 A.D.2d 968, 667 N.Y.S.2d 112 (3d Dept. 1997), *lv. denied*, 91 N.Y.2d 812, 672 N.Y.S.2d 848, 695 N.E.2d 717 (1998), for example, it was determined that the failure to join as parties property owners who had received approvals pursuant to such amendment may result in dismissal of the action if invalidation might adversely affect the interests of such third parties.

A local law amending the town's subdivision regulations and, incidentally as a result, subdivision approvals granted pursuant to the amendment were challenged in *Llana*. In the intervening time between the enactment of the law and the commencement of the action, seven property owners had received subdivision approval pursuant to the challenged law. The court found that these property owners would be prejudiced if the proceeding were to be

permitted to advance in their absence because it had not been demonstrated that their interests, as private citizens, would be adequately protected by the municipal respondents. Considering the ease in which the few individuals could have been joined in the first instance, the court refused to excuse the failure to do so in the interests of justice. Because an effective judgment could not be rendered in their absence, the court dismissed the action.

Similarly, in *Amodeo v. Town Board of the Town of Marlborough*, 249 A.D.2d 882, 672 N.Y.S.2d 439 (3d Dept. 1998), a challenge to the procedures employed in adopting a zoning amendment and a special permit granted pursuant to the challenged amendment was dismissed because the property owner/developer had not been joined as a party to the action. Since the statute of limitations had elapsed on the claims asserted, the action was dismissed and the claims were barred.

Consequently, one challenging a zoning enactment must ascertain whether any property owners have received approvals or obtained rights pursuant to the challenged law. If that is the case, those persons must be joined as parties or the court may dismiss the action. *See also Basha Kill Area Ass'n v. Town Board of the Town of Mamakating*, 302 A.D.2d 662, 754 N.Y.S.2d 714 (3d Dept. 2003).

XIV MORATORIUM

The enactment of a moratorium pending the adoption of permanent zoning regulations is a valid exercise of the police power where it is reasonably designed to temporarily halt development while a municipality considers changes to its zoning law. *See Cellular Telephone Company v. Village of Tarrytown*, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2d Dept.), *lv. denied*, 86 N.Y.2d 701, 631 N.Y.S.2d 605, 655 N.E.2d 702 (1995). A moratorium will be sustained if its restrictions are reasonable and are related to the public health, safety or general welfare of the community. *See Dune Associates, Inc. v. Anderson*, 119 A.D.2d 574, 500 N.Y.S.2d 741 (2d Dept. 1986). In addition, the duration of the moratorium may not exceed a reasonable period of time. *See Mitchell v. Kemp*, 176 A.D.2d 859, 575 N.Y.S.2d 337 (2d Dept. 1991).

Prior to purchasing a 21,383 square foot parcel of property, the plaintiff in *Caruso v. Town of Oyster Bay*, 172 Misc.2d 93, 656 N.Y.S.2d 809 (Sup. Ct. Nassau Co. 1997), *aff'd*, 250 A.D.2d 639, 672 N.Y.S.2d 418 (2d Dept. 1998), a builder, ascertained that the applicable minimum lot size was 10,000 square feet. Because subdivision approval was not required for a two lot split, he subdivided the property into two lots and sought a building permit. He was informed that his permit application would not be reviewed because the town was considering a rezoning of the area. A subsequently adopted moratorium barred the issuance of building permits for one-family dwellings for six months in a particular area of the town including the location of the plaintiff's property.

In ascertaining the substantive validity of the moratorium, the court judged the enactment by "whether the moratorium was a 'reasonable, necessary and limited response directed at redressing a genuine crisis or emergency.' " *Id.* at 97, 656 N.Y.S.2d at 813. (*quoting Cellular Telephone Company v. Village of Tarrytown*, 209 A.D.2d 57, 66, 624 N.Y.S.2d 170, 175 (2d Dept.), *lv. denied*, 86 N.Y.2d 701, 631 N.Y.S.2d 605, 655 N.E.2d 702 (1995)). The court invalidated the moratorium, concluding that no such crises or emergency was present.

Substantively, the *Caruso* decision indicates that courts may subject moratorium legislation to close scrutiny to determine whether exigent circumstances exist compelling the adoption of a moratorium and whether the basis for such a curtailment of property rights has been or can be demonstrated. Although being a legislative determination, normally accorded a presumption of validity, given the rigorous analysis to which moratoriums may be subjected pursuant to the reasoning of *Caruso*, moratorium legislation should include appropriate findings substantiating the basis for such legislation, the factual predicate for which should be fully documented in the record.

An otherwise valid moratorium will be invalidated if the requisite procedural steps are not observed. The extent of applicable procedural requirements depend to some extent on whether a moratorium is considered to be a "zoning" enactment subject to the requirements of article 16 of the Town Law and § 239-m of the General Municipal Law.

The proposed "adoption or amendment of a zoning ordinance or local law" is required by General Municipal Law § 239-m(3)(a) to be referred to the county planning agency, that is, the county planning board or department of planning, "if they apply to real property" located within 500 feet of various boundaries or features set forth in § 239-m(3)(b). It is well settled that the failure to comply with the referral requirements of § 239-m is a jurisdiction defect which requires invalidation of any noncomplying enactment. *See Burchetta v. Town Board of the Town of Carmel*, 167 A.D.2d 339, 561 N.Y.S.2d 305 (2d Dept. 1990); *Old Dock Associates v. Sullivan*, 150 A.D.2d 695, 541 N.Y.S.2d 569 (2d Dept. 1989); *Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149, 585 N.Y.S.2d 925 (2d Dept. 1992).

Whether a moratorium is a zoning regulation subject to the referral requirements of § 239-m was addressed by the *Caruso* decision. The town board adopted a local law providing for a moratorium without having referred the proposed local law to the Nassau County Planning Commission. Caruso's building permit application was held in abeyance because of the moratorium. Thereafter, Caruso commenced an action challenging the procedure and substance of the enactment.

The court first noted that where a challenge to a local law, including moratorium legislation, is not based upon a claim of facial invalidity or constitutionality, but upon the adoption procedures employed, the proper remedy is an article 78 proceeding. Since Caruso's declaratory judgment action was commenced within the general four-month statute of limitations for article 78 proceedings, the court entertained the merits of the claim.

The court concluded that "[t]he plain language of General Municipal Law § 239-m indicates that the proposed enactment of a moratorium must be referred to the County Planning Commission *before* final action is taken." 172 Misc.2d at 97, 656 N.Y.S.2d at 812 (emphasis in original). In reaching that conclusion, the court credited the decision in *B & L Development Corp. v. Town of Greenfield*, 146 Misc.2d 638, 551 N.Y.S.2d 734 (Sup. Ct. Saratoga Co. 1990), in which the court concluded that a moratorium "represents a form of zoning" and, consequently, the referral requirements of General Municipal Law § 239-m were applicable. *Id*. at 640, 551 N.Y.S.2d at 736. The *B & L Development* court based its conclusion on its finding that a moratorium is "an integral part of the total zoning plan. A moratorium is used in conjunction with, indeed it, generally, may be justified only in the context of, the establishment of a comprehensive zoning plan." *Id*. Consequently, a proposed moratorium must be referred to the appropriate county planning agency or such enactment will be jurisdictionally void.

The "adoption of a moratorium on land development or construction" is a Type II action pursuant to the SEQRA regulations, 6 NYCRR 617.5(c)(30), and, hence, is not subject to the requirements of SEQRA.

XV PREEMPTION

Principles

Although municipalities are delegated extensive authority to regulate land use, they may not enact zoning laws that relate to a specific subject area that has been preempted by State Legislation. *See Cohen v. Board of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64, 795 N.E.2d 619 (2003); *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 629, 546 N.E.2d 920, 922 (1989).

i Mining

The relationship between local land use authority and potential preemption issues is typified by the decisions in which municipalities have banned mining or fracking in all or a portion of a community.

The Mined Land Reclamation Law ("MLRL"), ECL §§ 23-2701--23-2727 provides a "detailed legislative scheme" for mining and reclamation of mined lands. *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126, 129, 524 N.Y.S.2d 25, 26, 518 N.E.2d 920, 921 (1987). The statute and the regulations promulgated by the DEC, 6 NYCRR Part 422, provide separate and distinct requirements for mining and for reclamation. Construing ECL § 23-2703(2), as it then existed, it has been determined that although the statute's express suppression clause prohibits local regulation of mining, nothing in the MLRL "evinces any legislative intent to preempt local land use regulation generally." *Morrell v. C.I.D. Landfill*, 125 A.D.2d 998, 999, 510 N.Y.S.2d 395, 396 (4th Dept. 1986), *lv. denied*, 69 N.Y.2d 612, 517 N.Y.S.2d 1028, 511 N.E.2d 87 (1987). Accordingly, land use regulations which restrict mining to certain zoning districts and prohibit mining in all other districts are not preempted by the MLRL. *See Frew Run*, *supra*; *Hoffay v. Tifft*, 164 A.D.2d 94, 562 N.Y.S.2d 995 (3d Dept. 1990); *Seaboard Contracting & Material v. Town of Smithtown*, 147 A.D.2d 4, 541 N.Y.S.2d 216 (2d Dept. 1989). The requirement of a special permit as a prerequisite of conducting mining activities in a particular zoning district and the imposition of conditions were considered to be valid land use regulations not preempted by the MLRL. *See Morrell*, 125 A.D.2d at 999, 510 N.Y.S.2d at 396.

While not altering the authority of a municipality to exclude mining from zoning districts or to require the issuance of a special permit as a prerequisite of establishing a mine, legislation adopted in 1991 restricts the ability of municipalities to impose conditions on special permits to conduct mining. ECL § 23-2703(2)(b) provides that conditions which may be imposed on approval of a special permit are limited to ingress and egress to public thoroughfares controlled by the local government; routing of vehicles transporting minerals; requirements and conditions specified in the DEC permit concerning setbacks, hours of operation, dust control and barriers to restrict access; and enforcement of reclamation requirements in the DEC permit.

In reviewing an application to establish a new mine subject to the MLRL, an application must be sent to the chief administrative officer of the local government in which the mine is proposed to be operated. *See* ECL § 23-2711(3). The chief administrative officer may suggest to the DEC appropriate setbacks, barriers to restrict access to the site, methods of dust control and hours of operation, and may determine whether mining is prohibited at the proposed location by the municipality's zoning regulations. If, in the opinion of the DEC, the determinations are "reasonable and necessary," it must incorporate them into the permit. *See* § 27-2711(3)(a), (b).

In *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126, 130-31, 524 N.Y.S.2d 25, 27-28, 518 N.E.2d 920, 922 (1987), a zoning law which banned mining in all zoning districts in the town was challenged as being preempted by the MLRL. The owner of a nonconforming mine asserted that *Frew Run* recognized the limited authority of municipalities to decide in which zoning districts mining may occur, but did not authorize the prohibition of mining in all districts in a community and that, as a result, the zoning restriction which prohibited mining throughout the town was preempted by the MLRL.

The Court of Appeals rejected the challenge to the law as being preempted by the MLRL and found that "the patent purpose of the 1991 amendment was to withdraw from municipalities the authority to enact local law imposing land reclamation standards that were stricter than the State-wide standard under the MLRL." *Gernatt Asphalt*, 87 N.Y.2d at 682, 642 N.Y.S.2d at 173, 664 N.E.2d at 1235. Nevertheless, "the MLRL does not preempt the Town's authority to determine that mining should not be a permitted use of land within the Town, and to enact amendments

to the local zoning ordinance in accordance with that determination." *Id*. at 683, 664 N.E.2d at 1235, 642 N.Y.S.2d at 173.

In *Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 101 A.D.3d 1505, 957 N.Y.S.2d 444 (3d Dept. 2012), it was determined that although the DEC's SEQRA determinations with respect to a mining permit issued by it pursuant to the MLRL bound the town with respect to SEQRA issues, the DEC's SEQRA determination did not supersede the town's zoning regulations governing review of special use permit applications, nor did it preordain the town's decision on the mine's special permit application. Similarly, the SEQRA findings did not bind the town to issue the requested special use permit or preclude it from employing the procedures and applicable special permit criteria in its zoning regulations, including the environmental and neighborhood impacts of the project.

In *Mombaccus Excavating, Inc. v. Town of Rochester*, 89 A.D.3d 1209, 932 N.Y.S.2d 551 (3d Dept. 2011), *lv. denied*, 18 N.Y.3d 808, 942 N.Y.S.2d 35, 965 N.E.2d 262 (2012), the town had amended the zoning law by eliminating unlimited gravel mining throughout the town and restricting "full-scale mining", that is, mining subject to the jurisdiction of the DEC under the MLRL to natural resource zoning districts the town also rezoned Mombaccus Excavating's property such that its property was situated in two zoning districts, only one of which permitted unlimited gravel mining. The court concluded that the amendment regulates only mining operations that are exempt from DEC permit requirements, does not violate the MLRL and is not superseded by that statute.

ii. Fracking

Similar to the preemption controversy with respect to mining generally, in response to technological developments which have made fracking more productive and economical, some municipalities have sought to ban hydrofracing within their community by zoning out such use.

A controversy arose regarding whether the Environmental Conservation Law ("ECL") preempts municipalities from banning the use of high-volume hydraulic fracturing (hydrofracking) to obtain natural gas from the Marcellus black shale formation which underlies the southern portion of New York State. ECL § 23-0303(2) provides that:

The provisions of [Mineral Resources article 23 of the ECL] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.

In *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d 450, 940 N.Y.S.2d 458 (Sup. Ct. Tompkins Co. 2012), the court determined "whether a local municipality may use its power to regulate land use to prohibit exploration for, and production of, oil and natural gas." *Id*. at 452, 940 N.Y.S.2d at 461. In order to prohibit hydrofracking, the town amended its zoning law in 2011 to prohibit all activities related to the exploration for, and production or storage of, natural gas and petroleum. The plaintiff owned gas leases that had been obtained prior to the enactment of the zoning amendment and had invested more than five million dollars in furtherance of those leases.

Because hydrofracking may involve the risk of contaminating ground and surface water supplies, town residents petitioned the town board to ban hydrofracking and, as a result, the town board amended the zoning law to prohibit hydrofracking and the exploration for and extraction of natural gas.

The plaintiff sought to invalidate the amendment on the grounds that it was expressly preempted by the ECL §

23-0303, the Oil, Gas and Solution Mining Law ("OGSML"), and that it impermissibly conflicted with the substantive provisions of the OGSML that directly regulate gas production.

The express supersession provision of the OGSML provides that "[t]he provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2) (emphasis added). The court related that that provision was last amended more than thirty years ago--long before the potential use of hydrofracking to recover natural gas could have been anticipated. However, the Court of Appeals had concluded in *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987), that a similar supersession clause contained in the MLRL, ECL, article 23, title 27, did not preempt local zoning laws. Because of the similarities between the OGSML and the MLRL as it existed at the time of the *Frew Run* decision, the court considered the *Frew Run* precedent to be controlling.

In *Frew Run*, the following supersedure provision of the MLRL was considered: "For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein." ECL § 23-2703(2). The court held that the zoning ordinance did not relate to the extractive mining industry but to an entirely different subject, that is, land use.

In *Frew Run*, we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the type of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities. In *Frew Run*, we concluded that nothing in the plain language, statutory scheme, or legislative purpose of the Mined Land Reclamation Law suggested that its reach was intended to be broader than necessary to preempt *conflicting regulations dealing with mining operations and reclamation of mined lands* (*id*. at 133, 524 N.Y.S.2d at 25, 518 N.E.2d at 920 (emphasis added)), and that in the absence of a clear expression of legislative intent to preempt local control over land use, the statute could not be read as preempting local zoning authority.

Gernatt Asphalt Products v. Town of Sardinia, 87 N.Y.2d 668, 681-682, 642 N.Y.S.2d 164, 172, 664 N.E.2d 1226, 1234 (1996).

The *Anschutz Exploration* court found that the primary language of the two supersession clauses is nearly identical. Neither supersedure clause contains a clear expression of legislative intent to preempt local authority over land use and zoning. Significantly, the MLRL law was amended in 1991 to codify the *Frew Run* decision and, in 1996, the amended supersession clause was construed by the Court of Appeals in *Gernatt Asphalt* to permit a complete ban on mining activities within a municipality. Despite that legislative and judicial activity regarding the preemptive scope of the MLRL, the OGSML, as enacted in 1976 and amended in 1981, does not contain a supersedure clause evidencing a clear legislative intent to preempt local zoning control over land use concerning oil and gas production. In addition, no meaningful difference exists in the purposes of the two laws. Both statutes provide for statewide regulation of operations with the principal objective of fostering effective use of a natural resource. The supersession provisions of each were adopted to eliminate inconsistent local regulations which inhibited that goal. Nor is any significant difference in the purpose of the two statutes apparent from their respective regulatory schemes.

The absence of a clear expression of legislative intent in the OGSML to preempt local zoning authority also is

apparent when it is compared to state statutes that definitely preempt local zoning authority, such as ECL, article 27, title 11 (siting industrial hazardous waste facilities) and Mental Hygiene Law § 41.34 (siting community residential facilities). The OGSML differs from those statutes in two meaningful respects. First, unlike the OGSML, the intent to preempt local zoning ordinances is clearly expressed in the text of the other statutes. Second, those statutes provide for the consideration of traditional land use concerns in determining whether to issue a permit under State law. *See* ECL § 27-1103(2)(b), (c), (g), (h); Mental Hygiene Law § 41.34(c)(5). The OGSML does not require consideration of such factors prior to issuance of a permit. In addition, to ensure that local concerns are considered, those statutes require advance notice to, and allow participation by, a municipality in which a proposed facility is to be located. *See* ECL § 27-1105(3)(c); ECL § 27-1113; Mental Hygiene Law § 41.34(c). By contrast, the OGSML does not require notice to an affected municipality unit after a permit has been granted and only before drilling starts. *See* ECL § 23-0305(13). As a result, an evident legislative intent to preempt local zoning authority is not clear from the fact that the OGSML does not specifically mandate a mechanism for consideration of local land use concerns. Instead, "local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while the DEC regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by local law." *Anschutz Exploration*, 35 Misc.3d at 467, 940 N.Y.S.2d at 471.

The fact that the zoning amendment prohibits all operations related to oil and gas exploration and production throughout the town does not compel a different result. In *Gernatt Asphalt*, the Court of Appeals rejected the argument that if the land within a municipality contains extractable minerals, the municipality must permit them to be mined somewhere. The court determined that because the MLRL does not restrict the power to zone, a municipality may exercise its zoning authority to ban mining within its borders.

The court noted that although the issue was a case of first impression in New York, the Supreme Courts of Pennsylvania and Colorado reached the same result in concluding that their respective state's statutes governing oil and gas production do not preempt the power of a local government to exercise its zoning power to regulate the districts where gas wells are a permitted use. *See Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 600 Pa. 207, 212, 964 A.2d 855, 858 (2009); *Board of County Commissioners of La Plata County v. Bowen/Edwards Associates, Inc*., 830 P.2d 1045 (1992).

However, the court invalidated the provision that provided that "[n]o permit issued by any local, state or federal agency, commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town." Although a municipality may regulate the use of land within its borders, including banning oil or gas operations, it possesses no authority to invalidate a permit lawfully issued by another governmental entity. By purporting to abrogate permits issued by any state agency, including the DEC, the provision directly related to the regulation of the oil and gas industries and, accordingly, is expressly preempted by the OGSML and is invalid. However, the invalidity of that provision did not require invalidation of the whole amendment because it could be severed without impairing the underlying purpose of the amendment.

The court reached an identical conclusion in *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc.3d 767, 943 N.Y.S.2d 722 (Sup. Ct. Otsego Co. 2012), *aff'd*, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (3d Dept.), *lv. granted*, 21 N.Y.3d 863 (Table), 2013 WL 4561213 (2013). The town in *Cooperstown Holstein* adopted an amendment to its zoning law similar to the one reviewed in *Anschutz Exploration*, which also effectively banned hydrofracking. As posed by the court, the issue was whether the State by "the enactment of ECL § 23-0303(2), prohibit local municipalities from enacting legislation which may impact upon the oil, gas and solution drilling or mining industries other than that pertaining to local roads and the municipalities' rights under the real property law?" *Cooperstown Holstein*, 35 Misc.3d at 770, 943 N.Y.S.2d at 724.

The court initially related that in evaluating the relationship between local regulation and the extent of state

preemption in ECL § 23-0303(2), a court must look to the legislative intent and the legislative history of the act to ascertain the scope of such preemption. The identification of the manner by which preemption is manifested, if at all, by the statutory language employed by the enabling legislation must first be addressed, that is, is the preemption manifested expressly, by implication or by operation of conflict preemption? The court found that because the legislature chose to expressly address preemption in the statute itself, the question which next arises is the extent of the preemption. To address that question, the court extensively reviewed the legislative history of the statute and of its predecessor and concluded that no support existed in the legislative history leading up to and including the 1981 amendment of the ECL as it relates to the supersession clause which would support the contention that the phrase "this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" was intended by the Legislature to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use.

In addition, case law also supports the conclusion that municipalities are not preempted by ECL § 23-0303(2) from enacting local zoning ordinances which may prohibit oil, gas and solution drilling or mining. In addressing the scope of the supersession clause of the MLRL, ECL § 23-2703(2), the Court of Appeals determined in *Frew Run, supra*, that the zoning regulations at issue did not frustrate the state's "purposes of the statute ... to foster a healthy, growing mining industry `and to aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition.' " *Frew Run*, 71 N.Y.2d at 132, 524 N.Y.S.2d at 28, 518 N.E.2d at 923. The Court of Appeals found that the "strikingly similar" supersession clause preempted the local municipality from establishing regulations pertaining to the methods of mining as such regulations were exclusively the province of the state while at the same time permitting the municipality, by exercise of its constitutional and statutory authority, to "regulate land use generally." *Cooperstown Holstein*, 35 Misc.3d at 778, 943 N.Y.S.2d at 729 (*quoting Frew Run*, 71 N.Y.2d. at 131, 524 N.Y.S.2d at 27, 518 N.E.2d at 922). "Here, no less can be said about ECL § 23-0303(2) as the preemption does not apply to local regulations addressing land use which may, at most, 'incidentally' impact upon the 'activities' of the industry of oil, gas and solution drilling or mining." *Id.*

The Court of Appeals confirmed the *Frew Run* conclusion that the supersession clause of the MLRL drew a distinction between the manner and method of mining and local land use regulation. "Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the type of regulatory provisions the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities." *Gernatt Asphalt*, 87 N.Y.2d at 681-682, 642 N.Y.S.2d at 172, 664 N.E.2d at 1234. The court also noted a significant aspect of the *Gernatt Asphalt* decision, that is, that a municipality may permissibly ban mining throughout the community in furtherance of its land use authority.

The *Cooperstown Holstein* court concluded that the zoning law at issue was a legitimate and permissible exercise of the municipality's constitutional and statutory authority to enact land use regulations even if they may have an incidental impact upon the oil, gas and solution drilling or mining industry. It did not conflict with the state's interest in establishing uniform policies and procedures for the manner and method of the industry and did not impede implementation of the state's declared policy with respect to these resources.

As a result, the court concluded that the supersession clause contained with ECL § 23-0303(2) does not preempt a local municipality from adopting land use regulation and, as such, municipalities are permitted to permit or prohibit oil, gas and solution mining or drilling in conformity with such constitutional and statutory authority.

In *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dept.), *lv. granted*, 21 N.Y.3d 863 (Table), 2013 WL 4562930 (2013), the Appellate Division adopted the same reasoning as the courts in *Anschutz Exploration* and *Cooperstown Holstein*. The town had amended its zoning ordinance to ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum. The petitioner's

predecessor in interest, Anschutz Exploration owned leases covering 22,200 acres of land in the town and sought to invalidate the amendment, claiming that it was preempted by the OGSML, ECL § 23-0301 *et seq.*

The court related that the State Constitution grants "every local government [the] power to adopt and amend local laws not inconsistent with the provisions of [the] constitution or any general law relating to its property, affairs or government." (Const., art. IX, § 2[c]). To implement this express grant of authority to local governments, the Legislature adopted various statutes authorizing numerous local powers including the authority to regulate the use of land. *See* Municipal Home Rule Law § 10[1][ii][a][11]; Statute of Local Government § 10(6), (7); Town Law § 261; *Kamhi v. Planning Board of the Town of Yorktown*, 59 N.Y.2d 385, 389, 465 N.Y.S.2d 865, 866, 452 N.E.2d 1193, 1194-95 (1983); *Riegert Apartments Corp. v. Planning Board of the Town of Clarkstown*, 57 N.Y.2d 206, 209, 455 N.Y.S.2d 558, 560, 441 N.E.2d 1076, 1078 (1982).

However, the Legislature may preempt such local legislation by expressly stating its intent to preempt or by implication. *See Cohen v. Board of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395, 400, 764 N.Y.S.2d 64, 67, 795 N.E.2d 619, 622 (2003). Where, as in *Norse Energy*, a statute contains an express preemption clause, its effect "turns on the proper construction of [the] statutory provision." *Norse Energy*, 108 A.D.3d at 31, 964 N.Y.S.2d at 719 (*quoting Frew Run*, 71 N.Y.2d at 131, 524 N.Y.S.2d at 27, 518 N.E.2d at 922).

The supersession clause in the OGSML provides that "[t]he provisions of [ECL article 23] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries...." ECL § 23-0303(2). Thus, the plain language of this provision prohibits municipalities from enacting laws or ordinances "relating to the regulation of the oil, gas and solution mining industries." *Norse Energy*, 108 A.D.3d at 31, 964 N.Y.S.2d at 719. The zoning ordinance did not seek to regulate the details or procedure of the oil, gas and solution mining industries. Instead, it establishes permissible and prohibited uses of land within the town for the purpose of regulating land generally. The court found that although the town's exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon the oil, gas and solution mining industries, zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted by the OGSML.

