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Land Use Law Update: The 2015 Mid-Year Roundup

By Sarah J. Adams-Schoen

This update summarizes New York cases related to land use and zoning that were decided in the first half of 2015.¹ The courts (and the litigants) sure have been busy.

Accessory Structures

In *Sacher v. Village of Old Brookville*,² the Second Department upheld the zoning board of appeals (ZBA) denial of variances for an accessory structure. Following the denial by the ZBA of the Village of Old Brookville of an application for setback and area variances for a second-story addition to an accessory building, and an affirmance by the trial court, the appellate court affirmed the trial court's judgment that the finding of the zoning board that the detriment to the community outweighed the benefit of granting the requested variances had a rational basis in the record and was not arbitrary and capricious.

The court reiterated that the statutory test requires a ZBA, in determining whether to grant an area variance, to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted. In balancing the interests, the ZBA must consider

- 1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
- 2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- 3) whether the requested area variance is substantial;
- 4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district;
- and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.³

Further, the ZBA may consider personal observations of members of the ZBA and the ZBA is "entitled



to consider the effect its decision would have as a precedent."⁴

Conditional Uses

In *Robert E. Havell Revocable Trust v. Zoning Board of Appeals of Village of Monroe*,⁵ the Second Department reversed the lower court, and affirmed the ZBA, holding that the ZBA's determination that the applicant's use of the property for tire sales and related services was a conditional use, rather than a use permitted as right, was not illegal, arbitrary and capricious, or an abuse of discretion.

The court ruled that the Supreme Court erred when it disregarded the full administrative record submitted by the ZBA on the ground that it was uncertified and granted the petition. The court explained that "[s]ince there was no allegation or indication that a substantial right of the petitioner was prejudiced by the lack of a certification, the Supreme Court should have disregarded the defect, and decided the matter on the merits."⁶

The court went on to address the merits, concluding that the ZBA's determination was consistent with the applicable zoning code notwithstanding an ambiguity in the code. The code specifically listed "repair service, including automotive" as uses permitted as of right and "tire sales and service" as conditional uses. The code provided, however, that "in the event of conflict in the terminology of any section or part thereof of this chapter, the more restrictive provisions shall control."⁷ Thus, the court confirmed the ZBA's determination that the proposed use of the properties for tire sales was a conditional use.

Nonconforming Use

In *TAC Peek Equities, Ltd. v. Town of Putnam Zoning Board of Appeals*,⁸ the Second Department ruled that a property did not lose its nonconforming-use status due to inactivity. The petitioners had appealed the denial of a permit to operate an automotive repair shop on their property. The court began by explaining that the trial court had erred in transferring the proceeding to the appellate court pursuant to CPLR § 7804(g), because the determination to be reviewed was not made after a trial-type hearing at which evidence was taken and was therefore not subject to substantial evidence review. The court went on to consider the merits, however, for the sake of judicial economy.

The court then ruled that the ZBA determination that the petitioner's property had lost its nonconforming-use status as an automotive repair shop did not have a rational basis. The relevant zoning code provides that a nonconforming-use status is lost when such non-

conforming use “is inactive or ceases...for a continuous period of more than two years.”⁹ The court found that contrary to the ZBA’s contention, the minimal extent of the nonconforming use in this case did not constitute either inactivity or cessation for the requisite time period, because there had been some automotive repair activity during that time. The court granted the petition as against the ZBA without costs, annulled the ZBA determination, and remitted the matter to the building inspector to issue the requested permit.

Open Meetings

In *Ballard v. New York Safety Track, LLC*,¹⁰ the Third Department affirmed the Supreme Court ruling that the Town committed violations of the Open Meetings Law when the Planning Board went into executive session on several occasions leading up to the execution of the 2013 agreement discussed above. The court explained that

“While a governing body may enter into an executive session, it may do so only for certain purposes, including, as is relevant here, the consideration of an appointment or to engage in private discussions relating to proposed or pending litigation. However, the body must “identify the subject matter to be discussed...with some degree of particularity.”¹¹

The court rejected the Town’s claim that any discussion of the 2013 agreement was protected by the attorney-client privilege, because, the court noted, “the Planning Board’s inclusion of additional persons into the session necessarily eliminated any reasonable expectation of confidentiality, effectively waiving any privilege attendant to such conversations.”¹²

