**WESTCHESTER MUNICIPAL PLANNING FEDERATION**

# CASELAW UPDATE 2018
# FOR ZONING BOARD MEMBERS:
# SPECIAL USE PERMITS, INTERPRETATIONS AND APPEALS AND NONCONFORMING USES

October 30, 2018


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## INTRODUCTION

The jurisdiction of zoning boards of appeal to issue area and use variances is fairly well understood. However, zoning boards are also empowered to interpret the municipal zoning laws and, where required, correct an order, decision or determination of an administrative official to comport with their interpretation. *See* Town Law §267-b(1); Village Law §7-712-b(1); General City Law § 81-b(2). At times, this jurisdiction requires that a zoning board determine whether a particular use is a preexisting nonconforming use or if changes that have occurred have caused the use's nonconforming status to be abandoned. Under some municipal codes, the zoning board of appeals is also delegated the authority to grant special use permits. This publication reviews the cases within the past year illustrating exercise of such jurisdiction by zoning boards of appeal.

## CASE LAW REVIEW

### I. Special Use Permits.

A special use permit is an "authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." Town Law §274-b(1); Village Law §7-725-b(1); General City Law §27-b(1). It is a zoning tool created by statute (see Town Law §274-b; Village Law §7-725-b; General City Law §27-b) to give municipal governments more control over the siting of particular uses to protect the surrounding community from the potential negative effects of them. Because special permit uses are considered to be permitted uses, the standard to obtain a permit authorizing one is lighter than the standard for securing a variance; once the applicant has demonstrated compliance with the special use permit requirements, the permit must be granted.

a. *278, LLC v. Zoning Board of Appeals of the Town of East Hampton*, 159 A.D.3d 891, 73 N.Y.S.3d 614 (2d Dep't 2018): In *278, LLC*, the petitioner-landowner built retaining walls along its oceanfront property and was issued a violation for "unlawfully and knowingly violating the Town Code." *Id.*, 159 A.D.3d at 891. Shortly after the petitioner had purchased its oceanfront property, it had been advised by the Town's Natural Resources Environmental Protection Department that the property contained resources protected under the Town Code and that any alteration of those features required a natural resources special permit. Notwithstanding being warned, the petitioner proceeded to build two retaining walls along the subject property as well as property it owned on either side, without obtaining any permits and was issued the violation. Pursuant to a negotiated settlement, the petitioner removed the retaining walls on either side of the subject parcel and agreed to obtain permits for the retaining walls.

After receiving the petitioner's application for a building permit for the walls, the Building Inspector officially determined that the retaining walls were located in an area containing dune land and beach vegetation and that a natural resources special permit was required before any building permit could be issued. Petitioner appealed that determination to the Town's ZBA but requested the special permit in the alternative. The petitioner also sought a variance to permit the retaining walls as an accessory use on property where no principal use existed. The ZBA upheld the Building Inspector's

determination, and denied the natural resources special permit but made no determination on petitioner's request for a variance. The petitioner sought to have the ZBA's determination annulled.

The Supreme Court denied the petition but remanded the matter to the ZBA for further proceedings on the variance application. The Appellate Division, Second Department affirmed denial of the special permit and modified the Supreme Court's directive for further proceedings by the ZBA, finding that the variance application was rendered moot once denial of the special permit was affirmed.

In reaching its decision, the Appellate Division found that the ZBA's decisions requiring the natural resources special permit and denying of the permit for lack of proof of compliance with the conditions for the permit were supported by evidence in the record and, therefore, not arbitrary and capricious or illegal. The Court rejected assertions that the ZBA acted improperly when it relied on the evidence of its own expert rather than that of the petitioner.

b. *Troy Sand & Gravel, Co., Inc. v. Fleming*, 156 A.D.3d 1295, 68 N.Y.S.3d 540 (3d Dep't 2017): This case involved the denial of a special use permit for an open pit hard rock quarry by the Town Board of the Town of Nassau[1] even though commercial excavation was a special permit use under the Town Code, a full environmental review of the project under the State Environmental Quality Review Act (referring to Article 8 of the Environmental Conservation Law and its implementing regulations codified at 6 N.Y.C.R.R. Part 617) ("SEQRA") was conducted by the New York State Department of Environmental Conservation ("DEC"), and the DEC adopted favorable findings to support the mining permit and issued a mining permit. After years of a protracted review and intervening litigation, the Town Board denied the special use permit on the grounds the petitioner-quarry owner failed to demonstrate compliance with certain of the standards or conditions for a special use permit for commercial excavation under the Town codes. Specifically, the Board concluded that petitioner failed to demonstrate that the use would be in harmony with the orderly development of the district, that the nature and intensity of the proposed activity would not discourage the appropriate development or value of adjacent land and buildings, and that the appearance and character of the use would be in harmony with the character and appearance of the surrounding neighborhood. The Supreme Court dismissed the petitioner-quarry owner's challenge and the Appellate Division, Third Department affirmed.