The court further related that the legislative history of ECL § 23-0303(2), specifically, and the OGSML, generally, supports its conclusion. Assessing the legislative history of the OGSML and, specifically, the 1981 amendments, the Legislature's intentions were to ensure uniform statewide standards and procedures with respect to the technical operational activities of the oil, gas and mining industries in an effort to increase efficiency while minimizing waste, and to eliminate inconsistent local regulation that impeded that goal. There is nothing in the language, statutory scheme or legislative history of the statute indicating an intention to usurp the authority traditionally delegated to municipalities to establish permissible and prohibited uses of land within their jurisdictions. In the absence of a clear expression of legislative intent to preempt local control over land use, the court declined to accord such a construction. "By construing ECL 23-0303(2) as preempting only local legislation regulating the actual operation, process and details of the oil, gas and solution mining industries, 'the statutes may be harmonized, thus avoiding any abridgment of [a] town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments ... and [the] Town Law.' " *Norse Energy*, 108 A.D.3d at 35, 964 N.Y.S.2d at 721 (*quoting Frew Run*, 71 N.Y.2d at 134, 524 N.Y.S.2d at 29, 518 N.E.2d at 924).

Relying on the decision in *Frew Run* for further support for its conclusion, the court related that "[c]onstruing the language 'relating to the extractive mining industry' according to its plain meaning, the [*Frew Run*] Court found that the zoning law was not preempted by the MLRL's supersession provision as it was related to 'an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town.' " *Id*. at 35-36, 964 N.Y.S.2d at 722 (*quoting Frew Run*, 71 N.Y.2d at 131, 524 N.Y.S.2d at 27-28, 518 N.E.2d at 922). In limiting supersession to those laws "relating to the extractive mining industry," the Court concluded, the Legislature intended to preempt only "[l]ocal regulations dealing with the

actual operation and process of mining. *Id*. at 36, 964 N.Y.S.2d at 722 (*quoting Frew Run*, 71 N.Y.2d. at 133, 524 N.Y.S.2d at 29, 518 N.E.2d at 923). The *Frew Run* court had opined that local zoning ordinances affect the mining industry only in incidental ways and, notably, do not frustrate the MLRL's stated purpose "to foster a healthy, growing mining industry." *Id*. (*quoting Frew Run*, 71 N.Y.2d. at 132, 524 N.Y.S.2d at 28, 518 N.E.2d at 923). The amendment challenged in *Norse Energy* while incidentally impacting the oil, gas, and solution mining industries, does not conflict with the state's interest in establishing uniform procedures for the operational activities of these industries.

Consequently, based on the plain meaning of the language contained in the supersession clause, the relevant legislative history and the purpose and policy of the OGSML as a whole, and mindful of the interpretation accorded to MLRL's similar supersession provision, it was concluded that ECL § 23-0303(2) does not preempt a municipality's authority to enact a local zoning ordinance prohibiting oil, gas and solution mining or drilling within its borders.

The court also rejected the contention that the amendment was invalid by virtue of the doctrine of implied preemption. Although the existence of an express preemption clause in a statute supports a reasonable inference that the Legislature did not intend to preempt other matters, it does not entirely foreclose any possibility of implied preemption. Under the doctrine of conflict preemption, a "local government ... may not exercise its police power by adopting a local law inconsistent with constitutional or general law." *Norse Energy*, 108 A.D.3d at 37, 964 N.Y.S.2d at 723 (*quoting New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217, 513 N.Y.S.2d 349, 351, 505 N.E.2d 915, 917 (1987), *aff'd*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)). The provisions of the OGSML which relate to the spacing of wells do not relate to traditional land use considerations but, instead, deal with the details and procedures of well spacing by drilling operators. The two do not conflict, but rather, may harmoniously coexist; the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML instructs operators as to the proper spacing of the units within those districts in order to prevent waste.

As a result, the OGSML does not preempt, either expressly or impliedly, a municipality's power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders.

iii. Check Cashing Establishments

In *Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead*, 91 A.D.3d 126, 933 N.Y.S.2d 388 (2d Dept. 2011), *aff'd on other grounds*, 20 N.Y.3d 481, 964 N.Y.S.2d 64, 986 N.E.2d 898 (2013), the town amended its zoning law to exclude check-cashing establishments in all districts other than its industrial and light manufacturing districts. The plaintiffs' check-cashing businesses, each of which was situated in a business district, became nonconforming uses and were required to terminate or relocate to industrial or light-manufacturing districts within the five-year amortization period provided. The plaintiffs asserted that the law was preempted by State law, that it was not a valid exercise of the town's zoning power and that it was unconstitutional. The Appellate Division concluded that the amendment was invalid by virtue of the doctrine of conflict preemption.

New York's constitutional home rule provision (N.Y. Const., art. IX, § 2(c)) "confers broad police powers upon local governments relating to the welfare of its citizens." *Sunrise Check Cashing*, 91 A.D.3d. at 133, 933 N.Y.S.2d at 394. However, a municipality cannot adopt laws that are inconsistent with the Constitution or with any general law of the State. "Broadly speaking, State preemption occurs in one of two ways--first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility." *Id*. at 133-34, 933 N.Y.S.2d at 394 (*quoting DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 95, 725 N.Y.S.2d 622, 625, 749 N.E.2d 186, 190 (2001)).

"Under the doctrine of conflict preemption, a local law is preempted by a state law when a 'right or benefit is expressly given ... by [ ] State law which has then been curtailed or taken away by the local law.' " *Id*. at 134, 933 N.Y.S.2d at 395 (*quoting Chwick v. Mulvey*, 81 A.D.3d 161, 167-168, 915 N.Y.S.2d 578, 584 (2d Dept. 2010)). "Put differently, conflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows." *Id*. (*quoting Chwick*, 81 A.D.3d at 168, 915 N.Y.S.2d at 584). In ascertaining the applicability of conflict preemption, courts consider the language of the local law or ordinance and the state statute, and also whether the direct ramifications of a local enactment renders unlawful that which is unequivocally permitted by State law. "The crux of conflict preemption is whether there is 'a head-on collision between the ... ordinance as it is applied' and a state statute." *Id*. (*quoting Chwick*, 81 A.D.3d at 168, 915 N.Y.S.2d at 584).

Pursuant to "field preemption," a local law regulating the same subject matter as a State law is inconsistent with the State's superior concern, whether or not the provisions of the local law actually conflict with a State-wide statute. "Such [local] laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns." *Id.* at 134-35, 933 N.Y.S.2d at 395 (*quoting Chwick*, 81 A.D.3d at 169, 915 N.Y.S.2d at 585). Field preemption may apply to any of three distinct situations: an express statement in a State statute that unambiguously declares that it preempts all local laws on the same subject matter; a pronouncement of State policy that expresses the intent of the Legislature to preempt local laws on the same subject matter; or the Legislature's enactment of a comprehensive and complete regulatory scheme which establishes an intent to preempt local laws.

Article 9-A of the Banking Law, entitled "Licensed Cashers of Checks," was adopted "to provide for the regulation of the business of cashing checks by the superintendent of banks whether the cashing of checks, drafts and money orders...." Banking Law § 367 itemizes the licensing prerequisites for "cashers of checks" and forbids the business of cashing checks for consideration unless the superintendent of banks approves a license. Banking Law § 369 provides, in part, that "if the superintendent shall find that the granting of such application will promote the convenience and advantage of the area in which such business is to be conducted..." he shall grant a license to permit the cashing of checks, drafts and money orders. That provision further states that "[i]n finding whether the application will promote the convenience and advantage to the public, the superintendent shall determine whether there is a community need for a new licensee in the proposed area to be served." In enacting a 1994 amendment to Banking Law § 369(1), the Legislature related that "[t]he legislature hereby finds and declares ... that the licensing of check cashers shall be determined in accordance with the needs of the communities they are to serve; and that it is in the public interest to promote the stability of the check cashing business for the purpose of meeting the needs of the communities that are served by check cashers."

The superintendent has also promulgated regulations regarding the licensing of cashers of checks. An applicant must provide, among other things, a "business plan containing such information as shall permit the superintendent to make a finding that the granting of the license will promote the convenience and advantage of the area in which the business is to be conducted including a determination that there is a community need for a new licensee in the proposed area to be served." 3 NYCRR 400.1(c)(7). The business plan must include the following information: "(i) description of primary market area (e.g., identification of blocks and other landmarks including the locations of banking institutions and other licensed check cashers operating in the service area surrounding the proposed location); (ii) description of projected customer base; (iii) proposed days and hours of operations; (iv) types of services proposed to be offered including special services such as fluency in languages which are predominant in the area of licensed location(s); (v) detailed description of demographics of the area including population density which information should be derived from official government records and other published sources; (vi) description of any proposed economic development of area; and (vii) specific marketing targets, if any." *Id*.

As a result, as the language of Banking Law § 369(1) demonstrates that the Legislature vested the superintendent with the duty to determine whether each applicant for a check-cashing license proposes to perform that function in an appropriate location, whether there is a community need for a new licensee at that location and whether the granting of such an application will be advantageous to the public. Pursuant to the Banking Law and to the regulations promulgated by the superintendent, where a license is granted, the successful applicant necessarily has demonstrated that the business is appropriately located based upon community needs, economic development plans, and demographic patterns.

In adopting the amendment, the town tacitly determined that it did not believe that the town's business district is a suitable locale for check-cashing establishments and that such businesses are only appropriately located in the industrial and light manufacturing districts. Such a circumstance is contrary to the Legislature's delegation to the superintendent of the duty to decide whether specific locations are appropriate for such businesses. The superintendent's determination to approve the plaintiffs' license applications necessarily included the finding that "there is a community need for a new licensee in the proposed area to be served," and that granting the applications would "promote the convenience and advantage to the public." 91 A.D.3d at 136, 933 N.Y.S.2d at 398 (*quoting* Banking Law § 369 (1)). As a result, the provision improperly conflicted with existing State law.

Independent levels of regulatory oversight can coexist and State statutes do not inevitably preempt local laws having only "tangential" impact on the State's concerns. However, the facts of the case confirmed that the amendment had more than a tangential effect on the functioning of the Banking Law. The amendment sought to achieve the same purpose as is delegated to the superintendent by making a decision as to suitable locations for check-cashing establishments. By approving such establishments only in the industrial and light manufacturing districts, the law essentially divested the superintendent of the delegated jurisdiction to determine whether there is a community need for a new licensee in the proposed area to be served.

Accordingly, the amendment barred the maintenance of existing check-cashing establishments in the business district despite the fact that the superintendent necessarily concluded the sites were suitable to serve a community need. Because such an exclusion is not authorized by State law and because the Legislature vested the superintendent with the authority to approve suitable locations for check-cashing establishments, the law was preempted by State law.

The Court of Appeals affirmed the decision of the Appellate Division. *See Sunrise Check Cashing*, 20 N.Y.3d 481, 964 N.Y.S.2d 64, 986 N.E.2d 898 (2013), finding that the amendment was not a proper exercise of the zoning power and impermissibly was directed at the perceived social evil of check-cashing services. The court specifically declined to address the preemption issue upon which the decision of the Appellate Division was based.

iv. Substance Abuse Facilities

In *Village of Nyack v. Daytop Village*, 78 N.Y.2d 500, 577 N.Y.S.2d 215, 583 N.E.2d 928 (1991), the Court of Appeals determined that the detailed provisions of the Mental Hygiene Law, Mental Hygiene Law article 19, and administrative regulations, 14 NYCRR Parts 1010-1030, regulating the approval and licensing of substance abuse facilities, did not preempt local zoning regulations. Daytop Village received approval from the New York State Division of Substance Abuse Services ("DSAS") to operate a residential substance abuse treatment program in a former hotel located in a commercial district in which residential uses were specifically prohibited. The village commenced an injunctive action and sought a preliminary injunction of Daytop's operation of the facility. The Appellate Division reversed Supreme Court's grant of the preliminary injunction, finding that the doctrines of preemption and inconsistency precluded the application of the zoning law to bar the operation of the facility at that location. *See Village of Nyack v. Daytop Village*, 173 A.D.2d 778, 570 N.Y.S.2d 836 (2d Dept. 1991). Based on the comprehensive scheme contained in article 19 of the Mental Hygiene Law, the Appellate Division determined that

requiring compliance with local land use regulations "would clearly impose additional restrictions on rights granted by State law and thereby 'tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns.' " *Id.* at 779-80, 570 N.Y.S.2d at 837

The Court of Appeals reversed because "no inherent inconsistency" existed between the local zoning regulations and the State law and the two could be harmonized. *Daytop Village*, 78 N.Y.2d at 504, 577 N.Y.S.2d at 217, 583 N.E.2d at 929. The court rejected Daytop's contention that the comprehensiveness of the State's approach to substance abuse treatment demonstrated the Legislature's intent to preclude local involvement in the location of residential treatment facilities. It was claimed that the additional burden on the operation of such facilities occasioned by local zoning regulations inhibited the implementation of the State's policy and, as a result, was preempted.

Although the statute and regulations provide a "sweeping effort to address the myriad problems that have flowed from the scourage of substance abuse in this State ... [n]one of this ... leads inexorably to the conclusion that the State's commitment to fighting substance abuse preempts all local laws that may have an impact, however tangential, upon the siting of substance abuse facilities." *Id*. at 506, 577 N.Y.S.2d at 217, 583 N.E.2d at 930. Unlike the provisions relating to community residential facilities for the handicapped, Mental Hygiene Law § 41.34, article 19 does not explicitly divest localities of zoning authority. Consequently, the zoning restrictions could be found to have been superseded only if that authority had been impliedly preempted.

The interests of the state and community are not necessarily contradictory. Although a potential conflict exists between the competing interests, "[s]tate and local regulation of the placement of substance abuse facilities will not by their very nature produce conflict and inconsistency." *Id.* at 507, 577 N.Y.S.2d at 218, 583 N.E.2d at 931. The court's finding that "[t]wo separate levels of regulatory oversight can coexist," weighed against implying preemption. *Id.* In analyzing the statute, its legislative history and the applicable regulations, it was also found that the "aspirational language" of the statute could not be read to preclude local regulation of the location of such facilities.

In sanctioning the village's regulation of the location of Daytop's drug treatment facility, the court acknowledged that the village had not attempted to bar the establishment of substance abuse facilities by its zoning law. The court concluded that the village "has a legitimate, legally grounded interest in regulating development within its borders" which is not preempted by the State's licensing of the facility. *Id*. at 508, 577 N.Y.S.2d at 219, 583 N.E.2d at 932.

v. New York State Uniform Fire Prevention and Building Code

The New York State Uniform Fire Prevention and Building Code contains detailed regulations regarding construction requirements, fire safety, maintenance and property standards for all construction in the State, and purports to be exclusive.

A provision in the New York State Uniform Fire Prevention and Building Code, 19 NYCRR 1201.2(c), provides that "[a] county or a city which participates in a regional off-track betting corporation established pursuant to article V of the Racing, Pari-Mutual Wagering and Breeding Law shall be accountable for administration and enforcement of the Uniform Code with respect to buildings, premises and equipment in the custody of, or activities related thereto undertaken by, such corporation, whenever such buildings, premises, equipment or activities are located or occur within the boundaries of the respective county or city." In *Catskill Regional Off-Track Betting Corp. v. Village of Suffern*, 65 A.D.3d 1340, 886 N.Y.S.2d 214 (2d Dept. 2009), the village's code enforcement officer had issued appearance tickets to the Catskill Regional Off-Track Betting Corporation ("OTB") alleging violations of the village's property maintenance code. OTB instituted an article 78 proceeding seeking to prohibit the village

from issuing or prosecuting building code violations. Supreme Court had found that the village did not have the authority to issue building code violations against OTB and that the alleged violations could only be enforced by county and not local government. *See Catskill Regional Off-Track Betting Corp.*, 20 Misc.3d 935, 862 N.Y.S.2d 280 (Sup. Ct. Rockland Co. 2008).

The Appellate Division reversed, finding that because the appearance tickets alleged violations of the village code, OTB's arguments with respect to the authority to enforce the Fire Code are immaterial. The Fire Code permits a municipality to establish and enforce its own building regulations as long as those regulations do not "supersede, void, repeal or make more or less restrictive" any of the provisions of the Fire Code or of rules or regulations made pursuant to it. *See* Executive Law § 379(3). OTB failed to establish that the relevant provisions of the village code at issue violate that proscription.

In *People v. Nicosia*, 171 Misc.2d 915, 656 N.Y.S.2d 123 (Just. Ct. Nassau Co. 1997), the operator of a day care center was charged with a violation of the Uniform Fire Prevention and Building Code for occupying a "cellar" which could not be utilized as "habitable space." The day care center was licensed by New York State Department of Social Services as a "group family day care home," with a maximum capacity of twelve children, ages six weeks to twelve years. In issuing a license, Department of Social Services implicitly determined the premises were a "basement" and not a "cellar." A basement is by definition "habitable space" which can be used for a full range of activities not permitted in the "nonhabitable space" which constitutes a cellar. The village disputed the department's conclusion, finding that the space in question was four feet to six feet below average finished grade, making the total height of the space more than four feet below the average grade. In addition, the space was more than 50% below grade. A "cellar" was defined by the State Code as space that has more than half of its height below the average established curb level or finished grade of the ground adjoining the building and generally could not be considered to be "habitable space." In addition, a floor level more than four feet below the average adjoining finished grade could not be deemed to constitute "habitable space." Therefore, the space in issue here was a cellar and not a basement. To the extent that the licensing determination by the Department of Social Services may have been based upon a finding that this space was a basement and not a cellar, it was incorrect and the premises could not be utilized as "habitable space." The defendant moved to dismiss the prosecution on the ground that the village was preempted once the State regulated the premises. The defendant asserted that such an intent to preempt is set forth in Social Services Law 390(12)(a), which provided that "no [local municipality] shall * * * enact any law * * * [to] enforce standards for sanitation, health, fire safety or building construction on a one or two family [house] * * * used to provide group family day care * * * [that would not] be applicable were such child day care not provided on the premises." Based upon that section, coupled with the overall legislative purpose of providing day care, a municipality could not enforce a requirement for a special permit, where one would normally not be required for other one-or two-family dwellings. *See People v. Bacon*, 133 Misc.2d 771, 508 N.Y.S.2d 138 (Dist. Ct. Nassau Co. 1986). The village contended that it was not precluded from enforcing other State laws, specifically the New York State Uniform Fire Prevention and Building Code.

However, although the village could not enforce certain village code regulations, no prohibition against local enforcement of other State regulations exists. Nothing in Social Services Law § 390(12)(a), precluded "local authorities with enforcement jurisdiction of the applicable sanitation, health, fire safety or building construction code from making appropriate inspections to assure compliance with such standards." Section 390(12)(a) also indicated that day care centers are subject to the same rules and regulations applicable to all one-and two-family dwellings. Therefore, the day care home, as with all one-and two-family dwellings in the village, must comply with the New York State Uniform Fire Prevention and Building Code, including its prohibition against using a cellar as a place of habitation, and the local enforcement was not preempted by the provisions of the Social Services Law. The Legislature never intended to preempt enforcement of the State uniform fire prevention and safety regulations by enacting Social Services Law § 390.

vi. Day Care Centers

In *People v. Bacon*, 133 Misc.2d 771, 508 N.Y.S.2d 138 (Dist. Ct. Nassau Co. 1986), the court determined that "public policy and the laws of this State require finding that a family day care home is a permissible use of residentially zoned property." *Id.* at 776, 508 N.Y.S.2d at 141. The court determined that an ordinance which is interpreted to prohibit family day care in a residential zoning district is invalid since it would "conflict with and hinder State law and policy favoring home day care for children" and would not bear a reasonable or substantial relation to the public health, safety or welfare. *Id*. at 777, 508 N.Y.S.2d at 141. Consequently, because the ordinance did not expressly prohibit day care centers as an accessory use on residential property, the court concluded that a day care center was a permissible accessory use. *Id*. at 777-78, 508 N.Y.S.2d at 142.

In *People v. Town of Clarkstown*, 160 A.D.2d 17, 559 N.Y.S.2d 736 (2d Dept. 1990), the town had amended its zoning law to add requirements for family day care homes. In particular, "performance standards" for day care homes were added, including requirements that: a suitable, safe, fenced or other enclosed play area shall be provided, located not less than 50 feet from any street line or 25 feet to any lot line with a play area of at least 200 square feet per child, which may not be located in a required front yard; no building areas may be occupied by the children within a required yard; at least one off-street parking space shall be provided for each staff member, and at least one space per every three (3) enrolled children; no family day care home shall be located on a lot that includes a two-family conversion; no more than six (6) children shall be enrolled in the family day care home.

The preemption doctrine, a "fundamental limitation on home rule powers," applies to invalidate local laws where "the State has demonstrated an intent to preempt an entire field and thereby preclude any further local regulation." *Id*. at 21, 559 N.Y.S.2d at 738 (*quoting Ardizzone v. Elliott*, 75 N.Y.2d 150, 155, 551 N.Y.S.2d 457, 460, 550 N.E.2d 906, 909 (1989)). An express pronouncement of the legislative intent to preempt is unnecessary. "It is enough that the Legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the Legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area." *Id.* (*quoting New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217, 513 N.Y.S.2d 349, 351, 505 N.E.2d 915, 917 (1987), *aff'd*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed. 2d 1 (1988)).

Although Social Services Law § 390 does not contain an express prohibition against local regulation of family day care, the State evinced an intent to preempt the regulation of family day care homes because the enforcement of local family day care regulations "would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns." *Id.* at 21, 559 N.Y.S.2d at 739.

Social Services Law § 390 and the implementing regulations, 18 NYCRR part 417, provide a comprehensive scheme of highly detailed family day care regulations. The regulations include specifications for, among many requirements, the evaluation of such use, including a mandate that an applicant comply with specific requirements to provide "safe and suitable" premises for the comfort and care of the children (18 NYCRR 417.5), that the premises be kept clean and sanitary (18 NYCRR 417.7) and that suitable safety precautions be taken to "eliminate all conditions which may contribute or create a fire or safety hazard" (18 NYCRR 417.8). The supervision and enforcement of the regulations are delegated to the State Social Services or an approved agency (18 NYCRR 417.16).

Although 18 NYCRR 417.3(h) requires that an applicant for a certificate to provide in-home day care demonstrate that the residence complies with local health and safety regulations, it does not authorize a locality to treat State-regulated family day care homes as a separate class of residences upon which it may impose distinct and onerous conditions. Instead, consistent with the State's policy to encourage the increased availability of day care homes, 18 NYCRR 417.3(h) establishes a satisfactory means of insuring that concerns such as safety, fire, and health standards are met by allowing an applicant to satisfy the criteria otherwise applicable to all residences

generally, or by proving that a valid certificate of occupancy had been issued on the premises as a residence. In addition, although State law permits family day care for up to eight children, the challenged ordinance limits such care to six children. Further, State law contains no prohibition against providing day care in a two-family or multiple-family dwelling, while the town restricts such use to single family detached residences. State law does not contain requirements as to the amount of play area that must be provided for each child, while the zoning law contains such requirements as well as restrictions on the location of play areas.

Although the town contended that its regulations were necessary to guarantee the safety of the children in day care homes, the State has already made such provisions and the town's additional regulations have the effect, if not the design, of undermining the development of home day care services in the town.

vii. Administrative Zoning Violations Bureau

In *Greens at Half Hollow, LLC v. Town of Huntington*, 15 Misc.3d 415, 831 N.Y.S.2d 649 (Sup. Ct. Suffolk Co. 2006), an administrative tribunal, the "Zoning Violations Bureau," created to adjudicate all zoning and land use code violations, instead of the local district court, was determined to be unconstitutional and to be preempted by the provisions of Town Law §§ 135 and 268(1).

viii. Agricultural Districts

The preemptive effect of provisions of the Agriculture and Markets Law was reviewed in *Inter-Lakes Health, Inc. v. Town of Ticonderoga Town Board*, 13 A.D.3d 846, 786 N.Y.S.2d 643 (3d Dept. 2004). The Essex County Agricultural District No. 7 was created in 1982 pursuant to article 25-AA of the Agriculture and Markets Law. A small portion of land owned by respondent Crammonds had been zoned "medium density residential" pursuant to the town's zoning law which prohibited farming and farming-related activities on land in that zoning district. The Department of Agriculture and Markets reviewed the town's zoning law for consistency with State law and concluded that the law conflicted with article 25-AA of the Agriculture and Markets Law pursuant to which the agricultural district was created. The town thereafter recognized that its zoning law conflicted with article 25-AA insofar as it prohibited farm operations in agricultural districts, and amended its zoning law to permit farm operations within agricultural districts. Neighbors of the Crammonds thereafter challenged the amendment asserting that the Agriculture and Markets Law was not intended to preempt local zoning laws that predated the creation of a particular agricultural district.

Agriculture and Markets Law § 305-a(1)(a) provides that "[l]ocal governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, shall exercise these powers in such manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened." Agriculture and Markets Law article 25-AA was enacted upon a finding that " 'many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes' due to local land use regulations inhibiting farming, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas." *Id*. at 847, 786 N.Y.S.2d at 645 (*quoting Town of Lysander v. Hafner*, 96 N.Y.2d 558, 563, 733 N.Y.S.2d 358, 360, 759 N.E.2d 356, 358 (2001) (*quoting* Agriculture and Markets Law § 300)). As a result, where a municipality seeks to administer a zoning law in a manner that is in conflict with the policy objectives of article 25-AA, it is superseded by § 305-a(1)(a) of the Agriculture and Markets Law. For example, the application of a zoning law to deny a building permit for mobile homes to be used to house migrant farm workers is superseded.