The court also found that the Town’s insistence that it was not obliged to make the proposed 2013 agreement available to petitioners before it was put to a vote “denied petitioners ‘any meaningful participation’ in the process leading to the final adoption of the controversial 2013 agreement, in clear contravention of Public Officers Law § 103(e).”¹³ Additionally, the court found that the Town Clerk’s failure to make the minutes from a March 2013 Planning Board meeting available within “two weeks from the date” of the meeting was a violation of Public Officers Law § 106(3). On these bases, the court affirmed the Supreme Court’s award of counsel fees and costs to the petitioners.¹⁴

Rebuilding and Equal Protection

In *Witt v. Village of Mamaroneck*,¹⁵ the U.S. District Court for the Southern District of New York dismissed the plaintiffs’ equal protection claim arising out of rebuilding efforts following Hurricane Irene. Plaintiff homeowners brought an action against the

Village of Mamaroneck and Building Inspector Robert Melillo pursuant to 42 U.S.C. § 1983. The action arose from the legal requirements defendants imposed on the plaintiffs in connection with their efforts to repair their home in the aftermath of Hurricane Irene. The plaintiffs maintained that similarly situated homeowners were not subjected to the same treatment, which therefore constituted a violation of their equal protection and substantive due process rights under the Fourteenth Amendment. The plaintiffs also alleged a *Monell* claim against the Village. The court dismissed these claims and gave the plaintiffs leave to amend the complaint. The Amended Complaint raised equal protection, substantive due process, and procedural due process claims, along with a *Monell* claim against the Village as well as various claims for relief under state law.

The court granted the defendants’ motion to dismiss. First, as for the equal protection and selective enforcement claims, the court found that the plaintiffs failed to allege differential treatment from similarly situated individuals. Second, as for the due process claims, the court found that even if the plaintiffs had carried their burden of establishing the deprivation of a cognizable property interest, it was “doubtful” that the defendants’ acts were arbitrary, conscience-shocking, or oppressive in the constitutional sense, and not merely incorrect or ill-advised. Finally, the court found that, because a *Monell* claim cannot be made absent an underlying constitutional violation, the plaintiffs’ *Monell* claim against the Village must also fail because a § 1983 claim can only be brought against a municipality if the action that is alleged to be unconstitutional was the result of an official policy or custom, which was not the case here.

RLUIPA

On March 27, 2015, the U.S. District Court for the Southern District of New York ruled in *Bernstein v. Wesley Hills*¹⁶ that four villages’ litigation of a town’s SEQRA review was not actionable under the Religious Land Use and Institutionalized Persons Act (RLUIPA), granting summary judgment in favor of all defendants in the consolidated action. The plaintiffs in this case (religious corporations and individuals affiliated with the Chofetz Chaim sect of Orthodox Judaism) alleged that the four villages within the Town of Ramapo discriminated against them by attempting to stop development of a proposed religious educational center and multi-family housing development and by colluding to bring a separate 2004 action (the “Chestnut Ridge Action”). The Villages prevailed on their SEQRA claims in the separate Chestnut Ridge Action at the trial court level, but lost at the Appellate Division.

In a grueling 76-page opinion, the court in *Bernstein* found that, because the plaintiffs’ claim rested primarily on the Villages’ alleged collusion to bring the Chestnut Ridge Action, the plaintiffs’ claims depended

on whether there was an equal protections violation. The court began by dismissing the plaintiffs' contention that the Second Circuit's decision in *Fortress Bible Church v. Feiner*¹⁷ eliminated the requirement that plaintiffs provide evidence of a similarly situated comparator because the defendants allegedly inappropriately employed SEQRA. Rejecting this claim, the court observed that *Fortress Bible* involved the question of when SEQRA review constitutes the implementation of a land use regulation under RLUIPA, not the question of whether municipal defendants have qualified immunity when pursuing First Amendment protected activity, such as the filing of a lawsuit.¹⁸

The court then found that the plaintiffs' equal protection claims failed because the plaintiffs had not presented any evidence of a comparator development "similarly situated in all respects."¹⁹ The court also noted that the plaintiffs failed to raise an issue of material fact with respect to the Villages' discriminatory intent, although the court did not question the sincerity of plaintiffs' allegations.²⁰

The court then considered the plaintiffs' substantial burden and nondiscrimination RLUIPA claims, explaining that the applicability of these claims hinged on two questions: (1) in filing the Chestnut Ridge Action, did the defendants "impose or implement" a land use regulation, and (2) if not, did the defendants take a "government action" in violation of RLUIPA? The answer to each was "no."