The Appellate Division's explanation of its ultimate conclusion illustrates how deferential the courts will be even where irrefutable irregularities occurred:

> As we previously held in this matter, 'the SEQRA findings did not bind the Town [Board] to issue the requested special use permit or preclude it from employing the procedures—and considering the standards—in its own local zoning regulations, including the environmental and neighborhood impacts of the project'. We recognize that the Town Board relied on environmental information that was outside of the SEQRA record and made factual findings with no basis in the final EIS in evaluating most of the standards it applied. However, inasmuch as the failure to meet even one applicable standard is a sufficient basis upon

[1] Even though the approval authority in *Troy Sand and Gravel* was the Town Board, the principles in the case are applicable to special use permits within the jurisdiction of zoning boards of appeal.

> which to deny a special use permit application, we cannot say that the Town Board's determination was irrational.

*Id.*, 156 A.D.3d at 1303-04, 68 N.Y.S.3d at 548. (citations omitted)

c. *Edwards v. Zoning Board of Appeals of the Town of Amherst*, 163 A.D.3d 1511, 83 N.Y.S.3d 767 (4th Dep't 2018): *Edwards* involved an appeal by petitioners-residents unhappy with the decision of the ZBA to grant a special use permit for a wireless telecommunications tower in the Town of Amherst. The Supreme Court denied the petition and the Appellate Division, Fourth Department affirmed. In reaching its decision, the Appellate Division rejected the petitioner's claim that the special use permit was inconsistent with the Town's comprehensive plan, noting that "the inclusion of a permitted use in a zoning code 'is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.'" *Id.*, 163 A.D.3d at 1512. (citations omitted).

The Appellate Division also rejected the petitioner's claim that the ZBA issued variances for the telecommunications tower that were not consistent with the State enabling statute governing variances, i.e. Town Law Section 267-b(3). The Court noted the right of zoning boards under Town Law 274-b(3) to issue area variances for special permit uses and, further, the provision of Town Law 274-b(5) which authorizes legislative bodies to allow zoning boards to waive any requirements for the approval, approval with modification or disapproval of special use permits under conditions specified in the local code. The Town of Amherst's Zoning Code, Section 203-6-7(21), specifically allowed the ZBA to waive any aspect or requirement for wireless telecommunication facilities upon a showing by clear and convincing evidence that the waiver will have no significant effect on the health, safety and welfare of the Town, its residents or other service providers. The Court found that such a showing had been made by the wireless company.

d. *Cooperstown Eagles, LLC v. Village of Cooperstown Zoning Board of Appeals*, 161 A.D.3d 1433, 77 N.Y.S.3d 716 (3d Dep't 2018): The petitioner-property owner in this case owned a two-story building in a business zoning district which contained a dental office on the first floor and two rental apartments on the second floor. Wanting to offer the two-bedroom apartment for short-term rental, the petitioner applied to the Village's zoning enforcement officer ("ZEO") for a special use permit that would allow that apartment to be used as a "tourist accommodation." The ZEO denied the permit because the local zoning code required that the property on which a tourist accommodation was located be owner-occupied and the owner did not live on the property. The owner appealed to the Village's ZBA seeking reversal of the ZEO's determination and, in the alternative, an area variance relieving petitioner of the owner-occupied requirement. The ZBA denied the appeal, finding that the petitioner was not entitled to the area variance.

In response, the petitioner conveyed a small ownership interest in the premises to the tenant of the long-term rental and reapplied for the tourist accommodation special use permit, which was granted. In addition, the petitioner challenged the denial of the variance in the Supreme Court. Respondent ZBA moved to dismiss the petition on the grounds the appeal was moot because petitioner had received the special use permit for a tourist accommodation. The Supreme Court agreed and dismissed the petition as moot. The petitioner appealed.

The Appellate Division, Third Department rejected the mootness argument, recognizing that a variance from the owner-occupied requirement would have given the petitioner greater rights than the tourist accommodation permit conferred. Nevertheless, the Court upheld the denial of the variance. Finding that the evidence factored into the balancing test by the ZBA "was fairly evenly split," the Court "yield[ed] to the ZBA's discretion and weighing of the evidence." *Id.*, 161 A.D.3d at 1438, 77 N.Y.S.3d at 721 (citations omitted).

## II. Interpretations and Appeals.

It would be nearly impossible to write a zoning law that is free of ambiguities and inconceivable that all parties will agree with the determinations of building inspectors. Therefore, the role of the zoning board of appeals to interpret zoning provisions and hear appeals from a building inspector's determination is essential to the orderly and efficient administration of a municipal zoning law. That function is aided by established rules of construction that have emerged from the case law over the years. The first rule is one of strict construction of zoning regulations and resolution of any ambiguities in favor of the property owner, since zoning laws are in derogation of common law property rights. Second, meaning should be given to all provisions and the zoning law should be read to avoid a construction that renders any of its provisions or words superfluous. Third, when a term is not defined, its ordinary meaning should be applied. Fourth, a zoning law should be construed as a whole, meaning that all of its parts should be read together so that legislative intent can be ascertained. Finally, the interpretation should be limited to the statutory language in the provision and any urge to insert conditions or criteria that are not expressly provided should be resisted. Adherence to and application of these rules in the interpretation of a zoning law and consideration of appeals enhance the likelihood that a court will affirm the zoning board's determination.