Moreover, the statute does not provide an exemption for zoning laws enacted prior to the creation of a particular

agricultural district. On the contrary, § 305-a (1)(a) directs municipalities to exercise their power to administer zoning regulations in a manner that does not unreasonably restrict or regulate farming operations within agricultural districts. The legislative history supports such a conclusion. As originally enacted, article 25-AA prohibited only the enactment of local laws and ordinances that unduly infringed upon farming operations. *See* L.1971, ch. 479, § 1. The statute has since been amended, most recently in 1997, to prohibition administering zoning laws in a manner that would "unreasonably restrict farming." L.1997, ch. 357, §§ 9, 11; L.1992, ch. 534, § 3. Those revisions were intended to "correct technical errors and to *strengthen*--not limit--the protections against unreasonably restrictive local laws and ordinances." *Id.* at 848, 786 N.Y.S.2d at 646 (*quoting Town of Lysander*, 96 N.Y.2d at 564, 733 N.Y.S.2d at 361, 759 N.E.2d at 359 (emphasis in original)). Indeed, the bill jacket to the 1997 amendment reflects that it was intended to eliminate "the weakness inherent in [the previous version of the statute] which precludes the Department [of Agriculture and Markets] from intervening in cases where the restrictive law or regulation was enacted prior to the creation of the agricultural district." Senate Mem. in Support, Bill Jacket, L.1997, ch. 357, at 13-14. Consequently, the zoning amendment challenged in *Inter-Lakes Health, Inc.* was consistent with 305-a(1)(a) of the Agriculture and Markets Act and was a valid enactment.

ix Variance Criteria

Municipal Home Rule Law §§ 10(1)(ii)(d)(3) and 10(1)(ii)(e)(3) permit towns to adopt local laws relating to their property, affairs or government. However, local laws relating to a municipality's property, affairs or government may not be inconsistent with the State Constitution or any general law. *See Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 376, 547 N.Y.S.2d 627, 628, 546 N.E.2d 920, 921 (1989). In addition, the authority to adopt local laws in those area is absent if the Legislature has expressly prohibited the enactment of a local law dealing with such matters. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144, 547 N.E.2d 346 (1989).

Intent to preempt a substantive area may be perceived either as a consequence of an explicit conflict between State and local laws or, alternatively, where the State has evidenced an intent to occupy the field. *See Albany Area Builders Ass'n*, 74 N.Y.2d at 377, 547 N.Y.S.2d at 629, 546 N.E.2d at 922. In particular, the intent to occupy the field may be implied from the nature of the subject matter regulated and the purpose and scope of the State scheme, including the need for State-wide uniformity. *See id*. Consistent therewith, a comprehensive and detailed statutory scheme evidences intent to preempt a field. *See id*. If the State has preempted a field, local regulation is impermissible even if no actual conflict exists between the regulations. *See id*.

In *Cohen v. Board of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64, 795 N.E.2d 619 (2003), the Court of Appeals affirmed the decisions reached by the Appellate Division and Supreme Court in two cases, *Cohen*, 297 A.D.2d 38, 746 N.Y.S.2d 506 (2d Dept. 2002), *aff'g*, N.Y.L.J., Nov. 30, 2000, p. 34, col. 4 (Sup. Ct. Nassau Co. 2000), and *Russo v. Black*, 297 A.D.2d 381, 746 N.Y.S.2d 605 (2d Dept. 2002), *aff'g*, N.Y.L.J., Feb. 14, 2001, p. 32, col. 1 (Sup. Ct. Nassau Co. 2001). The Court of Appeals determined that the statutory weighing analysis and considerations enumerated in Town Law 267-b(3) and Village Law § 7-712-b(3) preempt inconsistent local standards.

In *Russo*, an area variance application was analyzed based upon the standard of "practical difficulties." Area variances were denied in *Cohen*, based upon the provision of the local zoning law which authorized the granting of variances "only upon a showing of practical difficulty or unnecessary hardship in the way of carrying out the provisions of the Village zoning regulations."

In analyzing whether conflicting local standards were preempted by Town Law § 267-b(3), identical in all relevant respects to Village Law § 7-712-b(3), the court reiterated that "local authority to contravene laws of general application must yield to the superior interest of the Legislature when such interest has been demonstrated either by

an express statutory prohibition or, more significantly in this case, by a finding of preemption." 100 N.Y.2d at 401, 795 N.E.2d at 623, 764 N.Y.S.2d at 68 (*citing Kahmi*, 74 N.Y.2d at 430, 548 N.Y.S.2d at 147, 547 N.E.2d at 349; *Albany Area Builders Ass'n, supra*). Although the Legislature did not expressly convey its intent to preempt the field, the court concluded that the Legislature intended to occupy the field and to preempt local suppression authority pursuant to the Municipal Home Rule Law.

The State Legislature, in adopting the 1991 amendments to the Town Law and Village Law, effective in 1992, evinced an intent to occupy the field and to make variance analysis consistent throughout the State. The court rejected the municipalities' arguments that the legislation was intended only to clarify and codify existing common law requirements for area variances and was not intended to displace the authorization of localities to enact different requirements. Instead, the history confirms that the Legislature intended to supplant the perplexing "practical difficulty" standard with a consistent benchmark. The legislative history indicates that the statute was enacted to set forth readily understandable guidelines for both zoning boards of appeal and applicants, and to eliminate the confusion that had surrounded area variances. Faced with the turmoil and uncertainty that had plagued the law in this area for many years, the Legislature intended to occupy the field and thus preempt local supersession authority. *See also Stone Landing Corp. v. Board of Appeals of the Village of Amityville*, 5 A.D.3d 496, 773 N.Y.S.2d 103 (2d Dept. 2004). The rationale of *Cohen* has been interpreted to preempt inconsistent use variance standards. *See Kodogiannis v. Zoning Board of Appeals of the Town of Malta*, 42 A.D.3d 739, 839 N.Y.S.2d 588 (3d Dept. 2007).

x. Sale of Alcoholic Beverages

The Alcoholic Beverage Control Law, having created a regulatory system that is both comprehensive and detailed, is preemptive of local law with respect to establishments selling alcoholic beverages. *See Lansdown Entertainment Corp. v. New York City Dept. of Consumer Affairs*, 74 N.Y.2d 761, 545 N.Y.S.2d 82, 543 N.E.2d 725 (1989); *People v. De Jesus*, 54 N.Y.2d 465, 446 N.Y.S.2d 207, 430 N.E.2d 1260 (1981). "Since the State has preempted any local regulation concerning the subject matter of hours of operation, distribution, or consumption, local laws which concern the same subject matter must give way to State law ... The direct consequences of a local law may not 'render illegal what is specifically allowed by State law.' " *Lansdown Entertainment Corp*., 74 N.Y.2d at 764, 545 N.Y.S.2d at 83-84, 543 N.E.2d at 726-27 (*quoting De Jesus*, 54 N.Y.2d at 472, 446 N.Y.S.2d at 210, 430 N.E.2d at 1263).

In *Louhal Properties, Inc. v. Strada*, 191 Misc.2d 746, 743 N.Y.S.2d 810 (Sup. Ct. Nassau Co. 2002), *aff'd*, 307 A.D.2d 1029, 763 N.Y.S.2d 773 (2d Dept. 2003), the owner of a 7-Eleven store challenged an amendment to a zoning law which prohibited businesses located within 100 feet of property zoned for residential use from operating between the hours of 11:00 p.m. and 6:00 a.m. the following day. The amendment effectively barred 7-Eleven's intention to operate such a business because it intended to operate it as a 24-hour business located within 100 feet of residentially zoned property.

State law prohibits a retail establishment from selling beer from Sunday mornings at 3:00 a.m. until Sunday at noon. Alcoholic Beverage Control Law § 105-a. There are no other State law restrictions regarding the hours that a retail establishment may sell alcoholic beverages. The amended zoning law, which would prohibit 7-Eleven from operating between the hours of 11:00 p.m. and 6:00 a.m. the next day, seven days a week, rendered illegal the retail sale of alcoholic beverages by 7-Eleven during hours in which such sale would be permitted under State law. Consequently, the provision was preempted by State law and could not be enforced against 7-Eleven if 7-Eleven were licensed by the State liquor authority.

A provision of the zoning law challenged in *Tad's Franchises, Inc. v. Village of Pelham Manor*, 42 A.D.2d 616, 345 N.Y.S.2d 136 (2d Dept. 1973), *aff'd*, 35 N.Y.2d 672, 360 N.Y.S.2d 886, 319 N.E.2d 202 (1974), allowed the

use of property in retail districts for a restaurant or other establishment serving food and drink for on-premises consumption, but prohibited such uses from selling alcoholic beverages for on-premises consumption. Once the village permits a restaurant or other public eating place to be conducted in retail districts as a conforming use, it cannot regulate such incidental or extended activities as the sale of alcoholic beverages for on-premises consumption, which activities are solely within the exclusive jurisdiction of the State Liquor Authority. While the authority of the State Liquor Authority to determine the locations where liquor may be sold might, in a proper case, be circumscribed by outright exclusion of the class of establishments eligible to seek liquor licenses, once these establishments are permitted to operate, the Authority's power cannot be limited.

xi. Approval of Zoning Amendment by Super-Majority

In *Benderson Development Co., Inc. v. City of Utica*, 5 Misc.3d 467, 781 N.Y.S.2d 880 (Sup. Ct. Oneida Co. 2004), the city planning board recommended denial of a zone change petition after it had been referred to the board for its review and recommendation. The common council thereafter voted 6 to 3 in favor of the amendment and the amendment was deemed denied pursuant to a provision of the local zoning law which required a three-fourths affirmation vote, rather than a simple majority, to approve an amendment to the zoning law when the city planning board recommended denial.

The proponent of the zone change challenged the denial, asserting that the "three-fourths" provision of the zoning law was inconsistent with and preempted by General City Law § 83. General City Law § 83 provides that a zoning amendment "shall be affected by a simple majority vote of the council" unless a proper written protest petition is filed. The city, on the other hand, contended that that Municipal Home Rule Law § 10 authorized municipalities to adopt and amend local laws relating to property, affairs and government, including zoning laws, and that General City Law § 83 merely establishes the minimum standard which would control if the city had not adopted a local law addressing the same issue.

General City Law § 83 authorizes cities to adopt amendments to zoning ordinances and "prescribes the State-wide method and procedure established by the Legislature by which all cities may validly amend a zoning ordinance." *Id*. at 471, 781 N.Y.S.2d at 883. Since 1927, General City Law § 83 has required a three-fourths "super-majority" vote to amend zoning ordinances only when 20 percent of specified property owners file a protest petition. Moreover, General City Law § 83, as well as Town Law § 265 and Village Law § 7-708, were amended in 1990 to clarify the classes of property owners eligible to file a protest petition. In the 1990 amendment, "the Legislature specifically stated what had been unstated in Section 83 up to that time, namely that absent a formal protest by 3 distinct classes of property owners, an amendment to a zoning ordinance 'shall be effected by a simple majority vote of the council.' " *Id*. at 472, 781 N.Y.S.2d at 884 (*quoting* General City Law § 83(2)). That voting requirement is identical to that required for passage of any local law pursuant to Municipal Home Rule Law § 20. The legislative history does not even suggest that the specification of a simple majority vote to amend a zoning ordinance in the absence of a protest petition was a novel concept. On the contrary, the reference to passage by a simple majority constituted a codification of long-standing prior practice and law.

General City Law § 83 specifies the manner in which a city may exercise its power to amend its zoning ordinance and such amendments must be in compliance with that statute. "Where the State has demonstrated its intent to preempt an entire field and thereby preclude any further local regulation, local laws regulating the same subject matter will be deemed inconsistent and will not be given effect." *Id*. (*quoting City of New York v. Town of Blooming Grove Zoning Board of Appeals*, 305 A.D.2d 673, 674, 761 N.Y.S.2d 241, 242 (2d Dept. 2003), *lv. to appeal dismissed*, 100 N.Y.2d 614, 767 N.Y.S.2d 396, 799 N.E.2d 619 (2003)). As a result, the court concluded that "[t]he State of New York has clearly stated since 1927 that the only time a 'three-fourths' vote of the common council is required to effect a change in a city's zoning ordinance is when there has been a protest filed by a percentage of nearby property owners." *Id*. Consequently, it was concluded the Legislature demonstrated that it intended to preclude any further local regulation and that the three-fourths vote requirement was preempted.

As a result, although the Municipal Home Rule Law affords broad authority to adapt local zoning regulations to the current requirements of a particular community, local authority is preempted if the pertinent State zoning statute evinces an all-encompassing and preclusive scheme, as is the case with variance criteria and voting requirements for zoning amendments.

XVI INTERGOVERNMENTAL IMMUNITY

Although the principles governing the concept of governmental immunity from the land use regulations of one municipality have existed for nearly 25 years, since the decision of the Court of Appeals in *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988), the application of those principles remains somewhat unexplored and obscure.

In *County of Monroe*, the Court of Appeals replaced the previously utilized governmental-proprietary test for determining the applicability of zoning regulations to the activities of a governmental entity with a "balancing of the public interests" analytic approach. The balancing of public interests approach requires a weighing of: "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests, ... the applicant's grant of legislative authority, alternative locations in less restrictive zoning areas, alternative methods of providing the needed improvement and," lastly, the extent of "intergovernmental participation in the project development process and an opportunity to be heard." *Id.* at 343, 533 N.Y.S.2d at 704, 530 N.E.2d at 204.

In *Nanuet Fire Engine Co. No. 1 v. Amster*, 177 Misc.2d 296, 676 N.Y.S.2d 890 (Sup. Ct. Rockland Co. 1998), the issuance of a building permit to a fire district to construct a large fire station was appealed by its neighbors to the zoning board of appeals. Although the use was permitted by right in the zoning district, site plan review, which was otherwise required, was neither sought nor obtained. The town contended that the balancing test of *County of Monroe* was required to be undertaken to determine if the site plan requirement applied to it.

In the absence of a contrary legislative intent, a municipal entity is subject to local zoning regulations. Because the State Legislature did not specifically exempt fire districts from local zoning requirements in its authorizing legislation, the fire district was initially subject to the town's zoning requirements. Furthermore, by authorizing fire houses as a permitted use in the zoning district, the town had determined to subject fire districts to its zoning regulations. Consequently, to determine whether the construction of the fire house was subject to the town's zoning and site plan regulations, the municipality was required to undertake the balancing of the public interests analysis. The court noted that one of the significant factors in that analysis is intergovernmental participation in the development process and an opportunity to be heard, neither of which had occurred in the matter.

The decision in *County of Monroe* did not discuss what municipal body appropriately should undertake such an analysis and finding. The court in *Nanuet Fire Engine Co.* noted that the building inspector may have considered some of the factors set forth in *County of Monroe* in deciding to issue a building permit to the fire company. However, no authority existed for the building inspector to be the "arbiter of whether one governmental subdivision is subject to zoning regulation by another governmental subdivision, particularly where there has been no significant intergovernmental participation in the project development process and no public hearing has been held." *Id.* at 300, 676 N.Y.S.2d at 893. Since it has been inappropriate for the courts to displace the decision-making process of local governments and, because the record also was barren of the relevant facts, the matter was remanded to the town for the requisite weighing and findings pursuant to *County of Monroe*.

In *Crown Communication New York, Inc. v. Department of Transportation of the State of New York*, 4 N.Y.3d 159, 791 N.Y.S.2d 494, 824 N.E.2d 934, *cert. denied*, 546 U.S. 815, 126 S.Ct. 340, 163 L.Ed.2d 52 (2005), the Court of Appeals concluded that cell towers erected by a private vendor on State DOT property were not subject to local zoning regulations pursuant to the balancing of public interests test. The court found that the installation of licensed commercial antennae on the towers on DOT land served "a number of significant public interests that are advanced by the State's overall telecommunications plan." The decision relates that the State had submitted to the court evidence of numerous benefits the government's use of the towers would afford the public. The court found that the installation of licensed commercial antennae on the towers should be accorded immunity because co-location serves a number of significant public interests that are advanced by the State's overall telecommunications plan. The private antennae will improve the availability of 911 emergency cellular calls made by the public, thereby promoting the public safety interest central to construction of the State's towers. Subjecting the private carriers to local regulation in this case "could otherwise foil the fulfillment of the greater public purpose of promoting" the State's public safety and environmental goals associated with its telecommunications infrastructure development plan (*Crown Communication*, 4 N.Y.3d at 168, 791 N.Y.S.2d at 499, 824 N.E.2d at 939 (quoting *County of Monroe*, 72 N.Y.2d at 344, 533 N.Y.S.2d at 705, 530 N.E.2d at 205)). "In sum, the public and private uses of the towers are sufficiently intertwined to justify exemption of the wireless providers from local zoning regulations." *Id*. at 168, 791 N.Y.S.2d at 499, 824 N.E.2d at 939.

Although dealing with many other issues, the decision in *Town of Fenton v. Town of Chenango*, 91 A.D.3d 1246, 937 N.Y.S.2d 677 (3d Dept.), *lv. dismissed in part, denied in part*, 19 N.Y.3d 898, 949 N.Y.S.2d 342, 972 N.E.2d 507 (2012), sheds some light on the insufficiently explored area of governmental immunity from another municipality's land use regulations and requirements. The towns of Fenton and Chenango had been involved in extensive litigation arising from a change in the main channel of the Chenango River which required a modification of the location in the river where effluent from Chenango's wastewater treatment plant was discharged. This resulted in concern in Fenton about the proximity of the discharge to an aquifer used for potable water. Chenango's wastewater treatment plant discharge pipe ended in the original river channel. As a result of the change in the channel, there was often insufficient water in the original channel for the effluent discharge to meet the required dilution ratio required by the DEC. On the other side of the river and downstream, Fenton operated a waterworks that draws water from an aquifer located underneath the river. Fenton commenced an action against Chenango alleging violations of Fenton's Aquifer Law. Chenango nevertheless applied to the Fenton planning board for a permit under Fenton's Aquifer Law and, when that permit was denied, commenced a combined article 78 proceeding and declaratory judgment action seeking to annul the board's determination and declare its actions immune from the Aquifer Law.

A dispute between governmental entities regarding whether one entity is exempt from the local regulations of the other is resolved by balancing the public interests first announced in *County of Monroe, supra; see also Crown Communication New York, Inc. v. Department of Transportation of the State of New York*, 4 N.Y.3d 159, 165-166, 791 N.Y.S.2d 494, 497, 824 N.E.2d 934, 938, *cert. denied*, 546 U.S. 815, 126 S.Ct. 340, 163 L.Ed.2d 52 (2005). Relevant considerations in undertaking the weighing analysis include: "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests," as well as "the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, ... alternative methods of providing the needed improvement[,] intergovernmental participation in the project development process and an opportunity to be heard." *Fenton*, 91 A.D.3d at 1250, 937 N.Y.S.2d at 682 (*quoting County of Monroe*, 72 N.Y.2d at 343, 533 N.Y.S.2d at 704, 530 N.E.2d at 204). "Realistically, one factor in the calculus could be more influential than another or may be so significant as to completely overshadow all others, but no element should be thought of as ritualistically required or controlling." *Id*. (*quoting County of Monroe*, 72 N.Y.2d at 343, 533 N.Y.S.2d at 704, 530 N.E.2d at 204).

Applying the factors, the two towns involved are co-equal municipalities. Studies and post-construction testing

failed to reveal any negative impact on the aquifer of the shorter discharge route and, despite abundant opportunities, Fenton failed to produce any contrary proof. Further, Fenton had sufficient notice. It participated in discussions with the DEC and Chenango where the shorter discharge route was considered. Although Fenton ceased its participation in these discussions in mid-2004, notices of Chenango's permit application to construct the shorter route were published in the same local newspaper used by Fenton for notices, the local newspaper included an article about the planned extension, and the project was open and obvious once construction began.

XVII ESTOPPEL

A town board is free to amend its zoning regulations whenever it is deemed to be in the overall public interest to do so, assuming the requisite substantive and procedural requirements are followed. However, may a property owner acquire vested rights in a zone change if a property owner complies with conditions of a zone change which are costly and change his circumstances based on the zone change, or is a municipality estopped from again changing the zoning designation? The Second Department determined in *Sterngass v. Town Board of the Town of Clarkstown*, 10 A.D.3d 402, 781 N.Y.S.2d 131 (2d Dept. 2004), that, at least under the facts presented, a municipality may not permissibly change the applicable zoning after an applicant's costly compliance with the conditions of the zone change.

The town board approved a zone change to increase the permissible density for multi-family development on the property, subject to the demolition a commercial building on the property and the provision of sole access to an adjoining highway by the construction of an interior driveway which necessitated the acquisition of contiguous parcels or easements. Subsequently, the building was demolished at a cost of $40,000 and contiguous parcels were purchased for $800,000. The property owner filed an application for site plan approval shortly thereafter for a multi-family townhouse development in conformity with the new zoning designation. While the site plan application was pending, the town board restored the property to the prior, less dense zoning designation. The property owner instituted a mandamus proceeding to compel issuance of a building permit and estop the town from applying the newly adopted zoning designation and asserting a damage claim for breach of contract.

Although estoppel generally is inapplicable to municipalities, rare exceptions to that general rule exist in unusual situations if necessary to prevent significant injustice. *See E.F.S. Venture Corp. v. Foster*, 71 N.Y.2d 359, 526 N.Y.S.2d 56, 520 N.E.2d 1345 (1988). It is clear that a property owner does not acquire vested rights solely by virtue of a zone change. *See Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 120, 96 N.E.2d 731, 733 (1951). It is only when expenditures are so substantial that "municipal action results in serious loss rendering the improvements essentially valueless" that a property owner might be entitled to vested rights in a zone change. *See Town of Orangetown v. Magee*, 88 N.Y.2d 41, 48, 643 N.Y.S.2d 21, 25, 665 N.E.2d 1061, 1065 (1996).

The court found that the town's subsequent rezoning of the property invited invocation of the doctrine of vested rights by requiring both the demolition of the building and the acquisition of easements or adjoining parcels in order to develop the property in accordance with MF-3 zoning. The terms of the resolution mandated that the property owner change its position in reliance on the amendment and to its detriment in exchange for the rezoning. *See Ellington Construction Corp. v. Zoning Board of Appeals of the Village of New Hempstead*, 77 N.Y.2d 114, 564 N.Y.S.2d 1001, 566 N.E.2d 128 (1990). The court further found that the chronology of events indicated that the town may have acted in bad faith. *See Pokoik v. Silsdorf*, 40 N.Y.2d 769, 390 N.Y.S.2d 49, 358 N.E.2d 874 (1976); *Marasco v. Zoning Board of Appeals of the Village of Westbury*, 242 A.D.2d 724, 662 N.Y.S.2d 801 (2d Dept. 1997). The court speculated that the town may have adopted the rezoning to MF-3 as a ploy so that the landowners, at their own expense, would do what the town was unable to do, that is, cause the demolition of the building which had been considered by the town to be a nuisance. However, because the record was insufficient to determine the issues as a matter of law, the matter was remitted for a hearing to determine whether the rezoning of the property was barred by estoppel and/or bad faith.

Although estoppel can be invoked against a municipality in only exceptionally rare circumstances, the circumstances in *Sterngass* indicate double-dealing, if not fraud on the part of the municipality. The property owner dramatically altered its position and expended substantial sums of money in reliance on the zone change and in order to comply with the conditions imposed. A municipally generally may not contract away its legislative prerogatives. However, having determined that it was appropriate to rezone the property, it could not repudiate that action a mere few months later after the property owner complied with the expensive conditions of approval. If a significant period of time had elapsed before the conditions were complied with and the relevant conditions had substantially changed, the municipality would have had the discretion to revise the zoning for the property. However, under the unique circumstances presented, the town was not permitted to profit by its duplicitous actions.

Notes of Decisions (80)

McKinney's Town Law § 264, NY TOWN § 264
Current through L.2017, chapters 1 to 334.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 16. **Zoning** and Planning (Refs & Annos)

McKinney's Town Law § 265

§ 265. Changes

Currentness

1. Such regulations, restrictions and boundaries may from time to time be amended. Such **amendment** shall be effected by a simple majority vote of the town board, except that any such **amendment** shall require the approval of at least three-fourths of the members of the town board in the event such **amendment** is the subject of a written protest, presented to the town board and signed by:

(a) the owners of twenty percent or more of the area of land included in such proposed change; or

(b) the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or

(c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

The provisions of the previous section relative to public hearings and official notice shall apply equally to all proposed **amendments**.

2. **Amendments** made to any **zoning** ordinance (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the town board; such minutes shall describe and refer to any map adopted in connection with such change, **amendment** or supplement and a copy, summary or abstract thereof (exclusive of any map incorporated therein) shall be published once in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate, and affidavits of the publication thereof shall be filed with the town clerk. Such ordinance shall take effect upon filing in the office of the town clerk. Every town clerk shall maintain every map adopted in connection with a **zoning** ordinance or **amendment**.

Credits

(L.1932, c. 634. Amended L.1950, c. 666; L.1952, c. 554; L.1967, c. 529; L.1972, c. 958, § 3; L.1973, c. 240, § 3; L.1990, c. 606, § 1; L.1991, c. 657, § 3.)

Editors' Notes

PRACTICE COMMENTARIES

by Terry Rice

PROTEST PETITIONS

A proposed **amendment** to a **zoning** law possesses the potential of affecting property owners in the immediate vicinity to a greater degree than the community at large. Consequently, Town Law § 265(1) provides for the filing of a protest petition which requires approval of a **zoning amendment** by more than a simple majority of a town board, that is, by the affirmative vote of three-fourths of the members of a town board. "The purpose of the greater than majority vote is to provide additional protection to those property owners who would be most affected by a **zoning** change." *Webster Associates v. Town of Webster*, 119 Misc.2d 533, 538, 462 N.Y.S.2d 796, 799 (Sup. Ct. Monroe Co. 1983).