With respect to whether the Villages' initiation of a lawsuit challenging the Town's SEQRA determination constituted a imposition or implementation of a land use regulation, the court explained,

There is a difference between imposing or implementing a land use regulation, and filing a lawsuit to ensure that another municipality imposes or implements its own land use regulation.... [A] reading of RLUIPA [that implicates the latter circumstances] would expand its scope far beyond its intended targeting of the "widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes," to include governing any action a local government may take that could result in the enforcement of a land use regulation.²¹

Additionally, because the Town was the "involved agency" under SEQRA that implemented and controlled the SEQRA review of the development, the Town was the only entity that could have "implemented" the regulation.²²

Section 1983

In *Sherman v. Town of Chester*,²³ the U.S. District Court for Southern District of New York denied in part and granted in part the Town's motion to dismiss the plaintiff real estate developer's retaliation claim, which was based on evidence that the plaintiff was singled out and "being suffocated with red tape," but dismissed the plaintiff's § 1983 claims. Pending before the federal district court in this case was the Town's renewed motion to dismiss following the Second Circuit's reversal of the court's determination that the plaintiff's federal takings claim was unripe.

As a preliminary matter, the court noted that the plaintiff incorrectly relied on the Second Circuit's conclusion that his takings claim constituted a continuing violation when he asserted that each of his federal constitutional claims constituted a continuing violation. Relatedly, the plaintiff argued that the tolling provision of 28 U.S.C. § 1367(d) applied to his other federal claims because the prior litigation was voluntarily dismissed pursuant to FRCP 41. Although acknowledging an ambiguity in § 1367(d), the court nevertheless held that the tolling provision applies only to pendent claims dismissed pursuant to one of the four circumstances described in § 1367(c) and not, as plaintiff argued, to pendent claims dismissed for any other reason.

As to the retaliation claim, the court held the plaintiff showed the requisite requirements for his claim to survive the Town's motion to dismiss. For retaliation claims made under the First Amendment, the Second Circuit requires that plaintiffs show only that the plaintiff's conduct is protected under the First Amendment and that the defendant's conduct was motivated by or substantially caused by the plaintiff's exercise of speech. The court concluded that the trial court's opinion that the Town "singled out Sherman's development, suffocating him with red tape" over the course of a decade to "make sure he could never succeed in developing MareBrook" was sufficient to show that the defendants' conduct was motivated by or substantially caused by the plaintiff's exercise of speech, and evidence that the Town repeatedly refused the plaintiffs' requests to enforce zoning codes over a nine-year period was sufficient to constitute a continuing violation.

However, the plaintiff's due process claims did not survive the motion to dismiss. They did not constitute a continuing violation because they were based on discrete acts by the Town that were readily discerned by Sherman at the time the acts were taken. Finally, with respect to the state law claims, because the claims concerned the exercise of discretionary acts, the Town was entitled to immunity.

SEQRA

On February 19, 2015, the Third Department ruled in *Troy Sand & Gravel Co. Inc. v. Town of Nassau*²⁴

that, as an interested party, a town challenging a lead agency SEQRA determination is permitted to make its own findings under SEQRA, but the town's environmental determination has to be based upon, and is constrained by, the record developed by the lead agency. This case involved the Town of Nassau's efforts to challenge the Department of Environmental Conservation's (DEC) findings as to the environmental impacts of a proposed commercial mining operation. For a thorough analysis of this case, see Lisa Cobb's article, *As an 'Involved Agency,' Independent SEQRA Findings Are Limited*, *supra* page 14.

Citizens for St. Patrick's v. City of Watervliet,²⁵ discussed below under Standing and Other Jurisdictional Hurdles, involved challenges by individuals who opposed a development to the City's SEQRA and rezoning determinations. In 2012, defendant PCP Watervliet, LLC, a subsidiary of defendant Nigro Companies, purchased a parcel of property containing a church, school and rectory that were no longer in use in the City of Watervliet. Nigro petitioned the City Council to rezone the parcel from residential to commercial, and, following public hearings, the City issued a negative declaration and amended its zoning map as requested. Individuals then brought a challenge alleging that the City failed to comply with SEQRA, engaged in illegal spot zoning and violated the Open Meetings Law.