a. *Bartz v. Village of Leroy,* 159 A.D.3d 1338, 73 N.Y.S.3d 807 (4th Dep't 2018): In this case, the ZBA of the Village of Leroy was called upon to determine whether three building permits issued to respondent-developer for the construction of duplex residences on lots in an approved subdivision had been properly granted by the Building Inspector. After the subdivision was approved, the zoning regulations changed to restrict the property to single family residences only. The issue framed by the appeal was whether the developer-respondent had acquired a vested right to construct the duplexes by virtue of the subdivision approval. The ZBA affirmed the building permits and the petitioners, residents in the subdivision living in single family homes, appealed to the Supreme Court which denied the challenge. On appeal, the determination was modified by the Appellate Division, Fourth Department which agreed that the challenge to the two oldest building permits was properly denied because the petitioners had never challenged those permits in a timely manner and, therefore, had failed to exhaust their administrative remedies. However, the Appellate Division found the challenge to the more recent building permit timely, and annulled so much of the ZBA's decision as affirmed the more recent building permit because the respondent-developer had not acquired a vested right to construct duplexes. The Court explained its determination and the rule on vested rights as follows:

> There is no dispute that duplexes are not currently permitted in R–1 zoning districts and, therefore, the private respondents may build a duplex, i.e., a nonconforming structure, only if their right to do so vested. 'The New York rule ... has been that where a more restrictive zoning ordinance is enacted, an owner

> will be permitted to complete a structure or a development which an amendment has rendered nonconforming only where the owner has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment ... Whether rooted in equity or the common law, the operation and effect of the vested rights doctrine is the same and it has been applied alike to a single building or a subdivision'. With respect to subdivisions, 'a developer who improves his [or her] property pursuant to original subdivision approval may acquire a vested right in continued approval despite subsequent zoning changes ... But, if the improvements would be equally useful under the new zoning requirements, a vested right in the already approved subdivision may not be claimed based on the alterations'. Here, the ZBA determined that multiple structures had already been erected, but failed to address whether the improvements on the vacant lots were equally useful under the amended zoning laws. In our view, that failure renders the determination arbitrary and capricious and irrational.

*Id.*, 159 A.D.3d at 1341, 73 N.Y.S.3d at 811 (citations omitted). The Court found that the improvements made in the subdivision to that point would "equally be useful" to single family residences and, therefore, no vested right to build the duplexes had ripened. The general rule of deference to the ZBA's decision was irrelevant because the decision was found to be legally incorrect.

b. *Peyton v. New York City Board of Standard and Appeals*, 2018 WL 4999377 (1st Dep't 2018): In this case, the New York City Department of Buildings ("DOB") granted a permit for the construction of a nursing home on the Upper West Side after determining that the open space requirements of the applicable zoning provisions or "Zoning Resolutions", were satisfied. A resident of Park West Village, unhappy with the expansion of development on the Upper West Side, appealed the determination to the Board of Standard and Appeals ("BSA") arguing that the open space requirements under the City's zoning regulations were not satisfied and the building permit for the nursing home was issued in error because a portion of the open space for which credit was being taken was exclusively available to only one of the buildings on the "zoning lot"[2] on which the nursing home, the petitioner's apartment building, and other residential buildings were located in violation of the Zoning Resolutions.

The operative provisions subject to interpretation in *Peyton* were Zoning Resolution ("ZR") Sections 12-14, 12-142 and 12-10 (collectively the "Open Space Zoning Resolution"). Sections 12-14 and 12-142 required the preservation of a minimum amount of open space and the maintenance of a prescribed open space ratio on the zoning lot. "Open space" was defined in Section 12-10 as the part of a zoning lot open and unobstructed from its lowest level to the sky and accessible to and usable by all persons occupying a dwelling or rooming unit on a zoning lot. However, Section 12-10 further specified that a portion of the open space provided to meet the requirements of ZR Sections 12-14 and 12-142 could be located on the roof of a building, an area not typically available to anyone other than residents of the particular building. The issue raised in the case was whether a rooftop garden in an apartment

[2] Unlike in suburban communities, a "zoning lot" in New York City is more akin to a block that can be improved with multiple buildings in different ownership and control, subject to demonstrating compliance of the overall zoning lot or block with applicable regulations.

building accessible only to residents of that building could be counted towards the required open space for the zoning lot for purposes of the Open Space Zoning Resolution.