The statute authorizes the filing of a protest petition by any one of three separate and distinct ownership classifications as a prerequisite to invoking the "super-majority" voting requirement. *See Van Patten v. LaPorta*, 148 A.D.2d 858, 860-61, 539 N.Y.S.2d 132, 134 (3d Dept. 1989). First, because they obviously are most directly affected, the owners of 20% of the land included within a proposed **zone** change may file a qualifying protest petition. Second, the owners of 20% or more of the land immediately adjacent to the land which is the subject of a proposed **zone** change, extending 100 feet therefrom, may satisfy the requirements of the statute. Lastly, the owners of 20% or more of the land directly opposite the land which is the subject of a proposed **zone** change, extending 100 feet from the street frontage of such opposite land may invoke the super-majority voting requirement. A valid protest petition may not be signed by the owners of 20% of the combined adjacent and opposite area. *See Van Patten v. LaPorta*, 148 A.D.2d 858, 859-60, 539 N.Y.S.2d 132, 134 (3d Dept. 1989).

The protest petition provisions apply to the **amendment** of a **zoning** regulation, as well as to a proposal to repeal a previously enacted **zoning** provision. *See Hey v. Town Board of the Town of Potter*, 117 A.D.2d 989, 499 N.Y.S.2d 290 (4th Dept. 1986). However, the protest petition provisions do not apply to the initial adoption of a community's **zoning** law or to a **zoning** enactment applicable to property which had not previously been **zoned**. *See Ellish v. Village of Suffern*, 30 A.D.2d 554, 291 N.Y.S.2d 178 (2d Dept. 1968); *cf. Hanson v. Town Board of the Town of Nassau*, 16 Misc.3d 1137(A), 851 N.Y.S.2d 58 (Table), 2007 WL 2609819 at 2 (Sup. Ct. Rensselaer Co. 2007).

Determining the validity of a protest petition requires, first, a computation of the total area of land subject to the **amendment** and the area for which owners are eligible to sign the protest petition. Second, a determination of the percentage of the applicable area represented by the signers of a petition as compared to the total area subject to the **amendment** must be made. In making such an assessment, the statutory provisions must be strictly construed since its provisions are a departure from the common law. *See Bismark v. Village of Bayville*, 21 A.D.2d 797, 250 N.Y.S.2d 769 (2d Dept. 1964); *Jalowiec v. Reile*, 61 Misc.2d 909, 307 N.Y.S.2d 248 (Sup. Ct. Herkimer Co. 1970).

The first qualifying group, the owners of property affected by a **zone** change, is a straightforward calculation. However, the second and third categories require a computation of the area within a 100-foot perimeter adjacent to or across the street from such property. Although those computations generally also are relatively simple, specific, peculiar scenarios may raise difficult factual issues. For example, the area of land lying in the street right-of-way immediately adjacent to land which is the subject of a proposed **zoning amendment** should be excluded in calculating the total area immediately adjacent to the property. *See Biedermann v. Town of Orangetown*, 125 A.D.2d 465, 509 N.Y.S.2d 394 (2d Dept. 1986). However, with the exception of streets, other municipally owned property, including recreation fields and land utilized as an aqueduct, must be included in determining whether 20% of the owners of land immediately adjacent have signed an appropriate petition. *See Hittl v. Buckhout*, 13 Misc.2d 230, 176 N.Y.S.2d 401 (Sup. Ct. Westchester Co. 1958), *aff'd*, 10 A.D.2d 719, 199 N.Y.S.2d 444 (2d Dept. 1960).

The Court of Appeals determined in *Eadie v. Town Board of the Town of North Greenbush*, 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464 (2006), that "the 'one hundred feet' must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part." *Id.* at 314, 821 N.Y.S.2d at 145, 854 N.E.2d at 467. The Court noted that "[t]he language of the statute, on its face, points to that result: 'land included in such proposed change' can hardly be read to refer to land to which the proposed **zoning** change is inapplicable." *Id*.

Moreover, the court opined that "[f]airness and predictability point in the same direction" because "it makes the power to require a super-majority vote dependent on the distance of one's property from land that will actually be affected by the change." *Id.* at 314, 821 N.Y.S.2d at 145, 854 N.E.2d at 467. Although the decision allows property owners seeking a rezoning to insulate themselves against protest petitions by creating a "buffer **zone**" in which the **zoning** designation of a strip of property remains unchanged, the court saw nothing wrong with that result. "The whole point of the 'one hundred feet' requirement is that, where a buffer of that distance or more exists, neighbors beyond the buffer **zone** are not entitled to force a super-majority vote." *Id*. The court noted that a contrary interpretation possessed the potential to permit property owners within 100 feet of the boundary of a large parcel to compel a super-majority despite the fact that such owners might reside at a significant distance from land which was the subject of a **zone** change petition.

The Court of Appeals accurately concluded that the language of the statute unambiguously demonstrates the legislative intent that the super-majority voting requirement for a **zone** change could be invoked only by owners who reside within 100 feet of the actual property which is the subject of the **zone** change proposal. Judicial suggestions as to what the Legislature should have intended are not supported by the language of the statute. In fact, as the Court of Appeals noted, the fact that neighboring properties are buffered by one hundred feet from a parcel that is the subject of the **zone** change petition ensures that they are protected regardless of the intent of the petitioner in creating a buffer and, as a result, the super-majority requirement, in any event, is unnecessary in those circumstances.

Similarly, in *Ferraro v. Town Board of the Town of Amherst*, 79 A.D.3d 1691, 914 N.Y.S.2d 525 (4th Dept. 2010), *lv. denied*, 16 N.Y.3d 711, 923 N.Y.S.2d 415, 947 N.E.2d 1194 (2011), the rezoning of two adjacent parcels of property north of Maple Road in order to construct various commercial buildings, condominiums and a hotel was challenged. The property was located to the east of a sports arena, to the south of the University at Buffalo North Campus and to the south and west of a golf course. Most of the petitioners resided in a residential area located on the south side of Maple Road. After petitioners protested the proposed rezoning, the developer amended the petition for rezoning to include a 101-foot buffer **zone** immediately adjacent to Maple Road which would retain the same **zoning** classification. The town board approved the amended petition for rezoning by a vote of 4 to 3. The petitioners claimed that the owners of more than 20% of the property lying directly opposite the property had protested the rezoning and, as a result, the petition for rezoning was required to be approved by at least three-fourths of the members of the town board in order to be effective. The petitioners contended that their

properties were "directly opposite" the property and within 100 feet from the south side of Maple Road. However, the court determined that the petitioners' properties were required to be within 100 feet of the portion of the property to be rezoned in order for Town Law § 265(1)(c) to apply.

Resolution of the issue depended on what area of property is referred to by the word "thereto" in Town Law § 265(1)(c). The legislative history of that provision demonstrates that it was intended to apply to property directly opposite property included in a proposed rezoning. The original proposed language of the statute provided that a three-fourths vote was required if written protests were filed by "the owners of [20%] or more of the area of land directly opposite *to that land included in such proposed change*, extending [100] feet from the street frontage of such opposite land." *Ferraro*, 79 A.D.3d at 1693, 914 N.Y.S.2d at 527 (*quoting* Recommendation of Law Rev. Commn., 1990 McKinney's Session Laws of N.Y., at 2311 (emphasis added by court)). The word "thereto" in the statute as enacted was substituted for the emphasized language in the proposed statute. Inasmuch as there would be a 101-foot buffer **zone** between the petitioners' properties and the rezoned portion of the property, the petitioners' properties were not directly opposite the property to be rezoned and the property to be rezoned was not within 100 feet of the street frontage of petitioners' properties. As a result, the "buffer **zone**" created by the developers rendered the protest provision of Town Law § 265(1)(c) inapplicable.

The court also rejected the petitioners' contention that the driveways to the proposed development should have been rezoned and that the petitioners' properties would be within 100 feet of that rezoned property. The commissioner of buildings had determined that the driveways would serve a dual purpose and thus were not required to be rezoned, and the petitioners did not appeal that determination to the **zoning** board of appeals.

In *Ryan Homes, Inc. v. Town Board of the Town of Mendon*, 7 Misc.3d 709, 791 N.Y.S.2d 355 (Sup. Ct. Monroe Co. 2005), the court confirmed that property cannot be considered to be directly "opposite" property which is the subject of a **zone** change petition if there are significant intervening features. As in *Eadie*, a case that was decided subsequently, the court also determined that an applicant may create a "buffer" in excess of 100 feet on his/her property which is not included within a **zone** change application in order to effectively trump the protest petition provisions of Town Law § 265(1)(a) and (b). In *Ryan Homes*, a contract vendee of an 87-acre parcel of land sought a **zone** change to rezone 75 of the 87 acres. The property contained a 101-foot "buffer" strip along its north and east perimeters which was not the subject of the rezoning application and was to remain as **zoned**. The town board voted to rezone the 75-acre portion of the property despite the filing of two protest petitions. One protest petition was filed by what purported to be the owner of 20% or more of the land opposite the land sought to be rezoned. In addition, another protest petition was filed by what purported to be the owners of 20% or more of the land immediately adjacent to the land sought to be rezoned. The town board's counsel opined that although it was "technically true" that the properties owned by the neighbors were located more than 100 feet from the property sought to be rezoned, a "super-majority" consisting of the affirmative vote of four members of the town board nonetheless was required because "[t]he mere placement of lines on a map prepared by the applicant should not be allowed to defeat this legislative purpose." *Id*. at 711, 791 N.Y.S.2d at 357. The town board voted three to two to approve the **amendment** and the resolution was deemed defeated.

The petitioner contended that the rezoning resolution was validly passed by a majority of the town board and that a super majority vote for adoption was not required because the written protest petitions were invalid as not representing the class of land owners who are afforded the protection of the statute. In particular, it was alleged that one of the protest petitions did not represent the owner of 20% or more of the land "directly opposite thereto, extending one hundred feet from the street frontage of such opposite land" because the property and the proposed area sought to be rezoned was separated by 330 to 690 feet of land occupied by the New York State Thruway. It was further contended that the other protest petition did not represent the owners of 20% or more of the area of land "immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom" because the parcels were separated by a 101-foot strip of land between those properties and the area sought to be rezoned.

The court related that the provisions of Town Law § 265 "must be strictly construed." *Id*. at 712, 791 N.Y.S.2d at 358 (*quoting Webster Associates v. Town of Webster*, 119 Misc.2d 533, 536, 462 N.Y.S.2d 796, 798 (Sup. Ct. Monroe Co. 1983)). The court first determined that the property located on the other side of the New York State Thruway from the subject property was not "directly opposite" to the property sought to be rezoned. The court noted that the scenario was similar to the facts reviewed in *Webster Associates v. Town of Webster*, 119 Misc.2d 533, 462 N.Y.S.2d 796 (Sup. Ct. Monroe Co. 1983), discussed below, in which the protester's property was separated from the property sought to be rezoned by a "substantially intervening area" consisting of two expressway frontage roads, an embankment and a 200-foot-wide grassy median. The *Webster Associates* court determined that "[d]irectly opposite means immediately across from without anything intervening." *Id*. at 536, 462 N.Y.S.2d at 799. Consequently, the protester's property in *Webster Associates* was not considered to be "directly opposite" the land sought to be rezoned for purposes of Town Law § 265. The property in *Ryan Homes* was separated from the protesting property by the 330- to 690-foot New York State Thruway right-of-way. "Because of this substantial intervening area, the [protesting] property cannot be considered 'directly opposite' the land to be rezoned for purposes of Town Law § 265." *Id*. at 713, 791 N.Y.S.2d at 358.

Because none of the lands covered by the protest petitions were either directly opposite or immediately adjacent and 100 feet from the property which was sought to be rezoned, the protest petitions were invalid to invoke the three-fourths voting requirement. Since the **amendment** was approved by a 3-2 vote, it was properly enacted.

In *Webster Associates v. Town of Webster*, 119 Misc.2d 533, 538, 462 N.Y.S.2d 796, 799 (Sup. Ct. Monroe Co. 1983), it was determined that the term "directly opposite" means "immediately across from without anything intervening." *Id*. at 537, 462 N.Y.S.2d at 799. Consequently, land separated by expressway access roads, a grassy medium over 200 feet wide and an embankment, all of which were over 400 feet from the property which was the subject of a **zoning** **amendment** proposal, was not significantly affected thereby and, hence, not "directly opposite." *See also 431 Fifth Avenue Corp. v. City of New York*, 270 A.D. 241, 59 N.Y.S.2d 25 (1st Dept. 1945), *aff'd*, 287 N.Y. 588, 68 N.E.2d 877 (1946). In undertaking the required analysis and computations, the fact that land immediately adjacent or across the road is located within another municipality does not result in its exclusion from the included area. *See* 1969 Op.Atty.Gen. 40 (1969).

If a proposed **zoning** **amendment** affects a number of separate, noncontiguous and discrete parcels, the validity of a protest petition should be examined with respect to each parcel of land and not the entire proposed rezoning. *See 208 East 30th Street Corp. v. Town of North Salem*, 88 A.D.2d 281, 452 N.Y.S.2d 902 (2d Dept. 1982). The Second Department opined in *208 East 30th Street* that:

> Where ... there are separate provisions of a single **zoning** change, it would not be proper to require the owners of 20% of all the land affected by the **amendments** to protest in order to trigger the operation of section 265 of the Town Law. Such a holding would enable a municipal agency to ensure passage of a highly objectionable **zoning** **amendment** by simply combining it with another large, unobjectionable **amendment**. A statute must not be construe in a manner that would permit its purpose to be defeated.

Id. at 288, 452 N.Y.S.2d at 906.

It was determined in *Gosier v. Aubertine*, 71 A.D.3d 76, 891 N.Y.S.2d 788 (4th Dept. 2009), that "the signature of only one spouse with respect to property held as tenants by the entirety is sufficient for the property to be included in order to meet the 20% threshold required for a valid protest petition." *Id.* at 77, 891 N.Y.S.2d at 789. The town assessor's office and town board concluded that a protest petition did not satisfy the claimed basis of representing

20% of the area included with the proposed **amendment**, that is, the entire town. The conclusion was largely premised on the determination that a majority of the signatures on the protest petition that were not counted in determining the number of "valid acres" were signatures of only one spouse of property held as tenants by the entirety. The petitioners contended that had those signatures been counted, a super-majority vote of the town board would have been required. The town board approved the local law by a vote of 3 to 2. The Appellate Division affirmed the conclusion of Supreme Court that the protest petition was valid and that the local law was invalid because it was adopted by a vote of less than a three-fourths majority.

Town Law § 265 does not define the term "owners." However, in *Reister v. Town Board of the Town of Fleming*, 18 N.Y.2d 92, 95, 271 N.Y.S.2d 965, 967, 218 N.E.2d 681, 682 (1966), the Court of Appeals interpreted a similar provision in Town Law § 191 and found that the "salient characteristic [of a tenancy by the entirety] is the unique relationship between a husband and his wife each of whom is seized of the whole and not of any undivided portion of the estate" such that "both and each own the entire fee." *Gosier*, 71 A.D.3d at 79, 891 N.Y.S.2d at 790 (*quoting Reister*, 18 N.Y.2d at 95, 271 N.Y.S.2d at 967, 218 N.E.2d at 682); *see also Matter of Estate of Violi*, 65 N.Y.2d 392, 395, 492 N.Y.S.2d 550, 552, 482 N.E.2d 29, 31 (1985); *Stelz v. Shreck*, 128 N.Y. 263, 266, 28 N.E. 510, 510 (1891).

The *Gosier* court concluded that the same reasoning applies to Town Law § 265 and that it is sufficient to have the signature of only one spouse in order to consider the entire property for the purposes of a protest petition pursuant to Town Law § 265(1)(a); *see also* 1987 Op.Atty.Gen. No. 87-85; 1989 Op.Atty.Gen. No. 89-17.

One who holds a general power of attorney for a property owner may sign a protest petition in his capacity as attorney in fact. *See Bismark v. Village of Bayville*, 21 A.D.2d 797, 250 N.Y.S.2d 769 (2d Dept. 1964). However, as is illustrated by the *Bismark* decision, such status and a copy of the power of attorney should be submitted to the town board prior to a vote on the proposal. Having signed a protest petition, one may revoke his or her signature at any time before a vote is taken. Similarly, additional signatures may be added to a protest petition after a public hearing on a proposal has been closed, but before a vote is taken. *See Maione v. Town of Clarkstown*, 94 A.D.2d 716, 462 N.Y.S.2d 248 (2d Dept. 1983); *Iannarone v. Caso*, 59 Misc.2d 212, 298 N.Y.S.2d 350 (Sup. Ct. Nassau Co. 1969), *aff'd*, 33 A.D.2d 658, 306 N.Y.S.2d 404 (2d Dept. 1969), *lv. denied*, 26 N.Y.2d 610, 309 N.Y.S.2d 1027, 258 N.E.2d 103 (1970).

It is preferable to demonstrate to a town board that a protest petition indeed does satisfy the statutory requirements. Otherwise, a factual issue will exist which may result in rejection of the validity of a petition and will require either that the petitioners demonstrate its validity in an article 78 proceeding or, perhaps, the rejection of the petition by the court because of a lack of proof initially as to its sufficiency. Although some municipalities may independently compute the area covered by a petition, it is suggested that a protest petition be accompanied by an engineer's calculation of the total eligible area as well as the applicable area represented by the signatures of said owners. Such a demonstration eliminates what otherwise would be a potential issue.

As is discussed in the Commentary to Town Law § 264, the supersession provisions of the Municipal Home Rule Law provide authority for the elimination of the super-majority voting requirement of Town Law § 265. *See North Bay Associates v. Hope*, 116 A.D.2d 704, 497 N.Y.S.2d 757 (2d Dept. 1986), *lv. denied*, 68 N.Y.2d 603, 506 N.Y.S.2d 1026, 497 N.E.2d 706 (1986).

ESTOPPEL

A town board is free to amend its **zoning** regulations whenever it is deemed to be in the overall public interest to do so, assuming the requisite substantive and procedural requirements are followed. However, may a property owner

acquire vested rights in a **zone** change, if a property owner complies with conditions of a **zone** change which are costly and change his circumstances based on the **zone** change or is a municipality estopped from again changing the **zoning** designation? The Second Department determined in *Sterngass v. Town Board of the Town of Clarkstown*, 10 A.D.3d 402, 781 N.Y.S.2d 131 (2d Dept. 2004), that, at least under the facts presented, a municipality may not permissibly change the applicable **zoning** after an applicant's costly compliance with the conditions of the **zone** change.

The town board approved a **zone** change to increase the permissible density for multi-family development on the property, subject to the demolition a commercial building on the property and the provision of sole access to an adjoining highway by the construction of an interior driveway which necessitated the acquisition of contiguous parcels or easements. Subsequently, the building was demolished at a cost of $40,000 and contiguous parcels were purchased for $800,000. The property owner filed an application for site plan approval shortly thereafter for a multi-family townhouse development in conformity with the new **zoning** designation. While the site plan application was pending, the town board restored the property to the prior, less dense **zoning** designation. The property owner instituted a mandamus proceeding to compel issuance of a building permit and estop the town from applying the newly adopted **zoning** designation, and asserted a damage claim for breach of contract.

Although estoppel generally is inapplicable to municipalities, rare exceptions to that general rule exist in unusual situations if necessary to prevent significant injustice. *See E.F.S. Venture Corp. v. Foster*, 71 N.Y.2d 359, 526 N.Y.S.2d 56, 520 N.E.2d 1345 (1988). It is clear that a property owner does not acquire vested rights solely by virtue of a **zone** change. *See Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 120, 96 N.E.2d 731, 732-33 (1951). It is only when expenditures are so substantial that "municipal action results in serious loss rendering the improvements essentially valueless" that a property owner might be entitled to vested rights in a **zone** change. *See Town of Orangetown v. Magee*, 88 N.Y.2d 41, 48, 643 N.Y.S.2d 21, 25, 665 N.E.2d 1061, 1065 (1996).

The court found that the town's subsequent rezoning of the property invited invocation of the doctrine of vested rights by requiring both the demolition of the building and the acquisition of easements or adjoining parcels in order to develop the property in accordance with MF-3 **zoning**. The terms of the resolution mandated that the property owner change its position in reliance on the **amendment** and to its detriment in exchange for the rezoning. *See Ellington Construction Corp. v. **Zoning** Board of Appeals of the Village of New Hempstead*, 77 N.Y.2d 114, 564 N.Y.S.2d 1001, 566 N.E.2d 128 (1990). The court further found that the chronology of events indicated that the town may have acted in bad faith. *See Pokoik v. Silsdorf*, 40 N.Y.2d 769, 390 N.Y.S.2d 49, 358 N.E.2d 874 (1976); *Marasco v. **Zoning** Board of Appeals of the Village of Westbury*, 242 A.D.2d 724, 662 N.Y.S.2d 801 (2d Dept. 1997). The court speculated that the town may have adopted the rezoning to MF-3 as a ploy so that the landowners, at their own expense, would do what the town was unable to do, that is, cause the demolition of the building which had been considered by the town to be a nuisance. However, because the record was insufficient to determine the issues as a matter of law, the matter was remitted for a hearing to determine whether the rezoning of the property was barred by estoppel and/or bad faith.

Although estoppel can be invoked against a municipality in only exceptionally rare circumstances, the circumstances in *Sterngass* indicate double-dealing, if not fraud, on the part of the municipality. The property owner dramatically altered its position and expended substantial sums of money in reliance on the **zone** change and in order to comply with the conditions imposed. A municipally generally may not contract away its legislative prerogatives. However, having determined that it was appropriate to rezone the property, it could not repudiate that action a mere few months later after the property owner complied with the expensive conditions of approval. If a significant period of time had elapsed before the conditions were complied with and the relevant conditions had substantially changed, the municipality would have had the discretion to revise the **zoning** for the property. However, under the unique circumstances presented, the town was not permitted to profit by its duplicitous actions.

Relevant Additional Resources
Additional Resources listed below contain your search terms.

LAW REVIEW AND JOURNAL COMMENTARIES

Nonresidents, protest of **zoning** changes. 38 N.Y.U.L.Rev. 161 (1963).
Procedural requirements for enactment, **amendment** and repeal of **zoning** ordinances in New York State. 15 Syracuse L.Rev. 60 (1963).

LIBRARY REFERENCES

Zoning and Planning 1175 to 1190.

C.J.S. **Zoning** and Land Planning §§ 81 to 93.

RESEARCH REFERENCES

ALR Library

84 ALR 6th 133, Validity of **Zoning** Regulations Prohibiting or Regulating Removal or Exploitation of Oil and Gas, Including Hydrofracking.
7 ALR 4th 732, **Zoning**: Validity and Construction of Provisions of **Zoning** Statute or Ordinance Regarding Protest by Neighboring Property Owners.

Encyclopedias

N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 191, Mandatory Character of Procedural Requirements.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 195, Statutory Requirements as to Notice and Hearing for **Zoning** Legislation, Generally.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 198, Hearing on **Zoning** Legislation.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 200, Voting Requirements for **Zoning** Legislation.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 202, Entry of **Zoning** Legislation in Minutes; Filing.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 203, Entry or Filing of **Zoning** Map.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 204, Publication, Posting, and Service of **Zoning** Legislation.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 207, **Zoning Amendment** or Repeal, Generally; Power to Amend or Repeal.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 210, **Zoning Amendment** Procedure.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 213, Protest of **Zoning Amendment**.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 214, Protest of **Zoning Amendment**--Sufficiency of Protest.
N.Y. Jur. 2d Buildings, **Zoning**, and Land Controls § 215, Repeal of **Zoning** Legislation.

Forms

McKinney's Forms, Local Gov't, Town Law § 261 Form 8, Complaint for Judgment Declaring **Amendment** to **Zoning** Ordinance Invalid as Unreasonable and Confiscatory.
McKinney's Forms, Local Gov't, Town Law § 264 Form 5, Notice of Public Hearing on **Amendment** of **Zoning** Ordinance--Class of Residential District.
McKinney's Forms, Local Gov't, Town Law § 264 Form 6, Notice of Public Hearing on **Amendment** of **Zoning** Ordinance--Proposed **Amendments** Stated.
McKinney's Forms, Local Gov't, Town Law § 264 Form 9, Complaint for Judgment Declaring Invalidity of **Zoning** Ordinance **Amendment** Where **Amendment** Different from Proposed **Amendment** as Set Forth in Notice of Hearing.