The Third Department held that the plaintiffs' challenges to the SEQRA determination were moot because the plaintiffs did not seek any injunctive relief from the Court during the pendency of the appeal, and the church buildings had been demolished and a grocery store was fully constructed and operational on the property.

Sign Ordinances

In *Beck v. Town of Groton*,²⁶ the U.S. District Court for the Northern District of New York found that a Town's selective application of its sign ordinance was unconstitutional. Article 3 section 316.7 of the Town Code permitted a maximum of two signs of up to fifty square feet in size on property zoned Rural-Agricultural ("RA"). In early 2009, the plaintiff began erecting large signs on his property, which was zoned RA and included approximately eight-tenths of a mile of frontage along Route 222 in Groton, New York.

When the Code Enforcement Officer of the Town contacted the plaintiff and requested that he remove the signage in violation of § 316.7, the plaintiff refused. The Officer responded with a "Notice of Violation" and, because the signage made mention of the Officer by name accompanied with swastikas, a criminal mischief complaint.

The court held that the plaintiff established by a preponderance of the evidence that the Town selectively enforced the Town Code in violation of the plaintiff's right to equal protection of the laws and in such a way as to interfere with his right to free speech, and awarded him compensatory damages. The court first found that § 316.7 of the Town Code was content-neutral on its face because it regulated the size and number of signs permitted on certain property, and its application was not dependent on the content of the sign. But, the court found that the plaintiff presented sufficient credible evidence to show he was treated differently than his neighbor. The Town consistently and repeatedly enforced § 316.7 against plaintiff and did not bring any enforcement action against his neighbor despite two large signs posted on the neighbor's property. The court found the totality of the circumstances suggested the officer acted with ill will and bad faith towards the plaintiff when he contacted the Sheriff's Department.

Between the drafting of this update and the publication of this issue, the U.S. Supreme Court is bound to issue its decision in *Reed v. Town of Gilbert*.²⁷ Depending on how the Court decides the case, municipalities may need to act quickly to amend their sign regulations. For a detailed summary of the issues facing the Court, see *Land Use Law Update: Will Reed v. Town of Gilbert Require Municipalities Throughout the Country to Rewrite Their Sign Codes?*²⁸

Special Exceptions

In *Nathan v. Board of Appeals of Town of Hempstead*,²⁹ the Appellate Division, Second Department, held that where the property the petitioners wished to use for a three-family residence did not meet the applicable lot-size requirements, the Board of Appeals correctly denied the petitioners' application for a special exception permit. The court explained that a special exception granted by a zoning board gives permission to use property in a way that is consistent with the zoning regulation, although not necessarily allowed as of right. Thus, if, as here, the applicant failed to comply with any of the conditions set forth in the zoning ordinance, the zoning authority may deny the application.

Takings

The following two cases, although not New York cases from 2015, highlight a tension many New York municipalities are feeling as they examine whether to provide greater protections of their coastal, riverine and estuarine areas in order to decrease flood risk—i.e., will the imposition of such protections constitute a taking, or will the failure to impose such protections constitute a taking?

In *New Creek Bluebelt, Phase 4 v. City of New York*,³⁰ the imposition of such protections was a regulatory taking. There, the Second Department found a rea-

sonable probability that the city's wetlands designation was a regulatory taking under *Penn Central*. Although the claimants proved only an 82% diminution of value ("a diminution which, standing alone, is within the range generally found to be insufficient to constitute a regulatory taking"),

the parties agree[d] that, because of the wetlands regulations, it is highly improbable that the New York State Department of Environmental Conservation would issue a permit to develop the property in accordance with the applicable R3-1 zoning, which allows for attached and semi-attached one- and two- family dwellings, and that, accordingly, the highest and best use of the property is to leave it undeveloped and vacant. Thus, although the purpose of the wetlands regulations benefits the public good by providing flood prevention and mitigation, the wetlands regulations effectively prevent any economically beneficial use of the property.