A few years earlier, before *Peyton* arose, the DOB had interpreted and applied the Open Space Zoning Resolution to allow "reserved" open space to be "counted" towards the required open space in connection with a residential tower known as "808 Columbus." 808 Columbus provided almost an acre of open space on its roof for the exclusive use of its residents. Before issuing a building permit for 808 Columbus, the DOB analyzed the open space around each of the other buildings on the zoning lot and confirmed that there was sufficient open space accessible to their residents such that the buildings would have met the open space standards if analyzed independently. The permit for 808 Columbus was challenged by residents of Park West Village but the matter was ultimately settled under terms that allowed the rooftop garden on 808 Columbus to qualify as and be "counted" towards the open space required under the Open Space Zoning Resolution.

When the development of the nursing home arose, the developer, who was familiar with the dispute over the open space at 808 Columbus, proposed to make the open space on the roof of the nursing home open to all residents of dwellings on the zoning lot. That open space, combined with the rooftop garden at 808 Columbus and the other open space available in Park West Village, satisfied the Open Space Zoning Resolution by a margin of approximately 618 square feet. Petitioner, a resident of Park West Village, appealed the building permit to the BSA, arguing that the open space provided in 808 Columbus could not be counted towards the cumulative required open space on the zoning lot because it was not available to all residents, the nursing home suffered from a cumulative open space deficiency and, therefore, the building permit for the home was invalid.

The Supreme Court denied the petition and petitioner appealed. The Appellate Division, First Department reversed, finding that "clear and unambiguous" language in the City's Zoning Resolutions, as amended in 2011, precluded the consideration of open space not accessible to all residents on a zoning lot when determining if a project satisfies the governing open space requirements. Therefore, the rooftop garden on 808 Columbus could not be counted in the nursing home's calculation of open space; the Court annulled permit for the nursing home building.

The First Department acknowledged that the administrative agency's interpretation of a statute is entitled to deference and should be given great weight, but found that the question was one of pure legal interpretation and, therefore, the DOB's and BSA's interpretations were not controlling. The Court explained that resort to the historical practice of the DOB in applying the Open Space Zoning Resolution or the legislative history surrounding the 2011 amendments was inappropriate where no ambiguity in the statutory language existed.

As clearly as the First Department found the Open Space Zoning Resolution to be unambiguous, a dissenting Justice observed only ambiguity and conflicts. He concluded that deference to the interpretation made by the BSA was warranted and urged affirmance of the Supreme Court's decision, stating that the BSA's interpretation was neither irrational nor arbitrary and capricious. The dissenting Justice was troubled by what he perceived to be a calculated collateral attack on the 808 Columbus open space after the challenge to that open space had long been settled, having no legitimate bearing on the

nursing home's effect on available open space on the zoning lot. The Justice summed up his views as follows:

> Initially, it must be noted that petitioners do not actually challenge whether the 2015 approved nursing home—the project at issue here—complies with the ZR. In fact, the nursing home will have no practical effect on the zoning lot's compliance with open space requirements, as it neither increases the overall amount of open space needed for the lot as a whole nor displaces existing open space needed to comply with the ZR. Indeed, half of the nursing home's square footage consists of open space, and the DOB conditioned its approval of the project on that open space being accessible to all residents of the zoning lot. Further, the zoning lot as a whole would still have in excess of the minimum open space required. Thus, the proposed nursing home project purported to be in issue in this proceeding is in full compliance with the 2011 ZR [referring to the 2011 amendments to the Open Space Zoning Resolution].
>
> Instead, in a bid to halt the nursing home project, petitioners are attempting to resurrect and collaterally attack the 2009 resolution determining that 808 Columbus complied with open space requirements. Such line of argument is not only belated but is also foreclosed by the settlement of the 2009 article 78 proceeding, which was then dismissed with prejudice more than six years earlier. The time to challenge that resolution has expired (see Administrative Code of City of N.Y. § 25–207[a]; 2 RCNY 1–12.7; see also CPLR 217[1] ). In other words, petitioners are bound by the 2009 Resolution and cannot now re-litigate whether 808 Columbus's roof complies with open space requirements in relation to the present proposed project. Nor should we permit them to challenge that earlier resolution, a challenge [that] was completed and foreclosed, by raising it in this proceeding concerning an entirely different project which is in full compliance with the 2011 ZR.

*In Re Peyton*, slip op. at 11 (citations omitted).

c. *Freck v. Town of Porter*, 158 A.D.3d 1163, 71 N.Y.S.3d 252 (4th Dep't 2018): In *Freck*, owners of a farm applied to the zoning board of appeals for variances in connection with an excavation permit to construct two farm ponds on their property. The zoning board determined that since the owners had obtained a building permit, their excavation was allowed pursuant to that permit without the need for a separate excavation permit. The Board also granted a variance from yard and bulk requirements applicable in the district. The petitioner commenced a proceeding to challenge the zoning board's decisions. The Supreme Court dismissed the proceeding and the Appellate Division, Fourth Department affirmed, finding that the zoning board's interpretation that no excavation permit was necessary and its decision granting the variance were entitled to deference.

d. *Skyhigh Murals-Colossal Media Inc. v. Board of Standards and Appeals of the City of New York*, 162 A.D.3d 446, 79 N.Y.S.3d 37 (1st Dep't 2018): The Department of Buildings ("DOB") denied an application for a permit for an advertising sign that was within 100 feet of a special mixed use

district superimposed over a residence district in the City. On appeal by the applicant, the Board of Standards and Appeals ("BSA") affirmed the decision of the DOB. Under the controlling provision of the City Code, an advertising sign within 100 feet of a residence district could only be maintained if it was angled away from the residence district by specified degrees. The question posed by the application was whether the residence district regulation applied to the sign even though the property in question was also within the special mixed use district.