Treatises and Practice Aids

Anderson's American Law of **Zoning** § 32:3, Vested Rights, Timing.
Anderson's American Law of **Zoning** § 32:9, Movement Toward Earlier Vesting.
Anderson's American Law of **Zoning** § 8:19, Entry in Minutes.
New York **Zoning** Law and Practice, Fourth Edition § 1:17, **Zoning** **Amendment** or Variance.
New York **Zoning** Law and Practice, Fourth Edition § 2:12, **Zoning** Enabling Acts; Cities--Towns.
New York **Zoning** Law and Practice, Fourth Edition § 3:02, Mandatory Character of Procedural Requirements.
New York **Zoning** Law and Practice, Fourth Edition § 3:06, Procedural Requirements Applicable to Cities--Towns.
New York **Zoning** Law and Practice, Fourth Edition § 3:13, Notice and Hearing.
New York **Zoning** Law and Practice, Fourth Edition § 3:15, Notice and Hearing--Towns.
New York **Zoning** Law and Practice, Fourth Edition § 3:22, Voting Requirements; Towns.
New York **Zoning** Law and Practice, Fourth Edition § 3:27, Entry in Minutes; Filing.
New York **Zoning** Law and Practice, Fourth Edition § 3:28, Publication, Posting, and Personal Service.
New York **Zoning** Law and Practice, Fourth Edition § 3:30, Power to Amend.
New York **Zoning** Law and Practice, Fourth Edition § 3:32, **Amendment** Procedure.
New York **Zoning** Law and Practice, Fourth Edition § 3:33, Application for **Zone** Change.
New York **Zoning** Law and Practice, Fourth Edition § 3:34, Protest Petitions; Towns.
New York **Zoning** Law and Practice, Fourth Edition § 3:38, Construction of Protest Requirements.
New York **Zoning** Law and Practice, Fourth Edition § 3:40, Repeal.
New York **Zoning** Law and Practice, Fourth Edition § 9:10, Regional Planning Councils--**Zoning**; Review of Municipal Action.
New York **Zoning** Law and Practice, Fourth Edition § 26:01, Official Map; Adoption and Filing.
New York **Zoning** Law and Practice, Fourth Edition § 26:03, **Amendment** of the Official Map.
New York **Zoning** Law and Practice, Fourth Edition § 33:13, Indispensable Parties.
New York **Zoning** Law and Practice, Fourth Edition § 39:03, Ordinances Establishing **Amendment** Procedures; Cities--Towns.
Rathkopf's the Law of **Zoning** and Planning § 12:1, Compliance With Statutory **Zoning** Procedures.
Rathkopf's the Law of **Zoning** and Planning § 32:3, Number of Votes and Official Action.
Rathkopf's the Law of **Zoning** and Planning § 43:2, Description and Validity.
Rathkopf's the Law of **Zoning** and Planning § 43:4, Procedural Issues--Sufficiency of Protests--Form of Petition.
Rathkopf's the Law of **Zoning** and Planning § 39:19, Government Action on Petition--Action by Legislative Body.
Rathkopf's the Law of **Zoning** and Planning § 43:12, Procedural Issues--Rezoning of Separate Parcels--Separate or Contiguous Parcels.
Rathkopf's the Law of **Zoning** and Planning § 43:21, Meaning of "Immediately Adjacent".
NOTES OF DECISIONS

Construction and application

Town board's action in rezoning 123-acre tract from residential to research office use was not arbitrary, where it was adopted after careful study and consultation with experts and extensive hearings and changing conditions including continuing population growth and business expansion made the increasing urbanization of the town inevitable. Thomas v. Town of Bedford, 1962, 11 N.Y.2d 428, 230 N.Y.S.2d 684, 184 N.E.2d 285. **Zoning** And Planning 1163

Town's two family use board was precluded from approving homeowner's application for special permit to maintain two-family dwelling in single-family dwelling district for period of seven years from date of issuance of certificate of occupancy under local law regarding single-family dwelling districts, as amended, rather than under law as it existed when application was filed. Aversano v. Two Family Use Bd. of Town of Babylon (2 Dept. 1986) 117 A.D.2d 665, 498 N.Y.S.2d 403. **Zoning** And Planning 1352

Town Law provision governing **amendments** to **zoning** district boundaries must be strictly construed. Ryan Homes, Inc. v. Town Bd. of Town of Mendon, 2005, 7 Misc.3d 709, 791 N.Y.S.2d 355. **Zoning** And Planning 1175

Provisions of this section and section 264 are mandatory and cannot be superseded by enactment of local law, and where notice of public hearing made no reference to passage of local law but merely stated generally that hearing would be held on proposed **zoning** change and **zoning** change was not published subsequent to passage thereof, local law which amended **zoning** laws of town of Red Hook was invalid. Trifaro v. **Zoning** Bd. of Appeals of Town of Red Hook, Dutchess County, 1973, 73 Misc.2d 483, 342 N.Y.S.2d 95. **Zoning** And Planning 1181

Where Legislature did not state specifically when **zoning** ordinance was to be entered in minutes, when posting was required to take place, or when affidavits of posting and publication had to be filed with town clerk, it was to be presumed that Legislature intended the various acts to be completed within a reasonable time as one continuous operation, and it could not be held that Legislature intended that certain acts could be performed one year and remainder several years later. Cohn v. Town of Cazenovia, 1964, 42 Misc.2d 218, 247 N.Y.S.2d 919. **Zoning** And Planning 1011

A **zoning** map must be filed with a **zoning** local law only when the local law, in express terms, adopts the map or incorporates it therein, but there is no legal requirement that the map (or a portion thereof) be filed with a local law effecting a **zoning** change by metes and bounds description. Op.State Compt. 81-24.

Changes in **zoning** ordinances made by town board must be entered in ordinance book. 6 Op.State Compt. 245, 1950.

Construction with other laws--In general

Local town law which provided that town could adopt any land use regulation, restriction or **zoning** district classification or boundary by local law by favorable vote of simple majority of entire town board was valid, despite its alleged conflict with town law which required, under similar circumstances, favorable vote of at least three-fourths on members of town board, where simple majority law was enacted pursuant to town's authority under McKinney Municipal Home Rule Law § 10 to amend or supersede any provision of town law related to matters in which it was authorized to adopt local laws. North Bay Associates v. Hope (2 Dept. 1986) 116 A.D.2d 704, 497 N.Y.S.2d 757, appeal denied 68 N.Y.2d 603, 506 N.Y.S.2d 1026, 497 N.E.2d 706. **Zoning** And Planning 1136

Section 264 and this section are intended to cover different situations, the former having application when districts are being established, restrictions are being instituted and broad changes of **zoning** are being effected, while provisions of this section apply to modifications of a lesser degree, as well as to instances involving applications of individual property owners. North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 1954, 129 N.Y.S.2d 697, affirmed 1 A.D.2d 1043, 153 N.Y.S.2d 579. **Zoning** And Planning 1189

---- Environmental review, construction with other laws

In property owners' proceeding to challenge town's rezoning of adjoining property, record did not support owners' contentions that town board failed to take the requisite "hard look" at potential environmental impacts of the rezoning and that town board failed to follow certain statutory procedures in enacting pertinent **amendment** to **zoning** code and local law. Duke & Benedict, Inc. v. Town of Southeast (2 Dept. 1998) 253 A.D.2d 877, 678 N.Y.S.2d 343. Environmental Law 595(2); **Zoning** And Planning 1175

Town's environmental review of proposed rezoning for development with big box stores was inadequate; environmental costs of proposed development appeared smaller than they actually were, town failed to mitigate real environmental impact

when it would have been possible to do so and still foster development, and report appeared to have understated financial costs to taxpayers of town's plan for developing area as commercial hub. Eadie v. Town Bd. of Town of North Greenbush, 2005, 9 Misc.3d 599, 799 N.Y.S.2d 720, reversed 22 A.D.3d 1025, 803 N.Y.S.2d 262, leave to appeal granted 6 N.Y.3d 706, 812 N.Y.S.2d 35, 845 N.E.2d 467, stay granted 6 N.Y.3d 829, 813 N.Y.S.2d 708, 846 N.E.2d 1218, motion denied 7 N.Y.3d 727, 818 N.Y.S.2d 183, 850 N.E.2d 1158, affirmed 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464. **Zoning** And Planning 1166

Powers of town boards

Zoning Board of Appeals had no authority to amend town's **zoning** ordinance; that was a legislative function for the town board. Tantalo v. **Zoning** Bd. of Appeals of Town of Seneca Falls (4 Dept. 1973) 43 A.D.2d 793, 350 N.Y.S.2d 486. **Zoning** And Planning 1141

Town board's actions in approving rezoning to permit construction of regional shopping mall after planning board's disapproval of preliminary development plans was within town board's powers and properly exercised. Webster Associates v. Town of Webster, 1981, 112 Misc.2d 396, 447 N.Y.S.2d 401, affirmed 85 A.D.2d 882, 446 N.Y.S.2d 955, appeal dismissed 56 N.Y.2d 644, 450 N.Y.S.2d 1027, 436 N.E.2d 197, appeal granted 57 N.Y.2d 606, 455 N.Y.S.2d 1025, 441 N.E.2d 568, reversed 59 N.Y.2d 220, 464 N.Y.S.2d 431, 451 N.E.2d 189. **Zoning** And Planning 1166

Town board had authority to "reconsider" its prior resolution granting **zoning** change, so long as the requisite statutory procedures for changing present **zoning** regulations were followed. Vizzi v. Town of Islip, 1972, 71 Misc.2d 483, 336 N.Y.S.2d 520. **Zoning** And Planning 1175

The Town Board of the town of New Castle is not authorized to amend its **zoning** ordinance to provide a new **zoning** classification which would permit multiple family residential use limited to senior citizens only. 1972, Op.Atty.Gen. (Inf.) 115.

Petition for rezoning

Property owners' disclosure of their intent to operate aircraft repair service when they petitioned for change of **zoning** from "C" residential to "J-2" business district did not have effect of granting them permission to operate aircraft repair service station when their petition was granted, where petition also revealed that they had purchased property to operate service station to repair automobiles, which was permitted use in "J-2" business district, and there was no proof that town board ever found that operation of airplane repair service, which was not permitted use, was of same general character as operation of ordinary gas station. Town of Brookhaven v. Spadaro (2 Dept. 1994) 204 A.D.2d 533, 612 N.Y.S.2d 175. **Zoning** And Planning 1445

Current **Zoning** Ordinance requirements necessitate formal application for variance or **amendment** by nonconforming landowner despite prior planning board approval. 1979, Op.Atty.Gen. (Inf.) 162.

Zoning regulations of a town may be amended, changed or repealed by the town board in accordance with the procedures provided in this section, and the withdrawal of a petition requesting a change does not prohibit a town board with proceeding to make same. 1969, Op.Atty.Gen. (Inf.) 134.

A town may, in its **zoning** ordinance, require reasonable and relevant disclosures to be included in a petition for rezoning. 23

Op.State Compt. 802, 1967.

Compliance with prescribed procedures

A town's failure to update its official **zoning** map to reflect the creation a business district did not render the **zoning** ordinance creating the business district null and void, even though the municipal code mentioned an official **zoning** map in several places, where the official **zoning** map was made available merely as a reference tool, and written **zoning** descriptions of **zoning** controlled over inconsistent depictions in the official map. Boni Enterprises, LLC v. **Zoning** Bd. of Appeals of Town of Clifton Park (3 Dept. 2015) 124 A.D.3d 1052, 2 N.Y.S.3d 631. **Zoning** and Planning 1126

Town impermissibly usurped jurisdiction of local **zoning** authorities when it authorized stipulation of settlement in **zoning** enforcement action that permitted landowner to use its property in ways that were prohibited by the local **zoning** ordinance. Buckley v. Town of Wappinger (2 Dept. 2004) 12 A.D.3d 597, 785 N.Y.S.2d 98. **Zoning** And Planning 1772

Town **zoning** board did not violate the doctrine of legislative equivalency by using a resolution to amend **zoning** ordinance to allow construction of shopping center; board observed the procedural formalities for enacting a **zoning** **amendment**, such as conducting public hearing, notifying property owners affected by proposed **amendment**, and following voting requirements. Miller v. Kozakiewicz (2 Dept. 2001) 289 A.D.2d 494, 735 N.Y.S.2d 176. **Zoning** And Planning 1175

Generally, procedures outlined in **zoning** statutes must be strictly adhered to, but only a departure in substance from the formula prescribed by law vitiates the proceedings. Town of Schroeppel, Oswego County v. Spector, 1963, 43 Misc.2d 290, 251 N.Y.S.2d 233. **Zoning** And Planning 1336

Any **zoning** ordinance is derogatory of rights of owners under common law, and statutory procedure change must be complied with. Shefler v. City of Geneva, 1955, 1 Misc.2d 807, 147 N.Y.S.2d 400. **Zoning** And Planning 1125

A town resolution which purported to prescribe the procedure for a change of **zone** was invalid where procedure for change required consent of 33 ⅓ % of neighboring property owners. New York, N.H. & H.R. Co. v. Sulla, 1960, 198 N.Y.S.2d 353. **Zoning** And Planning 1190

A town need not submit a proposed repeal of an existing **zoning** ordinance nor an adoption of a new **zoning** ordinance replacing such existing ordinance to a **zoning** commission. 19 Op.State Compt. 5, 1963.

Legislative nature of change

Zoning is legislative function, and, thus, town board acts in its legislative capacity when considering an application to change **zoning** and is under no requirement to state its reasons for denying application. Litz v. Town Bd. of Guilderland (3 Dept. 1993) 197 A.D.2d 825, 602 N.Y.S.2d 966. **Zoning** And Planning 1189

Change of **zone** from residence to business granted by town board was the exercise of a legislative function. Penataquit Ass'n v. Furman, 1954, 283 A.D. 875, 129 N.Y.S.2d 221. See, also, Soule v. Town Bd. of Perinton, 1955, 141 N.Y.S.2d 167. Municipal Corporations 63.15(3); **Zoning** And Planning 1000

Notice of hearing or change--In general

Notice of proposed change to local **zoning** law will satisfy public notice requirements as long as it describes proposed change with reasonable precision. Gernatt Asphalt Products, Inc. v. Town of Sardinia, 1996, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226. **Zoning** And Planning 1181

Zoning **amendment** which differed substantially from proposed **amendment** as set forth in notice of hearing given prior to enactment thereof was invalid as not adopted in conformity with provisions of this section. Callanan Road Imp. Co. v. Town of Newburgh (2 Dept. 1958) 5 A.D.2d 1003, 173 N.Y.S.2d 780. **Zoning** And Planning 1181

Where meeting of town board on July 15, was called after notice of public hearing, and meeting was closed after defeat of resolution in favor of proposed **amendments** of **zoning** ordinances, and meeting was not adjourned to a further date, or to the call of the chair, reconsideration of proposed **zoning** **amendments** at special meeting on July 30, without new notice of public hearing, was illegal. Rabasco v. Town of Greenburgh (2 Dept. 1955) 285 A.D. 895, 137 N.Y.S.2d 802, affirmed 309 N.Y. 735, 128 N.E.2d 425. **Zoning** And Planning 1181

Where, after town board had acted upon rezoning ordinance, it rescinded its original action and passed new resolution, which was substantially the same as original resolution, new notice and hearing were not required for effective passage of new resolution. Iannarone v. Caso, 1969, 59 Misc.2d 212, 298 N.Y.S.2d 350, affirmed 33 A.D.2d 658, 306 N.Y.S.2d 404, appeal denied 26 N.Y.2d 610, 309 N.Y.S.2d 1027, 258 N.E.2d 103. **Zoning** And Planning 1180

Assuming premises to be affected by **amendment** of a **zoning** ordinance are properly described in notice of hearing on proposed **amendment**, statutory requirement as to notice is met if the published notice gives the average reader reasonable warning that property in which he has an interest may be affected, and an opportunity by exercise of reasonable diligence to determine whether such is the fact. 2525 East Ave., Inc. v. Town of Brighton, 1962, 33 Misc.2d 1029, 228 N.Y.S.2d 209, affirmed 17 A.D.2d 908, 233 N.Y.S.2d 759. **Zoning** And Planning 1181

Where notice of proposed general change of **zoning** ordinance respecting certain lands, including petitioner's was published and subsequently amended **zoning** ordinance was enacted excepting petitioner's property therefrom, notice and ordinance deprived petitioner of property right by granting an exception of which no notice was given or published, and exception to ordinance would be stricken therefrom. Paliotto v. Cohalan, 1957, 6 Misc.2d 1, 163 N.Y.S.2d 353, affirmed as modified on other grounds 6 A.D.2d 886, 177 N.Y.S.2d 553, affirmed 8 N.Y.2d 1065, 207 N.Y.S.2d 281, 170 N.E.2d 413. **Zoning** And Planning 195

Ordinances affecting changes in **zone** are valid only when adopted following public notice and hearing as prescribed by this chapter. Stiriz v. Stout, 1960, 210 N.Y.S.2d 325. **Zoning** And Planning 1180

Under this section requiring change in **zoning** ordinance to be entered in minutes of town board and a copy of such change to be published, strict compliance is required to make change in ordinance effective, and where minutes recited change to C-1 **Zone** and published notice referred to change from A-10 to C-1, this section was not complied with. Deligtisch v. Town of Greenburgh, 1954, 135 N.Y.S.2d 220. Municipal Corporations 100; Municipal Corporations 110; **Zoning** And Planning 1189

Even if notice of public hearing before town board regarding **amendment** of **zoning** ordinances was void, property owners association which was represented at the public hearing by its president and about thirty individual owners of realty in the section affected who protested and filed written objections to the **amendments** was not prejudiced by the irregularities in the

notice and could not object thereto. North Shore Beach Property Owners Ass'n v. Town of Brookhaven, 1952, 115 N.Y.S.2d 670. **Zoning** And Planning 1181

A resolution of town board of appeals, amending town **zoning** law as affecting unincorporated village in town, was not void because of failure to publish and post notice of resolution after its adoption. O'Beirne v. Koehler, 1948, 193 Misc. 101, 83 N.Y.S.2d 140. Towns 15; **Zoning** And Planning 1189

While L.1972, c. 958, which amended this section and sections 133, 134, 264, dispensed with the provisions that a printed copy of every general town ordinance or **zoning** ordinance or any **amendments** thereto approved by the town board be printed and posted on the signboard maintained by the tow clerk and further validated previous general town ordinances or **amendments** thereto approved by a town board when there was a failure to post, it made no provision for the validation of previous town **zoning** ordinances or **amendments** thereto when such failure occurred. 1973, Op.Atty.Gen. (Inf.) 85.

Where town board gives notice of public hearing prior to amending **zoning** ordinance to change minimum area of residential building lots from 20,000 to 30,000 square feet, the adopted **amendment** is not void where it provides for an increase to only 25,000 square feet. 18 Op.State Compt. 192, 1962.

---- Sufficiency, notice of hearing or change

Notice of proposed change to local **zoning** law satisfies its purpose of alerting public to potential and contemplated revisions, and will generally be deemed sufficient, if **amendment**, as adopted, is embraced within public notice. Gernatt Asphalt Products, Inc. v. Town of Sardinia, 1996, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226. **Zoning** And Planning 1181

Notice of proposed **amendments** to town **zoning** ordinance, indicating that town intended to appeal those provisions which authorized mining as permitted use throughout town and to enact new provision which authorized mining as specially permitted use only in those areas where it was currently being conducted, was not rendered inadequate when, at noticed meeting of town board, board decided to enact only the repealer **amendments**, with result that mining became a nonconforming rather than a specially permitted use in those areas within town where it was currently conducted; while mining company may have interpreted notice as all-or-nothing proposal, and prepared and directed its comments and objections exclusively to adoption of special provision and not to repealer provisions, mining company's misconception could not be blamed on any deficiency in notice. Gernatt Asphalt Products, Inc. v. Town of Sardinia, 1996, 87 N.Y.2d 668, 642 N.Y.S.2d 164, 664 N.E.2d 1226. **Zoning** And Planning 1181

Notice of hearing which was adequate for purpose of **zoning** **amendment** was not shown to have been prejudicially inadequate for purpose of imposition of conditions where plaintiff neighbors suggested no additional conditions which could be imposed and which would be appropriate for their protection, and such conditions as had been imposed were intended to be and were for benefit of neighbors. Albright v. Town of Manlius, 1971, 28 N.Y.2d 108, 320 N.Y.S.2d 50, 268 N.E.2d 785, reargument denied 29 N.Y.2d 649, 324 N.Y.S.2d 1031, 273 N.E.2d 320. **Zoning** And Planning 1653

Notice of public hearing concerning rezoning, which notice was given both by publication and by mail to address of last property owner as reflected in town's most recent tax assessment roll, was constitutionally sufficient, notwithstanding that true property owner may not have received actual notice because parcel was conveyed shortly before notice was sent; town was not required to verify property ownership information with county clerk's office before sending out notices of proposed rezoning to property owners. Anthony v. Town of Brookhaven (2 Dept. 1993) 190 A.D.2d 21, 596 N.Y.S.2d 459, appeal dismissed 82 N.Y.2d 747, 602 N.Y.S.2d 805, 622 N.E.2d 306. **Zoning** And Planning 1181

Notice of hearing as to adoption of amended building **zone** map was sufficient in content where it consisted of eight pages of maps on first page of which was printed statement to effect that hearing for purpose of considering adoption of amended building **zone** map, map contained legend by which various districts could be distinguished and it was unmistakably clear from map that plaintiffs' property was placed in Residence B district by proposed amended map. Rettaliata v. Town of Huntington, 1962, 36 Misc.2d 781, 233 N.Y.S.2d 593. **Zoning** And Planning 1181

In proceeding to obtain relief against building inspector's determination denying building permit for gasoline and service station, petition alleging that town **zoning** ordinance **amendment** prohibiting use of land in town for gasoline station purposes was unlawful because notice of public hearing preliminary to enactment gave no clear notice that **amendment** concerning gasoline service stations was to be considered was sufficient to allege right to issuance of the building permit. Brachfeld v. Sforza, 1952, 114 N.Y.S.2d 722. **Zoning** And Planning 1612

---- Failure to provide, notice of hearing or change

Where **zoning** resolution was never published as required under this section, it never became effective, notwithstanding assertions with respect to circumstances of such non-publication or the possibility that remedies therefore may have existed by way of mandamus or self-help. Benigno v. Cohalan, 1976, 40 N.Y.2d 880, 389 N.Y.S.2d 346, 357 N.E.2d 1001. **Zoning** And Planning 1137

Statute of limitations did not bar property owners' action challenging rezoning of property from residential to industrial manufacturing where property owners had never been sent written notice of rezoning; town did not comply with notice requirements in its **zoning** ordinance. Kuhn v. Town of Johnstown (3 Dept. 1998) 248 A.D.2d 828, 669 N.Y.S.2d 757. **Zoning** And Planning 1605

Publication in three area newspapers of notice of hearing on **zoning** **amendment**, and town supervisor's belief that public officials of unspecified neighboring municipalities attended hearing, failed to establish that representatives of each neighboring municipality received actual notice of hearing and, thus, violation of notice procedures was not harmless and required that **zoning** **amendment** be declared void. Cipperley v. Town of East Greenbush (3 Dept. 1995) 213 A.D.2d 933, 623 N.Y.S.2d 967. **Zoning** And Planning 1181; **Zoning** And Planning 1653

Failure of town to give written notice to adjoining municipalities of proposed **amendments** to **zoning** law which would severely restrict right to enlarge nonconforming uses, rendered **amendments** void. Bohan v. Town of Southampton, 1962, 227 N.Y.S.2d 712. **Zoning** And Planning 1180

Protest against proposed change--In general

Signature of only one spouse, even though both spouses were listed on assessment roll, was sufficient in order to consider entire property, held as tenants in entirety, toward 20-percent threshold required for validity of property owners' protest petition with respect to proposed **amendment** to town's **zoning** ordinance; statute did not define "owners" as all record owners of property, and it was just as unfair to effectively disenfranchise one spouse by allowing other spouse to withhold signature as it would be to allow one spouse to disenfranchise the other by signing petition, for purposes of meeting 20-percent threshold. Gosier v. Aubertine (4 Dept. 2009) 71 A.D.3d 76, 891 N.Y.S.2d 788. **Zoning** And Planning 1184

Fact that attorney representing operator of baseball complex seeking variance for outdoor artificial lighting system was not permitted to address town planning board after close of public comment period at board's last public hearing did not

constitute denial of procedural due process; operator had no entitlement to relief sought, and therefore, requirements of procedural due process did not apply. Twin Town Little League Inc. v. Town of Poestenkill (3 Dept. 1998) 249 A.D.2d 811, 671 N.Y.S.2d 831, leave to appeal denied 92 N.Y.2d 806, 677 N.Y.S.2d 781, 700 N.E.2d 320. Constitutional Law 4096; **Zoning** And Planning 1542

Property owners who signed protests in opposition to proposed **zoning** change could validly revoke their signatures after conclusion of public hearing and, as remaining signatories after the revocations owned less than 20% of property adjacent to premises in question, **zoning** change was validly enacted by favorable vote of majority of town board members and favorable vote by three-fourths of town board members was not required. Maione v. Town of Clarkstown (2 Dept. 1983) 94 A.D.2d 716, 462 N.Y.S.2d 248. **Zoning** And Planning 1184

Owners of large tract of land, which they sought to rezone, could not circumvent super-majority vote of town board, otherwise available to owners of land within 100 feet of land included in proposed change, by paper transactions whereby they deeded portions of their land to themselves and thus became their own neighbors, and by limiting supposed boundaries of property that they characterized as being "rezoned" to land generally within 100 feet of outer boundaries of the property. Eadie v. Town Bd. of Town of North Greenbush, 2005, 9 Misc.3d 599, 799 N.Y.S.2d 720, reversed 22 A.D.3d 1025, 803 N.Y.S.2d 262, leave to appeal granted 6 N.Y.3d 706, 812 N.Y.S.2d 35, 845 N.E.2d 467, stay granted 6 N.Y.3d 829, 813 N.Y.S.2d 708, 846 N.E.2d 1218, motion denied 7 N.Y.3d 727, 818 N.Y.S.2d 183, 850 N.E.2d 1158, affirmed 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464. **Zoning** And Planning 1188

Where **zoning** protest petition is only susceptible to attack based on petitioners' property being outside 100 foot fringe or being isolated by some other device, such as narrow slice along street frontage, town must ask (1) whether the unincluded intervening area is limited and capable of definite description, (2) whether use of the unincluded property is related to and dependent upon proposed use of described property, (3) whether, after rezoning of described property, unincluded property will be suitable for use as authorized by pre-existing and continuing **zoning**, and (4) whether described property be used in accord with its altered **zoning** classification independent of and without regard to use of intervening area, and where border is not properly described, or it remains related to or its future use will be ancillary to or dependent upon property that is being rezoned, or will not be usable as practical matter, then 100 foot border may be moved out to point where property of nearby landowners who are adversely affected commences. Eadie v. Town Bd. of Town of North Greenbush, 2005, 9 Misc.3d 599, 799 N.Y.S.2d 720, reversed 22 A.D.3d 1025, 803 N.Y.S.2d 262, leave to appeal granted 6 N.Y.3d 706, 812 N.Y.S.2d 35, 845 N.E.2d 467, stay granted 6 N.Y.3d 829, 813 N.Y.S.2d 708, 846 N.E.2d 1218, motion denied 7 N.Y.3d 727, 818 N.Y.S.2d 183, 850 N.E.2d 1158, affirmed 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464. **Zoning** And Planning 1184

Parcel of land would not be considered to be "directly opposite" subject property so as to allow owners of such property to validly sign protest challenging proposed rezoning of subject property where such property was separated from parcel by frontage road of expressway, grassy median over 200 feet wide, embankment and second frontage road of expressway. Webster Associates v. Town of Webster, 1983, 119 Misc.2d 533, 462 N.Y.S.2d 796. **Zoning** And Planning 1184

Where **amendment** to building **zone** ordinance changing **zone** from residential to commercial had been adopted properly, residential property owner could not supplement protest which had insufficient number of signatures by adding signature of another property owner whose power of attorney he held but use of which he had not indicated on protest. Deligtisch v. Town of Greenburgh, 1954, 135 N.Y.S.2d 220. **Zoning** And Planning 1184

If a protest presented to the town board contains the requisite percentage of signatories, and such signatories are truly persons "aggrieved" by the contemplated **zoning** change, lack of acknowledgment of such protest or certification of the signatures will not obviate the statutory requirement of a four vote majority of the town board as a condition precedent to enactment of the change. Op.State Compt. 64-144.