Thus, the court agreed with the trial court that the 82% property value diminution together with the effective prohibition on development of any part of the property was sufficient to establish a reasonable probability that the imposition of the wetlands regulations constituted a regulatory taking of the property.

But, in the possibly anomalous case of *St. Bernard Parish Government v. United States*,³¹ a municipality's failure to adequately prevent flooding constituted a temporary taking under *Arkansas Game & Fish Commission v. United States*.³² In *St. Bernard Parish*, the court ruled that the U.S. Army Corps of Engineers' failure to properly maintain the Mississippi River-Gulf Outlet (MR-GO), a seventy-six mile long navigational channel constructed, expanded and operated by the Corps, resulted in a taking of private property without just compensation in violation of the Takings Clause. The court found that the Corps' negligent design and failure to maintain the MR-GO exacerbated flood damage from Hurricane Katrina and several subsequent storms, and, although temporary, wrongfully deprived landowners of the use of their property.

According to the court, to prove a temporary taking, a plaintiff must show: (1) a protectable property interest under state law; (2) the character of the property and the owners' "reasonable-investment backed expectations"; (3) foreseeability; (4) causation; and (5) substantiality.³³

The Fifth Circuit previously rejected tort theories of liability in the Katrina litigation as violative of governmental immunity.³⁴ But, in *St. Bernard's Parish*,

by basing liability in large part on the Corps' negligent expansion and failure to maintain MR-GO, the court essentially expanded the Takings Clause to include negligent damage of private property by government failure to act. Because the case involved negligent design and maintenance, it leaves open the question of whether a government entity could be liable for failure to act in the face of foreseeable risks.

Standing and Other Jurisdictional Hurdles

In *LaRocca v. Department of Planning, Environment, and Development of Town of Brookhaven*,³⁵ the Second Department affirmed the lower court ruling that dismissed the applicant's claim for failure to exhaust administrative remedies. The applicant had commenced a proceeding under Article 78 of the New York Civil Practice Law and Rules (CPLR) seeking review of the denial of his application for a building permit by the Building Department. However, the applicant had failed to appeal to the ZBA prior to seeking judicial intervention and failed to establish that an exception to the exhaustion doctrine was applicable. As a result, he failed to exhaust available administrative remedies. Accordingly, the court found that the lower court properly granted the respondents' motion to dismiss the petition.

In a March 2015 decision of the U.S. District Court for the Eastern District of New York, *Safe Harbor Retreat, LLC v. Town of East Hampton*,³⁶ the court dismissed the plaintiff's Fair Housing Act and Americans with Disabilities Act claims as unripe because the plaintiff failed to apply for a required permit and instead appealed the determination that a permit was required.

Plaintiff Safe Harbor Retreat, LLC had proposed an "executive retreat" for persons suffering from alcoholism and other forms of substance addiction. The town's senior building inspector determined that Safe Harbor met the criteria of "functioning as a family unit" and therefore permitted in a residential zone without site plan approval. As a result, Safe Harbor claims that it expended significant funds and effort to establish the community residence. After a period in which public officials and others visited and praised the community residence, a competitor complained about it and local opposition groups formed. The building inspector then reversed his position, informing Safe Harbor that it was operating an unauthorized "Semi-Public Facility, in a residential district," and that, pursuant to the town code, a special permit was required. However, rather than seeking a special permit from the town's planning board, Safe Harbor filed an application with the ZBA to appeal the determination.³⁷ The ZBA held a hearing on the application and entered an order affirming the building inspector's determination that Safe Harbor was operating a semi-public facility in a residential district and therefore a special use permit was required.

The court found that because of Safe Harbor's failure to seek a special permit, the Town had not rendered a final decision regarding Safe Harbor's use of its premises. For the same reason, the Town had not had the opportunity to make an accommodation through the Town's "established procedures used to adjust the neutral policy in question."³⁸ Quoting *Sunrise Detox*, the court noted that "[a] federal lawsuit at this stage would inhibit the kind of give-and-take negotiation that often resolves land use problems, and would in that way impair or truncate a process that must be allowed to run its course."³⁹ Accordingly, the court found that the action was not ripe and dismissed it without prejudice.

The U.S. District Court for the Eastern District of New York dismissed another Fair Housing Act claim in another March 2015 decision, *Amityville Mobile Home Civic Association v. Town of Babylon*.⁴⁰ The court dismissed the complaint with prejudice for lack of subject matter jurisdiction and granted Rule 11 sanctions against plaintiffs' counsel.