The resolution by the City Planning Commission that created the first special mixed use district in the City provided that the restrictions governing the underlying residence districts could apply to the special mixed use districts "depending on the particular regulation at issue." The DOB and BSA determined that under the specific facts of the application and the regulation, the sign regulation applied in the special mixed use district.

The Supreme Court treated the abutting district as a special mixed use district only because of the statutory definitions and designations given to them, rejected BSA's determination that the sign regulation applied, and granted the applicant's challenge. The Appellate Division, First Department disagreed, explaining as follows:

> BSA's determination that DOB properly denied petitioner's application to install an advertising sign has a rational basis and is supported by substantial evidence. . . . The court should have deferred to BSA's determination instead of applying a de novo standard of review, since this case called for BSA to apply its expertise in zoning and land planning matters to regulations that are not entirely clear and unambiguous when read as a whole.

*Skyhigh Murals*, 162 A.D.3d at 447, 79 N.Y.S.3d at 38 (citations omitted).

e. *Ravena-Coeymans-Selkirk Central School District v. Town of Bethlehem*, 156 A.D.3d 179, 66 N.Y.S.3d 534 (3rd Dep't 2017): In this "exemption-from-zoning" case, the Courts were required to determine whether any municipal approvals were required for the petitioner-School District to replace an existing "traditional" (i.e. non-electric) sign at one of its elementary schools with an electronic message board. After being told that the electronic sign was prohibited under the Town code, the School District applied for a variance. In the meantime, the Town discovered that the District had erected the sign. The Town advised the District it was in violation of zoning laws and directed that the sign be removed. The School District resisted, arguing that it was exempt from the Town's zoning regulations governing signage.

Following a hearing, the ZBA denied the School District's variance request for traffic safety reasons, among others. The School District commenced a combined Article 78 proceeding and declaratory judgment action seeking a declaration that it was exempt from the Town's zoning regulations and, therefore, immune from having to comply with the sign regulations. The Town counterclaimed for an order directing the District to remove the illegal sign.

The Supreme Court dismissed the School District's request for a declaratory relief, dismissed the petition and directed removal of the sign. On appeal, the Appellate Division, Third

Department affirmed, finding that while public schools enjoy some level of exemption from zoning regulations, the immunity is not limitless and where the matter does not require oversight by the State Education Department, justification for finding immunity is absent. The Court explained its rejection of the School District's exemption argument as follows:

> The present case does not involve matters that, pursuant to the Education Law, require Education Department oversight of local school boards, for example, the selection of building sites and erection or demolition of buildings thereon (*see* Education Law §§ 401, 407, 408), the sale or acquisition of property (*see* Education Law §§ 402–405), health or safety conditions within the school (*see* Education Law §§ 409–409–l) or any use of a school building (*see* Education Law § 414; compare *Matter of Ithaca City School Dist. v. City of Ithaca*, 82 A.D.3d 1316, 1318, 918 N.Y.S.2d 232 [2011]; *Matter of Board of Educ., City of Buffalo v. City of Buffalo*, 32 A.D.2d at 100, 302 N.Y.S.2d 71). The Education Department does not require review of sign placement, and petitioner did not request any Education Department review here. Hence, there is no duplication of review -- nor the possibility of conflicting determinations -- by state and local entities. Neither is there any encroachment by the Town or the ZBA on a state agency's authority.

*Id.*, 156 A.D.3d at 185, 66 N.Y.S.3d at 538.

The Appellate Division further noted that the long line of case law establishing a rule of deference to educational and religious institutions recognized that the presumed beneficial effects of such uses could be rebutted with proof of significant adverse impacts on conditions such as traffic congestion and safety, property values and municipal services. The Court went on to conclude that denial of the variance was rational, noting the ZBA's concerns about traffic safety due to the sign's brightness and potential to distract motorists, the fact that the School could erect non-electric signs, and the proposed sign's noncompliance with at least three other size and location requirements of the Town's sign regulations.

f. *Catskill Heritage Alliance, Inc. v. Crossroads Ventures, LLC*, 161 A.D.3d 1413, 77 N.Y.S.3d 728 (3d Dep't 2018): In this case, the Zoning Board of Appeals of the Town of Shandaken ("ZBA") was called upon to determine whether attached duplexes and multiple-unit buildings proposed as part of a vacation resort development permitted on the developer-respondent's property upon issuance of a special permit, were "lodges" permitted as part of the resort use or multiple dwellings which were prohibited in the district. The issue was raised by an environmental organization opposed to the vacation resort development, which argued that many of the buildings proposed as part of the resort use, including the residential structures, were prohibited under the Town's zoning code. Initially, the Planning Board determined that the residential structures were permitted and granted the developer a special permit and site plan approval, but that determination was annulled by the Supreme Court in a proceeding brought by the opponents because the Planning Board was not the proper board to determine the question. Recognizing that the ZBA was the board with that jurisdiction, the Supreme Court remitted the matter to the ZBA for an interpretation prior to any further proceedings by the Planning Board.