Non-owners of property, subject to registration of **zoning** ordinance, may not petition for or protest against **amendment** of such ordinance. 15 Op.State Compt. 409, 1959.

---- Necessity of three-fourths vote, protest against proposed change

Statute providing that proposed **zoning** change required approval of at least three-fourths of members of town board when protest against change was signed by owners of 20 percent or more of area of land immediately adjacent to land to be rezoned, "extending 100 feet therefrom," unambiguously indicated that class of owners necessary to force supermajority vote had to live within 100 feet of property being rezoned, and therefore protest petition by petitioners who did not live within 100 feet of land being rezoned did not trigger need for supermajority vote to approve rezoning. Eadie v. Town Bd. of Town of North Greenbush (3 Dept. 2005) 22 A.D.3d 1025, 803 N.Y.S.2d 262, leave to appeal granted 6 N.Y.3d 706, 812 N.Y.S.2d 35, 845 N.E.2d 467, stay granted 6 N.Y.3d 829, 813 N.Y.S.2d 708, 846 N.E.2d 1218, motion denied 7 N.Y.3d 727, 818 N.Y.S.2d 183, 850 N.E.2d 1158, affirmed 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464. **Zoning** And Planning 1188

Creation of buffer **zone** is valid means by which to avoid triggering supermajority vote requirement under statute requiring that at least three-fourths of members of town board approve proposed **zoning** change when protest against change is signed by owners of 20 percent or more of area of land within 100 feet of land to be rezoned. Eadie v. Town Bd. of Town of North Greenbush (3 Dept. 2005) 22 A.D.3d 1025, 803 N.Y.S.2d 262, leave to appeal granted 6 N.Y.3d 706, 812 N.Y.S.2d 35, 845 N.E.2d 467, stay granted 6 N.Y.3d 829, 813 N.Y.S.2d 708, 846 N.E.2d 1218, motion denied 7 N.Y.3d 727, 818 N.Y.S.2d 183, 850 N.E.2d 1158, affirmed 7 N.Y.3d 306, 821 N.Y.S.2d 142, 854 N.E.2d 464. **Zoning** And Planning 1188

To be entitled to protest rezoning, and require three-fourths vote of members of town board to approve rezoning, neighbors had to own 20% of land directly opposite subject parcel extending 100 feet from street frontage of that opposite land, but did not have to own 20% or more of total area of all land directly opposite subject parcel. Baader v. Town Bd. of Town of Aurelius (4 Dept. 1991) 171 A.D.2d 1046, 568 N.Y.S.2d 991. **Zoning** And Planning 1154

Town board's three-to-two vote approving application for change in **zoning** was not sufficient to pass **amendment**, where landowner who submitted written objection owned slightly more than 20% of land area immediately adjacent to property for which **zoning** change was in question, if area lying in street were excluded, under Town Law requiring approval of at least three-fourths of members of town board of land regulation change if change is objected to by owners of 20% or more of immediately adjacent land. Biedermann v. Town of Orangetown, (2 Dept. 1986) 125 A.D.2d 465, 509 N.Y.S.2d 394. **Zoning** And Planning 1188

Town board's three-to-one vote, with one member abstaining, was insufficient to repeal **zoning** ordinance, after protest had been registered by 20% of affected property owners, under McKinney's Town Law § 265, which requires a three-fourths vote after protest. Hey v. Town Bd. of Town of Potter (4 Dept. 1986) 117 A.D.2d 989, 499 N.Y.S.2d 290. **Zoning** And Planning 1196

Where town board by less than a three-quarters vote adopted **zoning** **amendments** affecting eight discrete sites within the town, pursuant to a single vote and without a severability clause, and where protests were entered by owners of more than 20% of the land affected by one of the **amendments**, but not by 20% of the owners affected by any other **amendment** or by 20% of the total of all the owners affected by all the **amendments**, the **amendments** relating the seven sites as to which 20% of the affected owners did not protect were validly enacted. 208 East 30th Street Corp. v. Town of North Salem (2 Dept. 1982) 88 A.D.2d 281, 452 N.Y.S.2d 902. **Zoning** And Planning 1188

Property located on other side of thruway, 330 to 690 feet from proposed area to be rezoned, was not "directly opposite" to

that property, as required to invoke "supermajority" provision for town board votes on **amendments** to **zoning** district boundaries. Ryan Homes, Inc. v. Town Bd. of Town of Mendon, 2005, 7 Misc.3d 709, 791 N.Y.S.2d 355. **Zoning** And Planning 1188

Landowner may carve out buffer area on its own land between area to be rezoned and otherwise immediately adjacent parcels in order to avoid requirement of "supermajority" vote for **zoning amendment** where protest is filed by owners of 20 percent or more of area within 100 feet of area to be rezoned. Ryan Homes, Inc. v. Town Bd. of Town of Mendon, 2005, 7 Misc.3d 709, 791 N.Y.S.2d 355. **Zoning** And Planning 1188

Where no factual showing was made that owners of 20% or more of land adjacent to land affected by proposed **zoning amendment** had signed and filed protest against change, three-fourths vote in favor of proposed **amendment** by members of town board was not required. Schaus v. Town Bd. of Town of Clifton Park, Saratoga County, 1975, 83 Misc.2d 726, 372 N.Y.S.2d 952. **Zoning** And Planning 1188

Rezoning could be accomplished by majority vote of town board, rather than three-fourths vote, where, when property of persons who signed protest but did not own property within affected area at time protest was filed and property of persons who revoked their protest after it was given was subtracted from square footage included in protest, amount of square feet remaining fell short of requisite 20% of affected area. Iannarone v. Caso, 1969, 59 Misc.2d 212, 298 N.Y.S.2d 350, affirmed 33 A.D.2d 658, 306 N.Y.S.2d 404, appeal denied 26 N.Y.2d 610, 309 N.Y.S.2d 1027, 258 N.E.2d 103. **Zoning** And Planning 1188

Four affirmative votes of a town board are sufficient to effectuate a **zoning** change where protest petition is filed under this section even though the board consists of seven members. 1967, Op.Atty.Gen. (Inf.) 63.

Where a **zoning** ordinance covers the entire town and the owners of twenty per centum or more of the land in the town file a protest pursuant to this section, then a complete repealer requires a vote of three-fourths of the members of the board. Op.State Compt. 82-148.

---- Time of protest, protest against proposed change

Where it was not demonstrated that any expenditures were made in reliance upon **zoning** change in question, delay in commencing action challenging **zoning** change would not bar challenging party from proceeding because of laches. Bloom v. Town Bd. of Town of Yorktown (2 Dept. 1982) 88 A.D.2d 895, 450 N.Y.S.2d 603. **Zoning** And Planning 1605

Protest against proposed rezoning was properly interposed at intention to **zone** stage where town board's acts in succeeding stages would be purely ministerial. Webster Associates v. Town of Webster, 1983, 119 Misc.2d 533, 462 N.Y.S.2d 796. **Zoning** And Planning 1184

A protest against a proposed **amendment** of a **zoning** ordinance, filed pursuant to this section may be filed after the close of the public hearing and at any time prior to the time when the town board votes on the proposed **amendment**. Op.State Compt. 64-630.

Hearing

Party could not present evidence at hearing upon remittitur as to whether special use **amendments** to **zoning** code had been properly published, as such an argument was not raised in prior proceedings and was beyond scope of remittitur to determine whether **amendments** were legally enacted. Home Depot USA, Inc. v. Jack Baum (2 Dept. 1997) 243 A.D.2d 476, 663 N.Y.S.2d 73. **Zoning** And Planning 1724

Although **zoning** ordinance of town provides for a reference by town board to planning board of any proposed change in **zoning**, whether on motion of town board or on petition, the step so provided is a part of legislative function, and hence the provisions of this article read together with provisions of **zoning** ordinance did not impose a mandatory duty on town board to call a public hearing whenever a petition for a **zoning** change was presented to it. Southern Dutchess Country Club v. Town Bd. of Town of Fishkill (2 Dept. 1966) 25 A.D.2d 866, 270 N.Y.S.2d 165, affirmed 18 N.Y.2d 870, 276 N.Y.S.2d 121, 222 N.E.2d 739. **Zoning** And Planning 1182

Where realty was within area rezoned from business to industrial by **amendment** of **zoning** ordinance, subsequent resolution of town board excluding realty from industrial **zone** established by prior resolution was invalid as an attempt to effect an **amendment** to the **zoning** ordinance since subsequent resolution was adopted without a public hearing thereon and not in accordance with procedure prescribed by section 264. Paliotto v. Harwood, 1958, 11 Misc.2d 3, 173 N.Y.S.2d 103. **Zoning** And Planning 1182

Since town **zoning** **amendment** may be further amended, by ordinance, only upon following proper procedures, including the holding of a public hearing, the town board of the town of Sand Lake may not, by resolution, extend the efficacy of an ordinance for six months when such ordinance rezoned a specific area conditioned on the commencement of construction of a mall in such area within one year. 1977, Op.Atty.Gen. (Inf.) 218.

A town may not repeal a town **zoning** ordinance without holding a public hearing thereon. 15 Op.State Compt. 38, 1959.

Although there is no provision in this chapter whereby **zoning** and planning regulations are subject to permissive referendum, the Legislature has provided in this section and sections 264 and 267 of this chapter for public notices and hearings before determinations are made thereunder. 3 Op.State Compt. 413, 1947.

Amendments

Amendment to **zoning** ordinance prohibiting use of land in specified area for used car sales lot and public garage, precluded grant of application seeking permit to operate lot for such purpose, even though **amendment** was passed after application had been filed; there was no indication that town board had engaged in bad faith by delaying application until **amendment** became effective. Property Developer, Inc. v. Swiatek (4 Dept. 1993) 190 A.D.2d 1078, 593 N.Y.S.2d 702, leave to appeal denied 82 N.Y.2d 653, 601 N.Y.S.2d 583, 619 N.E.2d 661. **Zoning** And Planning 1352

Retroactive application of **amendment** to local law allowing homeowners in single-family dwelling districts to convert their homes to two-family dwellings, which required that seven years elapse from issuance of certificate of occupancy before two family use board could approve permit, was proper as **amendment** and did not create new policy, but merely clarified and reenforced original legislative intent and policy of town to afford existing residents of town relief from unforeseeable economic hardships by obtaining temporary two-family use permit to obtain rental income. Aversano v. Two Family Use Bd. of Town of Babylon (2 Dept. 1986) 117 A.D.2d 665, 498 N.Y.S.2d 403. **Zoning** And Planning 1352

A general **zoning** restriction may not be destroyed by piecemeal exemption of pieces of land equally subject to hardship created in the restriction, but remedy in such case is by **amendment** of the **zoning** ordinance which may not be done under guise of a variance. Asch v. Gillispie (2 Dept. 1961) 14 A.D.2d 543, 218 N.Y.S.2d 247. **Zoning** And Planning 1465;

Zoning And Planning 1478

The redesign and relocation of highway system and presence of well designed and maintained office building in the area were not such changes as would justify ordinance rezoning a vacant suburban tract near large and complex highway interchange from one family residence district to general business district. Walus v. Millington, 1966, 49 Misc.2d 104, 266 N.Y.S.2d 833, affirmed 31 A.D.2d 777, 297 N.Y.S.2d 894. Zoning And Planning 1163

This section does not limit method of changing zoning district boundary to an ordinance stating boundary in words and figures. Rettaliata v. Town of Huntington, 1962, 36 Misc.2d 781, 233 N.Y.S.2d 593. Zoning And Planning 1143

A town zoning map, which was incorporated into zoning regulations adopted as a local law, must be amended by the adoption of local laws rather than by simple resolutions or ordinances. Op.State Compt. 80-322.

Comprehensive planning

Zoning changes must be consonant with total planning strategy, reflecting consideration of needs of community, and there must be comprehensiveness of planning, rather than special interest, irrational ad hocery. Town of Bedford v. Village of Mount Kisco, 1973, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155, reargument denied 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655. Zoning And Planning 1151

Where change of zone was entirely consistent with area development plan, which had been approved by planning board prior to application for rezoning, and which adopted as one of its aims encouragement of multi-family residence and discouragement of commercial development, town complied with New York State Environmental Quality Review Act and town's environmental quality review ordinance and validly and legally rezoned area from single family to multi-family dwelling. Barry Road Long Acre Neighborhood Ass'n v. Johnson (4 Dept. 1985) 107 A.D.2d 1070, 486 N.Y.S.2d 557. Zoning And Planning 1161(2)

Record disclosing that area involved was poorly suited to future development of one family residences, that future tendency was for commercial use, that quality apartments would benefit town and that town board made its determination after consideration of relative advantages and disadvantages of proposed change established that zoning change was in conformance with comprehensive zoning plan and that general welfare of community was enhanced and that zoning amendment was valid and constitutional. Gilmer v. Fritz (3 Dept. 1967) 28 A.D.2d 804, 281 N.Y.S.2d 154. Zoning And Planning 1670

Conditions on variances

Town zoning board could not impose condition on grant of variance permitting use of agricultural-residential property for automobile body repair shop, requiring phasing out of operation on another parcel of property not subject to variance, notwithstanding contention that condition was justified by close relationship between properties and by interrelated nature of land in the community. St. Onge v. Donovan, 1988, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019. Zoning And Planning 1500

Conditions imposed by town planning board on variance for baseball complex's outdoor artificial lighting system, including conditions governing hours of system's operation, were reasonable; neighboring property owners raised concerns regarding the depreciation of the value of their property due to the noise and traffic associated with the ballgames and the intrusiveness

of the lighting. Twin Town Little League Inc. v. Town of Poestenkill (3 Dept. 1998) 249 A.D.2d 811, 671 N.Y.S.2d 831, leave to appeal denied 92 N.Y.2d 806, 677 N.Y.S.2d 781, 700 N.E.2d 320. **Zoning** And Planning 1505

Zoning board has the authority to attach conditions to its approval of a petitioner's site plan for a variance provided they are reasonable, directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact that might result from the grant of the variance. Twin Town Little League Inc. v. Town of Poestenkill (3 Dept. 1998) 249 A.D.2d 811, 671 N.Y.S.2d 831, leave to appeal denied 92 N.Y.2d 806, 677 N.Y.S.2d 781, 700 N.E.2d 320. **Zoning** And Planning 1486

Conditions per se do not void **zoning amendments**. Levine v. Town of Oyster Bay (2 Dept. 1966) 26 A.D.2d 583, 272 N.Y.S.2d 171. **Zoning** And Planning 1153

That **amendment** of town **zoning** ordinance, changing the classification of a parcel of land from residential to business, was conditioned upon the imposition of restrictive covenant subjecting such land to a more restricted use than was generally permitted in a business district, did not invalidate **amendment**. Church v. Town of Islip (2 Dept. 1959) 8 A.D.2d 962, 190 N.Y.S.2d 927, motion granted 7 N.Y.2d 784, 194 N.Y.S.2d 518, 163 N.E.2d 340, motion denied 9 A.D.2d 782, 193 N.Y.S.2d 1019, affirmed 8 N.Y.2d 254, 203 N.Y.S.2d 866, 168 N.E.2d 680. **Zoning** And Planning 1153

Granting of **zoning** change upon conditions or agreements, or recording of restrictive covenants, is unauthorized exercise of police power delegated to municipality, but court could not delete such invalid conditions from a rezoning resolution, as it could not assume that town board would have granted change without conditions. Town of Greenburgh v. Buser, 1955, 4 Misc.2d 513, 148 N.Y.S.2d 550. Municipal Corporations 111(4); **Zoning** And Planning 1153

Promotion of general welfare

Generally, when change of **zone**, variance or special permit is sought, there is specific project sponsored by particular developer which is subject of application; however, error occurs where **zoning** legislation is enacted to grant single owner a discriminatory benefit at expense and detriment of his neighbors, without any public advantage or justification, rather than pursuant to comprehensive plan for welfare of community. Kravetz v. Plenge (4 Dept. 1982) 84 A.D.2d 422, 446 N.Y.S.2d 807. **Zoning** And Planning 1145

In determining validity of **amendment** to **zoning** law, relevant inquiry is whether **amendment** was enacted for benefit of individual owner rather than for general welfare of community. Albright v. Town of Manlius (4 Dept. 1970) 34 A.D.2d 419, 312 N.Y.S.2d 13, modified on other grounds 28 N.Y.2d 108, 320 N.Y.S.2d 50, 268 N.E.2d 785, reargument denied 29 N.Y.2d 649, 324 N.Y.S.2d 1031, 273 N.E.2d 320. **Zoning** And Planning 157

Amendment to building **zone** ordinance which in effect reinstated **zoning** of realty after having downgraded it was valid and constitutional despite public meetings and picketing designed to influence upgrading, where town board adopted **amendment** upon its own judgment that it was in best interests of general welfare of community in **zoning** sense. Gates of Woodbury Co. v. Town of Oyster Bay (2 Dept. 1968) 29 A.D.2d 943, 289 N.Y.S.2d 379. **Zoning** And Planning 1146

Zoning ordinances could not be declared invalid as applied to particular property on ground that **zoning** authority was estopped or had waived, by its prior approval of applications to rezone other properties in the vicinity, its right to claim that public health, safety and welfare or other legitimate purpose would be served by enforcing the ordinances with respect to the particular property. Carnat Realty, Inc. v. Town of Islip, 1969, 60 Misc.2d 647, 303 N.Y.S.2d 99, modified on other grounds 34 A.D.2d 780, 311 N.Y.S.2d 239. **Zoning** And Planning 24

Spot zoning

Amendment of building **zone** ordinance changing approximately 14 acres of land from residential "D" district to industrial "H" district with condition that grade be reduced to that of road on which it fronted was void as constituting spot or contract **zoning**, where precise change and conditions were proposed by applicants for town **zoning** and were adopted in toto, rezoned parcel was first industrial intrusion in area and nonconforming gas station use was not rezoned but was left in residential district. Levine v. Town of Oyster Bay (2 Dept. 1966) 26 A.D.2d 583, 272 N.Y.S.2d 171. **Zoning** And Planning 1163

Notwithstanding fact that town board rezoned only property adjacent to that of plaintiff so as to include it within a proposed planned industrial park district after conducting hearings at which consideration was given to rezoning all of property in area, rezoning of tract, considering its size and location, did not constitute "spot **zoning**," absent evidence that rezoning of property was prompted by an intent to benefit owner thereof or that it was initiated at his instance. Daum v. Meade, 1971, 65 Misc.2d 572, 318 N.Y.S.2d 199, affirmed 37 A.D.2d 691, 323 N.Y.S.2d 670, appeal dismissed 29 N.Y.2d 640, 324 N.Y.S.2d 463, 273 N.E.2d 315, appeal denied 29 N.Y.2d 483, 324 N.Y.S.2d 1029, 274 N.E.2d 312, reargument denied 29 N.Y.2d 955, 329 N.Y.S.2d 1025, 280 N.E.2d 369. **Zoning** And Planning 1159

Vested property rights

Landowners did not acquire vested rights in the rezoning of their property when they complied with the town's conditions requiring demolition of hotel as a quid pro quo for the change in **zoning** from MF-1 to MF-3 to allow greater density in multi-family housing development. Sterngass v. Town Bd. of Town of Clarkstown (2 Dept. 2004) 10 A.D.3d 402, 781 N.Y.S.2d 131. **Zoning** And Planning 1161(1)

Generally, a landowner does not have vested rights in a **zoning** change. Sterngass v. Town Bd. of Town of Clarkstown (2 Dept. 2004) 10 A.D.3d 402, 781 N.Y.S.2d 131. **Zoning** And Planning 1154

Substantial improvements and expenditures standing alone are insufficient to give vested rights in a **zoning** change; the landowner must establish that the expenditures were so substantial that the municipal action results in serious loss rendering the improvements essentially valueless. Sterngass v. Town Bd. of Town of Clarkstown (2 Dept. 2004) 10 A.D.3d 402, 781 N.Y.S.2d 131. **Zoning** And Planning 1154

Landowner did not have vested right to complete proposed medical waste incinerator project at time town adopted **zoning** law forbidding incineration of commercial or hazardous waste, where there had been no construction or other change to land itself and no indication that improvement or expenditures made in reliance on prior state of law could not be recouped in marketplace or put to equal use despite new law's requirements. Pete Drown, Inc. v. Town Bd. of Town of Ellenburg (3 Dept. 1996) 229 A.D.2d 877, 646 N.Y.S.2d 205, leave to appeal denied 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232. **Zoning** And Planning 1352

A developer which made substantial expenditures prior to **zoning** change acquired vested right to develop its property pursuant to revised site plan approved prior to **zoning** change. 202 Developers, Inc. v. Town of Haverstraw (3 Dept. 1991) 175 A.D.2d 473, 572 N.Y.S.2d 517. **Zoning** And Planning 1352

Fact that property has been in particular **zone** for long periods of time does not render it inviolate to change in **zoning**. Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay, 1981, 109 Misc.2d 376, 438 N.Y.S.2d 715, affirmed 88 A.D.2d 484, 453 N.Y.S.2d 732. **Zoning** And Planning 1143

Fees and expenses

It is doubtful that a town board may charge a person who petitions for a **zoning** change an application fee and the cost of publication of the **amendment**. Op.State Compt. 80-60.

A town may not charge the cost of publication of a **zoning** change to the applicants who request such change. 25 Op.State Compt. 265, 1969.

Standing

A property owner whose land is subject to a **zoning** change has a legally cognizable interest in assuring that the government has satisfied State Environmental Quality Review Act (SEQRA) before any rezoning occurs. MYC New York Marina, L.L.C. v. Town Bd. of Town of East Hampton, 2007, 17 Misc.3d 751, 842 N.Y.S.2d 899. Environmental Law 656

Ownership of property adjacent or very close to affected property generally gives rise to a presumption of standing, in order to ensure government has satisfied State Environmental Quality Review Act (SEQRA) before any rezoning occurs, because it is reasonable to assume that an owner located in the immediate vicinity of a rezoned area will suffer an injury different from the community at large and thus be brought in to the **zone** of interest. MYC New York Marina, L.L.C. v. Town Bd. of Town of East Hampton, 2007, 17 Misc.3d 751, 842 N.Y.S.2d 899. Environmental Law 656

Neighboring landowners had standing to challenge town board's rezoning action; neighbors were not required to show actual injury or special damage, given their close proximity to subject premises, and they voiced concerns falling within **zone** of interest covered by **zoning** law and State Environmental Quality Review Act (SEQRA), including traffic, wildlife, and harmony with town's comprehensive plan. Ryan Homes, Inc. v. Town Bd. of Town of Mendon, 2005, 7 Misc.3d 709, 791 N.Y.S.2d 355. **Zoning** And Planning 1587

McKinney's Town Law § 265, NY TOWN § 265
Current through L.2017, chapters 1 to 334.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 16. Zoning and Planning (Refs & Annos)

McKinney's Town Law § 272-a

§ 272-a. Town comprehensive plan

Currentness

1. Legislative findings and intent. The legislature hereby finds and determines that:

(a) Significant decisions and actions affecting the immediate and long-range protection, enhancement, growth and development of the state and its communities are made by local governments.

(b) Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town comprehensive planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens.

(c) The development and enactment by the town government of a town comprehensive plan which can be readily identified, and is available for use by the public, is in the best interest of the people of each town.

(d) The great diversity of resources and conditions that exist within and among the towns of the state compels the consideration of such diversity in the development of each town comprehensive plan.

(e) The participation of citizens in an open, responsible and flexible planning process is essential to the designing of the optimum town comprehensive plan.

(f) The town comprehensive plan is a means to promote the health, safety and general welfare of the people of the town and to give due consideration to the needs of the people of the region of which the town is a part.

(g) The comprehensive plan fosters cooperation among governmental agencies planning and implementing capital projects

and municipalities that may be directly affected thereby.