To analyze the issue, the ZBA turned to the definition of "multiple dwellings" in the Town Code, which defined the use as a structure with three or more dwelling units but excluding temporary or transient-type accommodations like dormitories, boarding houses and motels. The Board then considered its common understanding of a "lodge" (not defined in the code), that is, an accommodation typically used for transient occupancy, and concluded that the proposed duplexes and multiple dwellings were permitted because their use would be transient-like. Special use permit and site plan approval from the Planning Board followed. In affirming the Supreme Court's dismissal of a second proceeding to challenge the ZBA's interpretation and Planning Board's subsequent approvals, the Appellate Division emphasized the ZBA's methodical analysis, as follows:

> Turning to proceeding No. 2, the ZBA considered, upon remittal, how to view the detached residential buildings under the zoning code. Inasmuch as the interpretation that followed was rendered upon the facts of Crossroads' proposal and was not an 'issue ... of pure legal interpretation,' it 'is afforded deference and will only be disturbed if irrational or unreasonable'. The zoning code defines multiple dwellings as structures with 'three or more dwelling units,' but states that rooms in '[a] boardinghouse, dormitory, motel, inn . . . or other similar building' do not constitute dwelling units (Code of Town of Shandaken § 116–4[B] ). A new multiple dwelling is prohibited in the project area, but a lodge development is not. A lodge is not defined in the zoning code, but the ZBA pointed out that a lodge is commonly defined as a transient residence, such as an inn or similar building having rooms that are excluded from the zoning code's definition of a dwelling unit contained in a multiple dwelling. The permanence of the residency is key, in other words, and the ZBA therefore defined a 'lodge' as including structures 'containing one or more units of lodging and sleeping accommodations for transient occupancy in connection with the special permitted use of hotel or lodge development and/or vacation resort held under common ownership' so long as the users had a primary residence elsewhere. The ZBA observed that the proposed buildings were intended for transient occupancy—either as a rental or as a timeshare purchase—and explicitly concluded that they were permitted lodges as a result. The ZBA's interpretation was entirely rational and will not be disturbed.

*Id.*, 161 A.D.3d at 1416-17, 77 N.Y.S.3d at 731-32 (citations omitted). The Appellate Court also held that the Planning Board rationally determined that the proposed project satisfied the legislatively imposed conditions for the vacation resort use and affirmed the special use permit and site plan approvals granted by that Board.

## III. Nonconforming Uses.

A nonconforming use is "'[a] use of property that existed before the enactment of a zoning restriction that prohibits the use.'" *Matter of Sand Land Corp. v. Zoning Board of Appeals of the Town of Southampton*, 137 A.D.3d 1289, 1291, 28 N.Y.S.3d 405, 408 (2d Dep't 2016), *lv. denied*, 28 N.Y.3d 906

(2016) (*quoting Matter of McDonald v. Zoning Board of Appeals of Town of Islip*, 31 A.D.3d 642, 642-643, 819 N.Y.S.2d 533 (2d Dep't 2006)).

a. *Abbatiello v. Town of North Hempstead Board of Zoning Appeals*, 164 A.D.3d 785, ____ N.Y.S.3d ____ (2d Dep't 2018): The petitioner in this case was the owner of a two-family residence on a 5,000 square foot lot in a business district in the Town of North Hempstead, which he acquired in 1977 and thereafter used as a two-family residence without interruption. The residence on the site was constructed in approximately 1920 when the two-family residence use was first established. At that time, and for twenty-five years thereafter, two-family residences on lots of a minimum of 5,000 square feet were permitted uses in the business district.

For reasons not clear in the Court's opinion, in 2013, the petitioner applied to the building department for a variance to permit him to continue to use the residence as a two-family home. The building inspector denied the request and the petitioner appealed to the ZBA. The variance was denied and petitioner commenced suit. The Supreme Court affirmed the ZBA's decision but the Appellate Division reversed, finding that the petitioner had established that the two-family residence was a preexisting nonconforming use that could continue without a variance. The Second Department explained:

> Contrary to the Board's conclusion, the petitioner presented evidence, including affidavits from neighbors and others who had lived in the community for many years, which was sufficient to establish that the property was a legal two-family residence prior to the 1945 amendments to the Town Zoning Code. By contrast, there was no evidence presented at the hearing to demonstrate that the property had been converted into a two-family dwelling after the 1945 amendments. Accordingly, the record does not contain evidence to support the rationality of the Board's determination denying the proposed use variance. Since the Board's determination was irrational, and arbitrary and capricious, the Supreme Court should have granted the petition, annulled the Board's determination, and remitted the matter to the Town for the issuance of the requested use variance.

*Id.*, 164 A.D.3d at 786-87 (citations omitted).

b. *Cleere v. Frost Ridge Campground, LLC,* 155 A.D.3d 1645, 65 N.Y.S.3d 405 (4th Dep't 2017): This case involved the activities of the respondent recreation and camping company ("Frost Ridge") which owned land in the Town of Leroy. Beginning in the 1950's, the property was used as a campsite and for recreational activities. In 2010, Frost Ridge began selling tickets to live commercial music events on the property hosted as part of the camp's summer concert series. For reasons not disclosed in the Court's opinion, in 2013, Frost Ridge made an application to the ZBA for a special use permit to continue the concerts on the property. The ZBA determined that no such permit was necessary without first holding a hearing. The petitioners commenced a proceeding to challenge the ZBA's determination. The Supreme Court found for petitioners because no hearing was held and remitted the matter to the ZBA for a hearing and determination.

Instead of pursuing its application for a special use permit, Frost Ridge amended its application to be one for an interpretation that no such permit was necessary. Specifically, Frost Ridge

sought an interpretation that its camping and related recreational activities, including live and recorded music and limited food service, qualified as a preexisting nonconforming use. Following the hearing, the ZBA determined that such activities were nonconforming and, therefore, could continue on the property.

The petitioners commenced a second proceeding to challenge that determination on a variety of grounds including that the ZBA's determination conflicted with prior decisions it had made in connection with campsite properties, that the Board failed to explain the reasons for its decision, that to the extent live music may have occurred on the site in the past, it had not occurred in the recent past and so any right to host live music events had been abandoned and, more generally, that the Board's decision was not supported by the evidence. The Supreme Court dismissed the challenge and the Appellate Division, Fourth Department affirmed, rejecting each of the petitioner's grounds as being contrary to the evidence in the record. The Appellate Division noted that the record contained substantial evidence in the form of first-hand accounts of neighbors and prior employees of the facility that camping and recreational activities consistently and regularly occurred on the site over the years, without interruption, and that live music was an established part of those activities.

## IV. Miscellaneous Procedural Matters.

a. *Corrales v. Zoning Board of Appeals of the Village of Dobbs Ferry,* 164 A.D.3d 582, 83 N.Y.S.3d 265 (2d Dep't 2018): Livingston Development Group, LLC filed an application to construct two buildings containing six condominium units each on its property with the building department, which eventually forwarded the application to the Planning Board. Almost a year later, in October 2013, the Planning Board held a public hearing on the proposal and recommended to the Village Board of Trustees that site plan approval be granted. Neighbors opposed to the proposal who lived within 200 feet of Livingston's property never received notice of the Planning Board's public hearing. The Board of Trustees granted approval subject to Livingston obtaining approval from the Village Architectural and Historic Review Board ("AHRB"); no further hearing was held by the Board of Trustees.

The AHRB denied Livingston's application and Livingston appealed to the ZBA. The neighbors' counsel argued to both the AHRB and the ZBA that use of the property for multiple residences was not allowed in the zoning district. On July 28, 2014, during an AHRB meeting at which the argument was reiterated by the opponents' counsel, the Assistant Building Inspector opined that the use was permitted under the zoning code.

The neighbors thereafter filed a formal "appeal" from the Assistant Building Inspector's July 28, 2014 "determination" with the ZBA. The ZBA dismissed the appeal as untimely, explaining that by forwarding Livingston's application to the Planning Board in 2012, the Building Inspector implicitly "determined" that Livingston's proposal was zoning compliant as of that date and that any appeal regarding the issue had to have been taken within 30 days of the 2012 date.

The petitioners-neighbors challenged the ZBA's dismissal of their appeal and the Board of Trustees' subsequent grant of site plan approval. The Supreme Court granted the petition/complaint, remitted the matter to the ZBA for a new determination on the merits of the petitioners-neighbors' appeal and declared that the Board of Trustees' site plan approval was jurisdictionally defective because no public hearing had been held by that Board. The Appellate Division, Second Department affirmed.

Essentially, the Courts held that under the operative provisions of the Village Law (Section 7-712-a(5)(a)) and Dobbs Ferry Code (Section 300-23(A)(2)), petitioners-neighbors' 30-day time limit to appeal from the Building Inspector's determination began to run when the Building Inspector's determination being appealed was *filed* in the Inspector's office. Since the Building Inspector never filed any determination in 2012, the 30-day clock was never triggered and the period to appeal had not expired.

b. *Fichera v. New York State Department of Environmental Conservation,* 159 A.D.3d 1493, 74 N.Y.S.3d 422 (4th Dep't 2018): *Fichera* involved a successful challenge by a group of residents opposed to a proposed mining project in the Town of Sterling, Cayuga County, to a variance and amended variance granted for a mining project, because the referral requirements of General Municipal Law 239-m(3)(a)(v) were not complied with. In this proceeding, Christopher J. Construction LLC ("CJC") applied to the New York State Department of Environmental Conservation ("DEC") and the ZBA of the Town of Sterling for a mine permit and variances, respectively, with the DEC acting as lead agency of the environmental review under SEQRA. The ZBA granted the variance application without referring the matter to the County Planning Board as required under General Municipal Law Section 239-m, apparently because the ZBA did not realize that variances were among the types of applications requiring referral. The ZBA subsequently made such referral after which it granted an *amended* variance on the basis of the findings upon which the original variance was decided.