(h) It is the intent of the legislature to encourage, but not to require, the preparation and adoption of a comprehensive plan pursuant to this section. Nothing herein shall be deemed to affect the status or validity of existing master plans, comprehensive plans, or land use plans.

2. Definitions. As used in this section, the term:

(a) “town comprehensive plan” means the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the town located outside the limits of any incorporated village or city.

(b) “land use regulation” means an ordinance or local law enacted by the town for the regulation of any aspect of land use and community resource protection and includes any zoning, subdivision, special use permit or site plan regulation or any other regulation which prescribes the appropriate use of property or the scale, location and intensity of development.

(c) “special board” means a board consisting of one or more members of the planning board and such other members as are appointed by the town board to prepare a proposed comprehensive plan and/or an amendment thereto.

3. Content of a town comprehensive plan. The town comprehensive plan may include the following topics at the level of detail adapted to the special requirements of the town:

(a) General statements of goals, objectives, principles, policies, and standards upon which proposals for the immediate and long-range enhancement, growth and development of the town are based.

(b) Consideration of regional needs and the official plans of other government units and agencies within the region.

(c) The existing and proposed location and intensity of land uses.

(d) Consideration of agricultural uses, historic and cultural resources, coastal and natural resources and sensitive environmental areas.

(e) Consideration of population, demographic and socio-economic trends and future projections.

(f) The location and types of transportation facilities.

(g) Existing and proposed general location of public and private utilities and infrastructure.

(h) Existing housing resources and future housing needs, including affordable housing.

(i) The present and future general location of educational and cultural facilities, historic sites, health facilities and facilities for emergency services.

(j) Existing and proposed recreation facilities and parkland.

(k) The present and potential future general location of commercial and industrial facilities.

(l) Specific policies and strategies for improving the local economy in coordination with other plan topics.

(m) Proposed measures, programs, devices, and instruments to implement the goals and objectives of the various topics within the comprehensive plan.

(n) All or part of the plan of another public agency.

(o) Any and all other items which are consistent with the orderly growth and development of the town.

4. Preparation. The town board, or by resolution of such town board, the planning board or a special board, may prepare a proposed town comprehensive plan and amendments thereto. In the event the planning board or special board is directed to prepare a proposed comprehensive plan or amendment thereto, such board shall, by resolution, recommend such proposed plan or amendment to the town board.

5. Referrals. (a) Any proposed comprehensive plan or amendment thereto that is prepared by the town board or a special board may be referred to the town planning board for review and recommendation before action by the town board.

(b) The town board shall, prior to adoption, refer the proposed comprehensive plan or any amendment thereto to the county planning board or agency or regional planning council for review and recommendation as required by section two hundred thirty-nine-m of the general municipal law. In the event the proposed plan or amendment thereto is prepared by the town planning board or a special board, such board may request comment on such proposed plan or amendment from the county planning board or agency or regional planning council.

6. Public hearings; notice. (a) In the event the town board prepares a proposed town comprehensive plan or amendment thereto, the town board shall hold one or more public hearings and such other meetings as it deems necessary to assure full opportunity for citizen participation in the preparation of such proposed plan or amendment, and in addition, the town board shall hold one or more public hearings prior to adoption of such proposed plan or amendment.

(b) In the event the town board has directed the planning board or a special board to prepare a proposed comprehensive plan or amendment thereto, the board preparing the plan shall hold one or more public hearings and such other meetings as it deems necessary to assure full opportunity for citizen participation in the preparation of such proposed plan or amendment. The town board shall, within ninety days of receiving the planning board or special board's recommendations on such proposed plan or amendment, and prior to adoption of such proposed plan or amendment, hold a public hearing on such proposed plan or amendment.

(c) Notice of a public hearing shall be published in a newspaper of general circulation in the town at least ten calendar days in advance of the hearing. The proposed comprehensive plan or amendment thereto shall be made available for public review during said period at the office of the town clerk and may be made available at any other place, including a public library.

7. Adoption. The town board may adopt by resolution a town comprehensive plan or any amendment thereto.

8. Environmental review. A town comprehensive plan, and any amendment thereto, is subject to the provisions of the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations. A town comprehensive plan may be designed to also serve as, or be accompanied by, a generic environmental impact statement pursuant to the state environmental quality review act statute and regulations. No further compliance with such law is required for subsequent site specific actions that are in conformance with the conditions and thresholds established for such actions in the generic environmental impact statement and its findings.

9. Agricultural review and coordination. A town comprehensive plan and any amendments thereto, for a town containing all or part of an agricultural district or lands receiving agricultural assessments within its jurisdiction, shall continue to be subject to the provisions of article twenty-five-AA of the agriculture and markets law relating to the enactment and administration of local laws, ordinances, rules or regulations. A newly adopted or amended town comprehensive plan shall take into consideration applicable county agricultural and farmland protection plans as created under article twenty-five-AAA of the agriculture and markets law.

10. Periodic review. The town board shall provide, as a component of such proposed comprehensive plan, the maximum

intervals at which the adopted plan shall be reviewed.

11. Effect of adoption of the town comprehensive plan. (a) All town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section.

(b) All plans for capital projects of another governmental agency on land included in the town comprehensive plan adopted pursuant to this section shall take such plan into consideration.

12. Filing of town comprehensive plan. The adopted town comprehensive plan and any amendments thereto shall be filed in the office of the town clerk and a copy thereof shall be filed in the office of the county planning agency.

Credits

(Added L.1993, c. 209, § 1. Amended L.1995, c. 418, § 4; L.1997, c. 458, § 22, eff. July 1, 1998.)

Editors' Notes

PRACTICE COMMENTARIES

by Terry Rice

The enactment or amendment of zoning regulations is intended to implement the planning and development goals of a community. It is the means to accomplish rational community planning rather than an end unto itself. *See Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265, 270 (1988). In *Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893-94, 235 N.E.2d 897, 900-01 (1968), the Court of Appeals held that "the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use." Consequently, some form of rational planning must precede any zoning enactment if it is to be valid. Indeed, Town Law § 263, which authorizes towns to adopt zoning regulations, specifically requires that "[s]uch regulations shall be made in accordance with a comprehensive plan...." Accordingly, the requirement that zoning regulations be in accordance with a comprehensive plan constitutes a portion of the delegation of authority to towns to adopt zoning regulations. *See Taylor v. Village of Head of the Harbor*, 104 A.D.2d 642, 480 N.Y.S.2d 21 (2d Dept. 1984), *appeal denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 478 N.E.2d 210 (1985). The failure to comply with that mandate renders the enactment of a zoning law unauthorized and *ultra vires*. *See Lake Illyria Corp. v. Town of Gardiner*, 43 A.D.2d 386, 352 N.Y.S.2d 54 (3d Dept. 1974). Of course, the failure to enact zoning regulations which are reasonably related to well-founded planning objectives also has constitutional implications. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.2d 303 (1926).

The rationale for requiring consistency with a comprehensive plan is premised on the delegation of authority for the welfare of the community as a whole being considered when adopting zoning regulations or amendments. "A comprehensive plan has as its underlying purpose the control of land uses for the benefit of the whole community based upon consideration of its problems and applying the enactment or a general policy to obtain a uniform result

not enacted in a haphazard or piecemeal fashion." *Kravetz v. Plenge*, 84 A.D.2d 422, 429, 446 N.Y.S.2d 807, 811 (4th Dept. 1982). Consistency and rationality are the key points of a comprehensive plan. *See Udell v. Haas*, 21 N.Y.2d 463, 471, 288 N.Y.S.2d 888, 895, 235 N.E.2d 897, 902 (1968). Mandating compliance with a comprehensive plan is intended to ensure that zoning enactments will not conflict with the fundamental land use policies of a community.

"In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even a majority of the community." *Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893, 235 N.E.2d 897, 900 (1968). Such a requirement diminishes the likelihood that the zoning authority will be exercised to benefit those in authority, to punish political foes or to advance a seemingly legitimate community goal at the expense of a few property owners who are called upon to bear the brunt of short-sighted decisions. The Court of Appeals acknowledged the necessity for such concerns in *Udell*:

[T]he 'comprehensive plan' protects the landowner from arbitrary restrictions on the use of his property which can result from the pressures which outraged voters can bring to bear on public officials. 'With the heavy presumption of constitutional validity that attaches to legislation purportedly under the police power, and the difficulty in judicially applying a 'reasonableness' standard, there is danger that zoning, considered a self-contained activity rather than a means to a broader end, may tyrannize individual property owners. Exercise of the legislative power to zone should be governed by rules and standards as clearly defined as possible, so that it cannot operate in an arbitrary and discriminatory fashion, and will actually be directed to the health, safety, welfare and morals of the community. The more clarity and specificity required in the articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts be able to review the regulation, declaring it *ultra vires* if it is not in reality `in accordance with a comprehensive plan.'

Id. at 469-70, 288 N.Y.S.2d at 894, 235 N.E.2d at 901.

Where a general development plan for a community as a whole is adopted after careful consideration and a zoning law is amended in accordance with that plan, it is likely that the public interest will be served by such action. Regardless of the source, the relevant evidence must establish "a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole." *Taylor v. Village of Head of the Harbor*, 104 A.D.2d 642, 644, 480 N.Y.S.2d 21, 23 (2d Dept. 1984), *appeal denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 478 N.E.2d 210 (1985); *see also Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973), *reargument denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 (1974).

The antithesis of such comprehensive and rational planning is "spot zoning," the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. *See Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951). Although the size of the parcel is a relevant inquiry, "the real test for spot zoning is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." *Collard v. Village of Flower Hill*, 52 N.Y.2d 594, 600, 439 N.Y.S.2d 326, 329, 421 N.E.2d 818, 821 (1981). If a zone change accords with a town's comprehensive plan, it is not spot zoning.

Prior to 1995, no statute defined the concept or term "comprehensive plan." As is discussed below, Town Law § 272-a now provides an enumeration of various items which may be contained in a community's comprehensive plan. For many years indeed it had been the case that "[e]xactly what constitutes a 'comprehensive plan' has never been made clear." *Udell v. Haas*, 21 N.Y.2d 463, 471, 288 N.Y.S.2d 888, 895, 235 N.E.2d 897, 902 (1968). As with the existing case law, the statute provides a blank slate as to what the comprehensive plan of any particular

community may contain. That choice was and is solely within the discretion of each municipality.

The elusive search for a community's amorphous comprehensive plan and the virtual non-existence of any consistency requirement have been somewhat modified by the provisions of the 1995 amendment to the statute which mandates that all land use regulations comply with a town's written comprehensive plan if one has been adopted pursuant to Town Law § 272-a. Under the case law, a comprehensive plan was not required to be contained in a single document, nor, for that matter, was it mandatory that it be a written document. *See Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265, 270 (1988); *Neville v. Koch*, 173 A.D.2d 323, 323, 575 N.Y.S.2d 463, 464 (1st Dept. 1991), *aff'd*, 79 N.Y.2d 416, 583 N.Y.S.2d 802, 593 N.E.2d 256 (1992). Instead, courts endeavored to discern a community's comprehensive plan by examining all relevant evidence of a municipality's land use policies. *See Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265, 270 (1988); *Udell v. Haas*, 21 N.Y.2d 463, 471, 288 N.Y.S.2d 888, 895, 235 N.E.2d 897, 902 (1968); *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 122, 96 N.E.2d 731, 734 (1951). Pursuant to the existing case law, a community's comprehensive plan may consist of a compilation of land use policies that may be found in any number of ordinances, resolutions, and policy statements by the town. *Osiecki v. Town of Huntington*, 170 A.D.2d 490, 490-91, 565 N.Y.S.2d 564, 565 (2d Dept.), *appeal denied*, 78 N.Y.2d 863, 578 N.Y.S.2d 877, 586 N.E.2d 60 (1991). Although those policies may be garnered from any source under the case law, a master plan, the zoning law and the zoning map of a town are the most obvious sources of such policies.

A town is not compelled to act only in accordance with such previously adopted land use policies if changed circumstances warrant different solutions. "Although stability and regularity are essential to the operation of zoning plans, zoning is not static; the obligation is the support of comprehensive planning with recognition of the dynamics of change, not slavish servitude to any particular plan." *Kravetz v. Plenge*, 84 A.D.2d 422, 430, 446 N.Y.S.2d 807, 812 (4th Dept. 1982); *see also Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973), *reargument denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 (1974). The case law provides that if a need for the betterment of a community is demonstrated and a zoning amendment satisfies that need, such change becomes part of a community's comprehensive plan. *See Kravetz v. Plenge*, 84 A.D.2d 422, 446 N.Y.S.2d 807 (4th Dept. 1982). In reviewing a challenged amendment, "the court decides if it is in accordance with a well-considered plan ... by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole...." *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265, 270 (1988). As is the case whenever analyzing whether an enactment was consistent with a community's comprehensive plan, the primary consideration in reviewing an amendment is whether forethought has been given to a community's land use problems. Again, because consistency is the hallmark of the analysis, a zoning amendment may not conflict with the fundamental land use policies of a community. *See Curtis-Wright Corp. v. Town of East Hampton*, 82 A.D.2d 551, 442 N.Y.S.2d 125 (2d Dept. 1981).

In *Infinity Consulting Group, Inc. v. Town of Huntington*, 49 A.D.3d 813, 854 N.Y.S.2d 524 (2d Dept.), *appeal dismissed*, 11 N.Y.3d 781, 866 N.Y.S.2d 604, 896 N.E.2d 89, and *lv. denied*, 11 N.Y.3d 852, 872 N.Y.S.2d 65, 900 N.E.2d 547 (2008), the plaintiff owned a one-acre parcel, improved with a single-family dwelling, which had been zoned for residential use since 1947. The 1993 comprehensive plan designated the front portion of the property to a depth of 250 feet as commercial and recommended that the rear of the property remain residential. However, the property was never rezoned to implement the recommendation of the comprehensive plan. The plaintiff purchased the property in 2000 with the intention of utilizing it for professional offices. After a zone change application to rezone the entire property for commercial use was denied, the plaintiff commenced an action to declare the residential zoning of the property invalid as being inconsistent with the town's comprehensive zoning plan. The Appellate Division reversed the conclusion of Supreme Court that the residential zoning of the property was invalid as being inconsistent with the comprehensive plan.

One who challenges such a legislative act bears a heavy burden of proof. *See Town of Bedford v. Village of Mount*

Kisco, 33 N.Y.2d 178, 186, 351 N.Y.S.2d 129, 134, 306 N.E.2d 155, 158 (1973), *rearguement denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 (1974). Consequently, if the validity of a legislative classification is considered to be "fairly debatable," the legislative judgment must be allowed to control. *See Shepard v. Village of Skaneateles*, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949); *DeSena v. Gulde*, 24 A.D.2d 165, 169, 265 N.Y.S.2d 239, 244, (2d Dept. 1965). If a plaintiff fails to demonstrate a clear divergence with the comprehensive plan, the zoning classification must be upheld. *See Taylor v. Village of Head of Harbor*, 104 A.D.2d 642, 644-645, 480 N.Y.S.2d 21, 23 (2d Dept. 1984), *lv. denied*, 64 N.Y.2d 609, 489 N.Y.S.2d 1026, 478 N.E.2d 210 (1985); *Blumberg v. City of Yonkers*, 41 A.D.2d 300, 306-308, 341 N.Y.S.2d 977, 984 (2d Dept.), *appeal dismissed*, 32 N.Y.2d 896, 346 N.Y.S.2d 814, 300 N.E.2d 154 and 32 N.Y.2d 966, 347 N.Y.S.2d 1029, 300 N.E.2d 743, *lv. denied*, 33 N.Y.2d 514, 348 N.Y.S.2d 1025, 301 N.E.2d 869 (1973). In assessing the validity of a zoning enactment, zoning decisions must be consistent with a total planning strategy, reflecting consideration of the needs of the community as a whole. *See Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893, 235 N.E.2d 897, 900 (1968).

The property considered in *Infinity Consulting* was located at the entrance to a residential neighborhood, having no entry from a commercial roadway, and was bordered on two sides by residential properties. Under the circumstances, the town board's decision to act contrary to the comprehensive plan and not to rezone the property was reasonable and had a rational basis because genuine concerns existed that rezoning the property for commercial use would have a negative effect on traffic congestion and the residential character of the neighborhood.

In reviewing the planning analysis prerequisite for a zoning amendment, the validity of an amendment is not judged solely by the adequacy of a study for a particular amendment, but, instead, upon all of a town's zoning policies and plans. If a town has planned for a balanced and well-ordered community, an amendment will be upheld. *See Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 130, 531 N.Y.S.2d 782, 786-87, 527 N.E.2d 265, 269-70 (1988); *Neville v. Koch*, 173 A.D.2d 323, 323, 575 N.Y.S.2d 463, 464 (1st Dept. 1991), *aff'd*, 79 N.Y.2d 416, 583 N.Y.S.2d 802, 593 N.E.2d 256 (1992); *King Road Materials v. Garafalo*, 173 A.D.2d 931, 569 N.Y.S.2d 790 (3d Dept. 1991).

If a town has not adopted a comprehensive plan utilizing the revised version of Town Law § 272-a, amendment of a zoning law is permissible without the necessity of formally amending the community's adopted comprehensive plan, that is, as long as the town board has acted consistently with the community's total planning strategy and considered the needs of the community. However, "amendments made in a piecemeal fashion or by 'irrational *ad hocery*' cannot be sustained." *Los-Green, Inc. v. Weber*, 156 A.D.2d 994, 994, 548 N.Y.S.2d 832, 832 (4th Dept. 1989), *appeal denied*, 76 N.Y.2d 701, 557 N.Y.S.2d 878, 557 N.E.2d 114 (1990). Moreover, the courts closely scrutinize and are skeptical of expert testimony and rationalizations developed after a board has adopted such regulations. *See Udell*, 21 N.Y.2d at 470-71, 288 N.Y.S.2d at 894-95, 235 N.E.2d at 901.

Pursuant to the existing case law, zoning must be consistent with a community's comprehensive plan as evidenced by "some form of planning." Invalidation is the consequence of violation of that principle. However, in application, New York courts have not rigorously enforced this important precept which serves as the justification for all zoning actions. If some form of demonstrable planning analysis preceded its enactment, a zoning amendment is unlikely to be annulled. To some extent, this is a result of the presumptions and burdens favoring municipal legislative action. *See Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265, 270 (1988) ("Because zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt."). As compared to other jurisdictions, such as California and Florida, the comprehensive plan requirement was a very weak requirement in New York.

The case law confirms the generally deferential approach of the courts in reviewing zoning enactments challenged as not being in compliance with a comprehensive plan. In addition, given the historically nebulous nature of what a comprehensive plan may consist of, the decisions also substantiate the *ad hoc* nature of the courts' inquiry. Reflective of the hesitancy of the courts to invalidate zoning enactments, the existence of almost any form of planning analysis prior to acting on an amendment is likely to doom any challenge. For example, in *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973), *reargument denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 (1974), the Court of Appeals rebuffed a challenge to the rezoning of property to permit multi-family development despite the fact that the property was adjacent to single-family residences and the rezoning was contrary to the village's 10-year-old comprehensive plan, because the minutes of the meeting at which the rezoning was approved demonstrated the planning basis for the board of trustees' decision. *See also Lazore v. Board of Trustees of the Village of Massena*, 191 A.D.2d 764, 594 N.Y.S.2d 400 (3d Dept. 1993). Because circumstances change and the record demonstrated the reasons for the board of trustees' action, it was not necessary formally to amend the comprehensive plan. Similarly, the continued designation of a parcel of property as residential was sustained in *Tilles Investment Co. v. Town of Huntington*, 74 N.Y.2d 885, 547 N.Y.S.2d 835, 547 N.E.2d 90 (1989), despite the commercial zoning of property across the street and approximately 70 "*ad hoc*" changes to the area. The court found that the area continued to reflect that town's original policy, expressed in its master plan, that the area remain residential. The court concluded that the property owner had failed to demonstrate that the town had so deviated from its original plan that, in effect, a comprehensive plan no longer existed.

Unless an amendment or enactment is irrational, completely devoid of virtually any sensible planning basis or absolutely out of character with the immediate area, courts are unlikely to invalidate the enactment. For example, in *DeSena v. Gulde*, 24 A.D.2d 165, 265 N.Y.S.2d 239 (2d Dept. 1965), after having rezoned property from residential to light manufacturing, premised upon a master plan which recommended light manufacturing for the property, a board of trustees again amended the zoning law to return the property to residential zoning, solely because of vehement public opposition. The court annulled the subsequent rezoning because of the board's failure to follow its own master plan and the inconsistency with its prior action. *See also Northeastern Environmental Developers v. Town of Colonie*, 72 A.D.2d 881, 422 N.Y.S.2d 144 (3d Dept. 1979); *Rammar Associates v. Village of Westbury*, 59 Misc.2d 875, 300 N.Y.S.2d 698 (Sup. Ct. Nassau Co. 1969). As evidenced by the decision in *Osiecki v. Town of Huntington*, 170 A.D.2d 490, 490-91, 565 N.Y.S.2d 564, 565 (2d Dept. 1991), *appeal denied*, 78 N.Y.2d 863, 578 N.Y.S.2d 877, 586 N.E.2d 60 (1991), an amendment which disregards a municipality's comprehensive plan or an adopted master plan, as well as the recommendations of its planning board, and for which no justification or planning rationale is offered, will be invalidated. *See also Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893-94, 235 N.E.2d 897, 900-01 (1968); *Los-Green, Inc. v. Weber*, 156 A.D.2d 994, 548 N.Y.S.2d 832 (4th Dept. 1989), *appeal denied*, 76 N.Y.2d 701, 557 N.Y.S.2d 878, 557 N.E.2d 114 (1990). Judicial intervention also would be warranted in those unusual instances when property is virtually surrounded by property zoned or developed for inconsistent uses, which renders the development of the property impractical for a use for which it is zoned. *See Mary Chess, Inc. v. City of Glen Cove*, 18 N.Y.2d 205, 273 N.Y.S.2d 46, 216 N.E.2d 406 (1966); *Stevens v. Town of Huntington*, 20 N.Y.2d 352, 283 N.Y.S.2d 16, 229 N.E.2d 591, *reargument denied*, 20 N.Y.2d 806, 284 N.Y.S.2d 1031, 231 N.E.2d 137 (1967); *Grimpel Associates v. Cohalan*, 41 N.Y.2d 431, 393 N.Y.S.2d 373, 361 N.E.2d 1022 (1977); *see also Reuschenberg v. Town of Huntington*, 143 A.D.2d 265, 532 N.Y.S.2d 148 (2d Dept. 1988).

Among the key factors in determining whether a zoning amendment is part of a rational comprehensive plan is the zoning history of a community in the area. If an amendment is contrary to the consistent history of land use decisions in an area, it is likely to be invalidated. For example, in *West Branch Conservation Ass'n v. Town of Ramapo*, N.Y.L.J., March 6, 2000, p. 31, col. 3 (Sup. Ct. Rockland Co. 2000), *aff'd*, 284 A.D.2d 401, 726 N.Y.S.2d 137 (2d Dept. 2001), a rezoning was so utterly inconsistent with the history of land use in the area and with the relevant studies and planning philosophy, that the court repudiated the legislative action of the town board as constituting impermissible spot zoning. As is further evidenced by the decision in *West Branch*, the existence of a purportedly beneficial social goal in enacting a zoning amendment or rezoning of property is not a substitute for rational planning and compliance with a community's comprehensive plan.

The owners of a 100-acre farm and of a 7-acre retail nursery jointly sought a zone change for 24 acres of the farm property from RR-80 to CS ("Community Shopping") in order to construct and jointly operate a 60,000-square-foot retail farmers market. The county department of planning recommended against the zone change on three occasions pursuant to General Municipal Law § 239-m, finding that the use was out of character with the residential neighborhood, was contrary to the town and county master plans, would change the rural character of the area and would constitute spot zoning. Thereafter, the town board voted 3-2 to approve the zone change, which vote was insufficient for approval because of the super-majority requirement triggered by the county planning board's adverse recommendation. The applicants thereafter provided a covenant and "option," described below, and the town board again voted on the petition. One member of the town board changed his vote to approve the request in reliance on the covenant, thereby approving the requested rezoning amendment.

The covenant, which was instrumental in the change of the critical vote, provided an "option" to the town and petitioner conservation association to purchase the development rights of that portion of the property not affected by the zone change, subject to the right of the owner to continue to farm the property. The "option" could be exercised by the town or conservation association at any time until 60 days after notice that the owner had entered into a contract of sale with a third party. Upon exercise of the "option," the development rights could only be utilized for open land, park land and farm use, "but not two (2) acre residential use." The agreement also provided the town and the conservation association with a right of first refusal to purchase the property.

Among the claims asserted in the subsequent litigation challenging the rezoning was a claim that it constituted spot zoning by creating an island of commercial use for the sole benefit of the applicants in the midst of a rural residential area. The decision aptly summarizes the relevant criteria in analyzing the substantive validity of a zone change. The court reiterated that "spot zoning" is "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners." (*quoting Rogers v. Village of Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951)). On the other hand, if "an ordinance is enacted in accordance with a comprehensive plan, it is not 'spot zoning' even though it (1) singles out and affects but one small plot (citations omitted) or (2) creates in the center of a large zone small areas or districts devoted to a different use." *Id.* (*quoting Rogers*, 302 N.Y. at 124, 96 N.E.2d at 735).

Among the key considerations in reviewing the substantive validity of a zoning amendment are: the size of the area rezoned; the character of the adjacent land uses; the character of the uses permitted by the amendment and the history of zoning, land use and growth in the area. Although the size of a rezoned area is a material consideration, it is not conclusive. While the rezoning of a smaller parcel possesses a higher likelihood of being considered spot zoning and a large parcel is less likely to run afoul of this precept, size is not a conclusive factor. The paramount concern is not whether an area which has been the subject of a zone change is located within a larger area utilized for a different category of use but, instead, whether it was adopted pursuant to a comprehensive plan for the benefit of the community or for the individual owner.