The petitioners-neighbors commenced suit and the ZBA and DEC moved to dismiss the proceeding. The Supreme Court denied the petition but the Appellate Division, Fourth Department modified the holding on appeal to the extent of annulling the ZBA's variance decisions because the failure to make the proper referral to the County Planning Board was a jurisdictional defect. CJC's and the ZBA's arguments that the statute of limitations to challenge the original variance barred the challenge were rejected by the Appellate Division, which explained that a jurisdictional defect in connection with an approval precludes the statute of limitations from ever running (or expiring). The Court explained its analysis as follows:

> 'General Municipal Law § 239–m requires that a municipal agency, before taking final action on an application for [land use] approval, refer that application to a county or regional planning board for its recommendation'. It is undisputed that the ZBA did not refer the initial application for an area variance to the Cayuga County Planning Board (County Planning Board) before taking final action on that application. Contrary to the contention of the Town respondents, area variances are proposed actions for which referral is required under the statute. The alleged failure to comply with the referral provisions of the statute is not a mere procedural irregularity but is rather a jurisdictional defect involving the validity of a legislative act'. Thus, the ZBA's failure to refer the initial application for an area variance to the County Planning Board renders the subsequent approval by the ZBA 'null and void'. . . .
>
> Contrary to the contentions of the Town respondents and the Owners, where, as here, there is a jurisdictional defect, 'the statute of limitations does not begin to run upon the filing of [the] jurisdictionally defective document'. We thus conclude that the court erred in granting the motion and cross motion insofar as

> they sought dismissal of the third cause of action and that the ZBA's determination approving the initial application for an area variance is null and void. Inasmuch as the determination granting an amended area variance was based on the initial, void determination, we further conclude that the ZBA's approval of the amended area variance is likewise null and void. Although the Owners contend that the ZBA's determinations need not be voided because the ZBA's unanimous approval to grant the amended area variance was sufficient to override the recommendation of the 'Cayuga County GML 239–l, m & n Review Committee' to disapprove the area variance, we conclude that the subsequent vote cannot retroactively cure the jurisdictional defect in granting the original area variance upon which the ZBA relied in granting the amended area variance.

*Id.*, 159 A.D.3d at 1496, 74 N.Y.S.3d at 425 (citations omitted).

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Gerri has lectured and/or written articles regarding various zoning, environmental law, property rights, and constitutional issues for National, State and local organizations and groups. She is an Associate Member of the Urban Land Institute/Westchester-Fairfield District Council, in which she co-chairs the Business Development Committee and serves on the Management/Advisory and Women's Leadership Initiative Committees. HTW also supports the programs and efforts of the Land Use Law Center at the Elisabeth Haub School of Law at Pace University, from which Gerri earned her J.D., *cum laude*.

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Noelle is a long-time resident of Westchester County and a 2006 graduate of Pace Law School, where she was an Honors Fellow at the Land Use Law Center and a Research and Writing Editor for the Pace Environmental Law Review. As a student associate and Honors Fellow with the Land Use Law Center, Noelle, among other things, contributed to the Gaining Ground Database and was an editor of the practice guide *Reinventing Redevelopment Law.*

Noelle is a member of the United Way of Westchester/Putnam Emerging Leader's Alliance (ELA) Executive Committee, and Co- Chair of the ELA's Volunteer Committee. This year she was a recipient of the Westchester/Putnam United Way's 2018 "Rock Star" award. She is also a member of the Westchester Women's Bar Association's Real Estate Committee, and a member of the New York State Bar Association's Local and State Government Law and Real Estate Law Sections.

HTW is proud to announce that Noelle has been selected to receive the Land Use Law Center's first Distinguished Young Attorney Award for her demonstrated excellence in and commitment to land use law, which will be conferred at the Center's Founder's Award Dinner on December 5, 2018.

**ABOUT HOCHERMAN TORTORELLA & WEKSTEIN:** With more than 70 years of combined experience in Westchester, the Hudson Valley and Long Island, the lawyers at HTW offer high-quality personalized counsel and pragmatic solutions to corporate, not-for-profit and private clients in all aspects of zoning, land use and entitlement matters, real property transactions and litigation. HTW's approach in representing its clients is solution-oriented, but the firm has extensive experience with Article 78 Proceedings and other types of litigation and, when necessary, litigates to protect its clients' rights and interests. For additional information, please consult the firm's website at htwlegal.com or contact Gerri Tortorella.