With respect to the character of the area, the fact that a rezoning authorizes a use which is inconsistent with the surrounding neighborhood may be an indication of spot zoning and the absence of comprehensive planning. However, as with all of the enumerated considerations, the more germane inquiry is the nature of the use permitted by the zoning amendment and the relation of that use to community requirements.

Particularly relevant in discerning whether an amendment is consistent with a community's land use philosophy is the history of zoning, development, growth and zoning changes in the area. In *West Branch* the site and surrounding area had been zoned R-50 (single-family residence, 50,000-square-foot minimum lot area) for many

years prior to a 1978 master plan. A master plan adopted by the town in 1978 provided that: a) commercial uses should be excluded from the area and limited to four other areas of the town; b) the semi-rural nature of the area should be maintained and c) the site and area should be designated as "Rural Density Residence and Open Space." In order to conform the zoning with the goals of the master plan, the town rezoned the site and surrounding area RR-80 (single-family residence, 80,000-square-foot minimum lot area). Based on the 40-year history of preserving the rural character of the area, the court found no evidence that the town intended to permit commercial development in the area.

However, since formal amendment of a community's comprehensive plan is not a prerequisite to a zoning amendment under the then-existing statutory scheme, a court's inquiry may not conclude with an examination of a municipality's comprehensive plan and zoning map. Changed conditions may provide a planning rationale for revised zoning designations. "Although stability and regularity are essential to the operation of zoning plans, zoning is not static; the obligation is the support of comprehensive planning with recognition of the dynamics of change, not slavish servitude to any particular plan." *Kravetz v. Plenge*, 84 A.D.2d 422, 430, 446 N.Y.S.2d 807, 812 (4th Dept. 1982); *see also Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973), *reargument denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 (1974). In reviewing a challenged amendment, "the court decides if it is in accordance with a well-considered plan ... by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole...." *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265, 270 (1988).

In *West Branch*, the court found that there had been no change in the character of the adjacent land uses in the last 40 years which would support the challenged zone change. In fact, the only relevant change was to decrease the permissible density in the neighborhood from R-50 to RR-80. No commercial or retail development existed in the area. No benefit to the community had been demonstrated by virtue of the zone change; the only benefit was to the property owners.

The substance of the resolution granting the zone change also influenced the court's conclusion. The resolution banned almost all other uses permitted by right in the CS district except the proposed farmers' market. Although the master plan indicated that all of such uses were compatible in the CS district, no explanation was provided for their proscription in this instance. In the opinion of the court, it appeared "inconsistent that the Board would find all other commercial uses inconsistent with the CS zone for this property while selectively approving the Farmers' Market use for the same property."

Given the appropriate judicial reluctance to second-guess such legislative judgments, the existence of some rational planning justifying a zone change is generally sufficient to sustain a rezoning. As the *West Branch* court determined, "[w]here detailed planning has been done, the Courts are less inclined to find that a zoning amendment was not enacted in accordance with a comprehensive plan." (*citing Goodrich v. Southampton*, 39 N.Y.2d 1008, 387 N.Y.S.2d 242, 355 N.E.2d 297 (1976)). However, neither the volume of documents generated nor the effort expended in examining a zone change proposal is determinative, particularly when, as is *West Branch*, the record lacks a detailed explanation for granting the zone change.

The covenant provided by the applicants did not diminish the court's conclusion that the zone change constituted spot zoning. The covenants, according to the court's analysis, provided that the zone change would be approved in exchange for an agreement not to develop the balance of the property and to continue to farm it. In construing the implications of the covenant, which was "an integral part of the zone change," the court examined whether the covenant was adopted "as part of a well considered and comprehensive plan, whether it constitutes a benefit solely for the property owners or constitutes a benefit to the adjoining property owners or the community as a whole." *Id.* However, the document was ambiguous and failed to provide any certain public benefit. While the covenant

obligated the owners to continue to farm the balance of the property, it lacked a specific durational obligation or a guarantee that they would continue to farm the property. The provisions left open the possibility that the applicants would receive the requested zone change and cease farming, resulting in no public benefit. The option/offer to purchase was considered to be illusory and speculative, failing to guarantee that the lands would be farmed or remain as open space. Lastly, if the right of first refusal were not exercise by the town or conservation associations, a third-party would be permitted to develop the property pursuant to the RR-80 zoning designation. Consequently, the court determined that the covenant failed to guarantee that the public would ever receive the benefit sought to be provided thereby.

The court compared the covenant with that considered in *Cannon v. Murphy*, 196 A.D.2d 498, 600 N.Y.S.2d 965 (2d Dept. 1993), in which a zone change was invalidated despite the fact that the covenant provided for a decreased density on another parcel than a pending rezoning application would have authorized. The court concluded that the covenant in *Cannon* provided an immediate, specific and permanent public benefit while the one in *West Branch* was illusory and uncertain.

Providing a covenant or agreement furnishing a public benefit as part of a rezoning decision does not alter "the traditional analysis with regard to the existence of 'spot zoning'...." *Id.* "Even if the if the Declaration actually accomplished its purpose of maintaining the 75 acres of the Conklin Farm as farm/open land, it would still not negate the radical nature of this zone change which interposes a CS zone in the middle of an area that is exclusively a rural residential zone." *Id.*

Based on its analysis, the court concluded that the rezoning was enacted for the sole benefit of the applicants and without any legitimate purpose benefiting the town as a whole. The zone change was found to be incompatible with the surrounding rural residential area, creating an island of commercial use in its midst. The rezoning, further, was inconsistent with 40 years of zoning and land use decisions in the town, not based on any demonstrated change or growth in the community and not premised on any need in the community for such zoning.

The decision demonstrates that while strict adherence to a community's ancient master plan is not required, any significant change in the permissible land uses for an area must be supported by a demonstration of changed circumstances which justifies a modification of the previous legislative judgment, particularly when the change is drastic. Moreover, while the courts are deferential to planning studies undertaken to support a zone change and legislative determinations regarding appropriate zoning designations, no amount of planning rationalization can substantiate a zone change which is completely contrary to the pattern of development in an area. Regardless of the perceived social benefit sought by a zone change, adherence to a community's expressed land use policies and history cannot be ignored or rationalized away.

West Branch additionally instructs that the provision of a covenant, agreement or promise to induce a town board to grant a zone change will be scrutinized to determine if it actually provides the promised public benefit. Such an agreement will, further, be analyzed in the context of consistency with a community's comprehensive plan. Regardless of how alluring a promise given to induce the granting of a zone change may be, the courts will, nonetheless, not excuse adherence to a community's comprehensive plan.

On the other hand, the court rejected a spot zoning challenge to zoning amendments intended to permit a large shopping center despite a number of indicia of spot zoning and seeming similarities to the *West Branch* decision, but with a markedly different course of land use history in the area in *Miller v. Kozakiewicz*, N.Y.L.J., July 25, 2000, p. 30. col.1 (Sup. Ct. Suffolk Co. 2000). The rezoning of a 50-acre parcel from four zones to two, Industrial A and Business B, was sought to construct a 431,000-square-foot shopping center. Although the town planning board recommended approval of the zone changes, the county planning board, in rendering its review pursuant to

General Municipal Law § 239-m, recommended disapproval because it considered the changes to be: premature prior to completion of a revised master plan; an unwarranted over-intensification of retail uses in the CR-58 corridor; and inconsistent with the county retail development plan which called for limiting new commercial development along major roadways.

Although the town's 1973 master plan provided for industrial development along the adjoining highway corridor, there had been "unchecked and consistent conversion" of industrial-zoned parcels to commercial and business uses along the corridor. Development for business and commercial use occurred, contrary to the master plan, because industrial development was hindered by the county groundwater protection regulations which limited industrial development, and by the availability of a large site for industrial development. In addition, the town had adopted an economic development policy of providing required infrastructure along the highway corridor and had extended a sewer district to the area in order to stimulate commercial development. Moreover, numerous commercial enterprises and strip malls had been approved by the town board since the early 1970's.

The petitioners acknowledged the constant alteration of industrial zoned parcels to commercial and business uses in the corridor, but asserted that a portion of the parcel was rezoned to Industrial A while a shopping center is a permitted use only in the Business B zoning district. It was contended that the zoning of a portion of the site as Industrial A, with its greatly increased maximum building density, was intended to circumvent the lesser permissible density for the Business B zone. The issue distilled to whether, if the rezoning of three-quarters of the parcel to Business B is reasonable in light of the town board's land use policies along the highway corridor, the rezoning of approximately 10 acres from an agriculture designation to Industrial B was spot zoning.

"To satisfy the statutory requirements of Town Law section 263, respondents need to show that the zoning amendment was 'adopted for a legitimate governmental purpose and that there is ... a reasonable relation between the end sought to be achieved by it and the means used to achieve that end.' " *Id.* (*quoting Village Board of Trustees of Malone v. Zoning Board of Appeals of the Village of Malone*, 164 A.D.2d 24, 28, 562 N.Y.S.2d 973, 975 (3d Dept. 1990)). A claim of spot zoning, on the other hand, is assessed by determining "whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." *Id.* (*quoting Collard v. Village of Flower Hill*, 52 N.Y.2d 594, 600, 439 N.Y.S.2d 326, 329, 421 N.E.2d 818, 821 (1981)). Where a zone change deviates from a master plan, an amendment is not invalid if it is the result of comprehensive planning conducted in accordance with the statutory requirements. Consequently, the analysis distilled to "whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole." *Id.* (*quoting Schoonmaker Homes-John Steinberg v. Village of Maybrook*, 178 A.D.2d 722, 728, 576 N.Y.S.2d 954, 958 (3d Dept. 1991), *lv. denied*, 79 N.Y.2d 757, 583 N.Y.S.2d 193, 592 N.E.2d 801 (1992)).

The town's 1973 master plan was, in the opinion of the court, of no current value given the fact that the area had developed contrary to its recommendations. The pattern of change to commercial and retail development was consistent and continuing. The history of zoning actions along the corridor reflected a generally uniform course of action; not arbitrary spot zoning. Moreover, the proposed development would not "clash" with the neighboring land uses. In short, the petitioners failed to satisfy their heavy burden of demonstrating that the zone change was arbitrarily adopted, without any substantial relationship to the public welfare, and that it was not granted as part of a uniform plan calculated to serve the welfare of the community. The court noted that "[c]learly, from time to time, the town board, as the legislative body, has the power to make reasonable changes in districts deemed by it, in its judgment, to be advisable for the proper future development." *Id.* The zone change was consistent with the town's history of land use decisions and with its comprehensive plan.

Unlike the limiting condition in *West Branch* which emphasized the impermissible *ad hoc* nature of the rezoning, the *Miller* court found that a condition which limited the permissible uses of the site supported the rationale for the

rezoning. With respect to the Industrial A portion of the site, the only permissible use was as a lumberyard, which was intended to permit a Home Depot store. Rather than finding that such a limitation emphasized the irrationality of the amendment, the court opined that:

It is an accepted practice for a town board to impose appropriate conditions and safeguards in conjunction with a change of zone (citation omitted), as long as the conditions are reasonable and relate only to the property involved without regard to the person who owns or occupies it. Such is so even when the conditions approach contractual arrangements. The execution of a private declaration of covenants restricting the use to which the parcel sought to be rezoned may be put is now a common mechanism (citations omitted) and 'is as much a zoning regulation as an ordinance adopted without conditions.'

Id. Such reasonable conditions were permissibly calculated to minimize any adverse impact of the rezoning on the adjacent properties and provided no basis for annulment of the zone change.

The town's objective in adopting the rezoning was the stimulation of retail development in the area. Such a goal is a legitimate basis for the rezoning of property. "Promotion of commercial development has been found to be a legitimate governmental interest benefiting the entire community ... as has the interest of providing needed jobs for residents." *Id.* (*citing Daniels v. Van Voris*, 241 A.D.2d 796, 660 N.Y.S.2d 758 (3d Dept. 1997); *Lazore v. Board of Trustees of the Village of Massena*, 191 A.D.2d 764, 594 N.Y.S.2d 400 (3d Dept. 1993)). Having concluded that in the absence of the requested amendments, retail development of the site would not be possible, the court found the existence of a reasonable relationship between the objective of improving the economic health of the community and the amendment.

The court concluded that "[t]his is not an instance where an island has been created in an essentially different district, or where a comparatively small area is singled out and placed in a district the use of which is different from the use permitted in the district." *Id.* The town board considered and credited the drastic intervening changes to its outdated master plan and decided to continue its policy of encouraging retail development despite the contrary recommendation of the archaic master plan. Because the judgment of the town board was, at a minimum, debatable, the court could not set aside its determination.

The key distinction between the two decisions is the clear history of land use decisions in each instance. In *West Branch*, the town board consistently demonstrated its commitment to low-density residential use in the area and the exclusion of commercial uses. The steadfast confirmation of that philosophy over time, together with the stable residential and open-space character of the area, condemned the radical and poorly justified amendment to invalidation. In *Miller*, on the other hand, despite a contrary master plan, the town had evidenced a continuing commitment to foster commercial and retail development in the area and the area had developed in that manner in the intervening years. The decisions demonstrate that while a minimum of planning rationalization is usually sufficient to demonstrate compliance with a community's comprehensive plan, the history and the pattern of development of an area often are controlling. The introduction of a discordant land use contrary to a town's history of decision making is likely to be condemned as spot zoning. The granting of a zone change for a use dissimilar to the pattern of development in an area, contrary to a municipality's demonstrable land use history and lacking a public land use benefit, is the essence of spot zoning. In addition, while covenants or agreements which limit permissible uses of property or provide for some related public benefit may ameliorate impacts of a zone change or act as an incentive for approval, they do not diminish the requirement of compliance with a community's comprehensive plan. If, as in *Miller*, a restriction is consistent with the philosophy underlying an amendment, the condition will likely be viewed as supporting the basis for the amendment. However, as was reviewed in *West Branch*, when a covenant or restriction emphasizes the lack of a planning rationale for an amendment and the singling out of one parcel for inconsistent treatment, it will constitute additional evidence of spot zoning.

A spot zoning challenge to a zone change from a residential zoning designation to "planned commercial district" was rejected in *Yellow Lantern Kampground v. Town of Cortlandville*, 279 A.D.2d 6, 716 N.Y.S.2d 786 (3d Dept. 2000), because of a default on the part of the town board in undertaking the required analysis and the inconsistency of the use to be permitted with the established character of the area. The plaintiff, the owner of three parcels of property, had operated an asphalt plant on one of the parcels since the early 1960's. The use continued as a nonconforming use when the area was zoned from industrial to business use in 1968, and the volume and scope of the operations subsequently increased pursuant to a number of variances.

The property owner petitioned the town to rezone all three parcels to industrial use in 1998 and the town planning board recommended approval of the rezoning only for the one parcel on which the asphalt business was being conducted. Thereafter, the town board rezoned all three parcels to an industrial designation.

In assessing the spot zoning challenge to the zoning amendment, the court enumerated the relevant factors to be considered as follows: whether the rezoning is consistent with a comprehensive land use plan; whether it is compatible with surrounding uses; the likelihood of harm to surrounding properties; the availability and suitability of other parcels; and the recommendations of professional planning staff (*citing Save Our Forest Action Coalition v. City of Kingston*, 246 A.D.2d 217, 221, 675 N.Y.S.2d 451, 454 (3d Dept. 1998)). No individual element is decisive since the key consideration is "whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." *Id.* at 10, 716 N.Y.S.2d at 789. In rejecting the amendment as constituting spot zoning, the court found that the Town Board had failed to engage in a "reasoned consideration" of those determinative factors but, instead, based its decision solely on its finding that the rezoning would not adversely affect the area since the use could, in any event, continue as a nonconforming use, and on the economic benefits to the community. The first rationalization "would justify the transformation of substantially any nonconforming use into a conforming one by the facile device of rezoning the affected parcels. Rezoning on that basis impermissibly 'rewards the nonconforming user, contravenes the strong policy intended to achieve the ultimate elimination of nonconforming uses * * * and diminishes the effectiveness of the comprehensive zoning plan.' " *Id.* (*quoting Augenblick v. Town of Cortlandt*, 104 A.D.2d 806, 815, 480 N.Y.S.2d 232, 240 (2d Dept. 1984) [Lazar, J., dissenting], *rev'd on dissenting mem. below*, 66 N.Y.2d 775, 497 N.Y.S.2d 363, 488 N.E.2d 109 (1985)).

The decision acknowledges that a zone change may validity be motivated by the goal of encouraging economic development. However, the legitimacy of such a rationale does not excuse consideration of the compatibility of a proposed use with and impact on surrounding properties and its consistency with a community's comprehensive plan. Emphasizing the town's default in undertaking the required analysis, the court noted that the record lacked any indication of the total area of the business district or the other properties located in the district, the uses of those properties or the conceivable affect of the rezoning on those properties. To the contrary, the other properties in the district consisted of residential and light commercial uses and none were devoted to industrial uses. Compounding the lack of requisite analysis, the town board also failed to consider alternative sites for the petitioner's composting use within the existing industrial district.

The court concluded that the town board failed to consider whether the proposed use was consistent with the town's comprehensive plan. The fact that the use proposed by the rezoning would permit the same use as the petitioner's existing nonconforming use is an impermissible consideration. As a result, the court invalidated the amendment as constituting spot zoning and because it failed to comply with the town's comprehensive plan.

On the other hand, a spot zoning challenge to the rezoning of property from a residential zone to a planned commercial district to permit the development of a senior citizen assisting living development was rejected in *Boyles v. Town Board of the Town of Bethlehem*, 278 A.D.2d 688, 718 N.Y.S.2d 430 (3d Dept. 2000). The

petitioner agreed to reduce the scope of the project during the review process from 107 units to 94. Among the conditions of the amendment was a restriction of the use of the property to an assisted-living residence for senior citizens, eliminating the ability to use the property for various uses otherwise permitted in the district.

The court identified the identical factors as the *Yellow Lantern* court which are relevant in considering a spot zoning challenge, that is, whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels and the recommendations of professional planning staff. In considering those factors, the inquiry ultimately distills to "whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." *Id.* at 690, 718 N.Y.S.2d at 432.

In assessing the spot zoning challenge, the court first determined that although size alone is not a determinative factor, the 6.7-acre size of the parcel was a small portion of the surrounding residentially zoned parcels, favoring the conclusion that the amendment was permissible. The surrounding land uses primarily consisted of one-and two-family dwellings and apartment complexes, uses which might be adversely affected by the panoply of potential uses in the planned commercial district, which included strip shopping centers. However, to ameliorate any potential deleterious impacts, the petitioner agreed to reduce the number of units to be constructed and the town board restricted the application of the amendment to the property only to a senior-citizen assisted living development. In addition, demographic studies demonstrated a community need for such a development and an examination of potential alternative sites substantiated the rejection of such prospective locations. Lastly, as a result of the foregoing analysis, the court concluded that the rezoning did benefit the community as a whole. As a result, the court determined that the rezoning was consistent with the town's comprehensive plan, consisting of the zoning law, zoning map and recommendations of its land use advisory committee.

These decisions demonstrate that despite the presumption of validity that adheres to legislative enactments, including zoning amendments, a town board must undertake the requisite analysis to establish a legitimate planning basis for a zoning amendment. The decisions also illustrate that the decisive consideration clearly is the history of zoning and land use in an area. An amendment which is utterly inconsistent with the pattern of development in an area is likely to be invalidated as impermissible spot zoning. However, an amendment which authorizes land uses consistent with the character or development trend in an area generally will be justifiable by logical planning rationale and are likely to be sustained.

REVISED SECTION 272-a

The revised version of Town Law § 272-a represents an effort to compel New York municipalities to take the comprehensive plan requirement more seriously. A complete revision of Town Law § 272-a, which became effective July 1, 1994, specifies the items of which a comprehensive plan may consist. The legislation provides a list of topics or concerns which may be included in a comprehensive plan. The legislation does not invalidate a community's existing "comprehensive plan," as the term is amorphously defined under existing case law. The Legislative Memorandum in Support of the legislation provides that "[n]o existing ... town comprehensive plan and land use regulations in whatever form or designation would be invalidated by the provisions of this act."

The legislation defines the term "town comprehensive plan" to mean:

the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the town.

Town Law § 272-a(2)(a).

Town Law § 272-a(3) enumerates fifteen topics which may be included in a community's comprehensive plan "at the level of detail adapted to the special requirements of the town." The enumerated topics include an array of planning and development issues which may be relevant concerns of a town. Substantiating that a comprehensive plan is intended to be a flexible planning document designed to examine the particular and unique development concerns of a community, the statute also provides that a comprehensive plan may include "[a]ny and all other items which are consistent with the orderly growth and development of the town." Town Law § 272-a(3)(o). Town Law § 272-a does not mandate that any of the elements set forth in the statute must be included in a comprehensive plan adopted pursuant to that section.

Prior to the adoption of this version of Town Law § 272-a, the preparation of a "master plan" was solely within the purview of a community's planning board. Now, however, only the town board is authorized to adopt a town comprehensive plan. However, a town board may authorize its planning board or other "special board," as the term is defined therein, to prepare a town's comprehensive plan or amendments thereto and to recommend approval of the same by the town board. *See* Town Law § 272-a(4). The statute provides public hearing requirements prior to a town board adoption of a comprehensive plan and for hearings by a planning board or "special board" authorized to prepare and recommend adoption of a comprehensive plan. *See* Town Law § 272-a(6). Town Law § 272-a also confirms that the adoption of a comprehensive plan is subject to the review requirements of General Municipal Law § 239-m and the State Environmental Quality Review Act. *See* Town Law § 272-a(5)(b), (8).

A further amendment, which became effective July 1, 1995, added a number of substantive and procedural provisions to Town Law § 272-a. Town Law § 272-a(11)(a) provides that "[a]ll town land use regulations shall be in accordance with the comprehensive plan adopted pursuant to this section." The intent of the revised statute is that if a town has adopted a comprehensive plan in accordance with the amended version of Town Law § 272-a, that document should be the exclusive document for determining compliance with the mandate of Town Law § 263. It no longer would be sufficient to demonstrate "some form of planning" preceding the enactment of a zoning amendment. Moreover, in order to discern the propriety of an amendment, the previously required ordeal of examination of a myriad of documents, statements and policies has been supplanted by an examination of the written comprehensive plan adopted pursuant to Town Law § 272-a. Consequently, a town's comprehensive plan adopted pursuant to the revised provision must formally be amended prior to a change which is inconsistent therewith. If an amendment is inconsistent with the adopted plan, it will be invalid. Of course, nothing prevents simultaneous adoption of an amendment to the comprehensive plan and a zoning amendment, assuming the necessary planning has been accomplished and the required procedures followed.

A mandatory component of a comprehensive plan adopted pursuant to Town Law § 272-a is a time period within which the comprehensive plan will be reviewed to determine if changed circumstances require its amendment or if it remains valid. *See* Town Law § 272-a(10). Although the statute permits a town board to determine the maximum review period, a default in timely reviewing a previously adopted comprehensive plan certainly places all amendments in jeopardy of invalidation. In addition, Town Law § 272-a(11)(b) provides that other governmental agencies must take into consideration a town's comprehensive plan adopted pursuant to this section in formulating their plans for capital projects. This provision requires agencies such as, for example, the New York State Thruway Authority and Department of Transportation, to consider a town's comprehensive plan in formulating its capital plans. Because of this provision, such agencies may not merely disregard the polices of a community and pursue their own objectives. At a minimum, it would seem, such agencies must consider alternative approaches and measures to minimize the conflict with a community's comprehensive plan. Moreover, while governmental entities may possess immunity from local zoning restrictions, *see City of Rochester v. County of Monroe*, 72 N.Y.2d 338, 533 N.Y.S.2d 702, 530 N.E.2d 202 (1988), local land use plans and restrictions, as expressed in a comprehensive plan, must be considered if the location of a facility in a community can be considered to be a capital project.

Under previous case law, the mandate of compliance with a comprehensive plan related only to zoning laws. Town Law § 272-a (11)(a) requires that "[a]ll town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section." The term "land use regulation" is defined to include "any zoning, subdivision, special use permit or site plan regulation which prescribes the appropriate use of property or the scale, location and intensity of development." In other words, all town regulations which effect land use must consider and be in accordance with a town comprehensive plan.

It should be noted that provisions authorizing transfer of development rights (Town Law § 261-a) and incentive zoning (Town Law § 261-b) require that such mechanisms be implemented in accordance with a town's comprehensive plan. Although the provisions predate adoption of the revised Town Law § 272-a, a comprehensive plan adopted pursuant to Town Law § 272-a must examine the implementation and utilization of these devices if a town intends to implement such schemes.

It is important to emphasize that Town Law § 272-a does not require that any community adopt a comprehensive plan pursuant to Town Law § 272-a or that a community's existing comprehensive plan, that is, one predating the 1995 amendment to Town Law § 272-a, must be amended prior to adoption of a zoning amendment inconsistent with its existing comprehensive plan. The revised statute confirms the legislation's intent to encourage the preparation and adoption of comprehensive plans, but not to mandate such a requirement. Consequently, a town may continue to operate under the vagaries of the existing case law. However, once a town adopts a comprehensive plan pursuant to Town Law § 272-a, the revised statutory scheme applies and consistency with its comprehensive plan is required.

Notes of Decisions (19)

McKinney's Town Law § 272-a, NY TOWN § 272-a
Current through L.2017, chapters 1 to 334.

End of Document