Plaintiffs are Amityville Mobile Home Civic Association (AMHCA) and the residents of Frontier Park, a mobile home park. Defendant Frontier, a private developer, filed an application with the Town, which the Town approved, to rezone the property from Multiple Residential to accommodate a mixed-use multi-residential development. The Town then adopted a relocation plan, which provided relocation assistance funds (\$20,000). The plaintiffs' complaint alleged that defendants violated numerous federal laws including the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment.

Frontier contended and the court agreed that the case should be dismissed for lack of subject matter jurisdiction because the plaintiffs' claims were based on the incorrect premise that the relocation plan required the residents to sign a release giving up their "rights" to the one-hundred affordable/workforce units in the new development. The complaint contained no allegations that any plaintiffs executed the documents associated with the Plan; nor did it allege that plaintiffs applied for the affordable/workforce housing units or were denied the units based upon their agreement to the Plan. The court found that the plaintiffs could not plausibly allege that execution of the Plan documents foreclosed any "right" to the affordable housing because the Plan contained no such provision.⁴¹

On May 8, 2015, the U.S. District Court for the Eastern District of New York dismissed *545 Halsey Lane Properties, LLC v. Town of Southampton*⁴² on ripeness grounds. This case involves challenges of two decisions by the Planning Board regarding conditional approvals of the plaintiff's applications for a building permit for the construction of a barn or barns on its property. The plaintiff 545 Halsey Lane Properties, LLC

commenced the federal action pursuant to 42 U.S.C. § 1983 against defendants Town of Southampton, Town of Southampton Planning Board, and the members of the Planning Board. The plaintiff also commenced two related state court proceedings pursuant to CPLR Article 78 to challenge the decisions of the Planning Board.

On April 8, 2015, the court had ruled that members of the Planning Board were entitled to qualified immunity and dismissed the complaint as against those individuals in their individual capacities. The court found the members of the Planning Board could not be deemed to have violated "clearly established law" under the Town Code. Furthermore, even if they could be deemed to have violated "clearly established law," the court determined that their actions were objectively reasonable under the circumstances. In the same order, the court rejected the Defendants' ripeness argument, finding that the resolutions issued by the Planning Board, which were not appealable to the Town's ZBA, constituted "final, definitive positions as to how it could use its property" sufficient to establish the ripeness of its Equal Protection claim.

Subsequently, the defendants moved for and the court granted reconsideration of the April 8 order. The defendants argued on reconsideration that the court misapprehended their ripeness argument and, alternatively, that the court's qualified immunity ruling was erroneous. The court agreed that the claims were not ripe and therefore did not address the defendants' arguments on reconsideration regarding qualified immunity.

With respect to ripeness, the defendants had argued that an earlier order remitting one of the Article 78 proceedings to the Planning Board for factual determinations had rendered the action unripe. In more than one prior order, the court had rejected this argument, reasoning, in part, that because it has "held that the Article 78 proceedings do not render the present action [un]ripe, it follows that the specter of additional Article 78 proceedings does not render an otherwise ripe claim unripe."⁴³ Upon reconsideration, the court agreed with the defendants that "it is not future Article 78 proceedings that call this Court's subject matter jurisdiction over this action into question. Rather, it is the future proceedings before the Planning Board, the administrative agency with authority to resolve the Plaintiff's site plan applications, that does so."⁴⁴

In holding that the claims were unripe, the court rejected the plaintiffs' argument that further efforts to obtain approval from the Planning Board were futile. The court noted that, in the land use context, the futility exception applies when the agency "lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied."⁴⁵ The court also noted, however, that "courts in [the Second] Circuit have recognized that mere allegations of open hostility [are] not sufficient to invoke the futility exception."⁴⁶

The court found that the futility exception did not apply because, although the town attorney has taken a position on the issue, no commentary suggests the Planning Board has an entrenched position, the Planning Board had discretion to make the final determination, and any delay by the administrative body was not sufficiently extreme to justify application of the futility exception.⁴⁷

The Third Department affirmed dismissal on mootness grounds and noted that the Town violated the open meetings law in *Ballard v. New York Safety Track, LLC*.⁴⁸ The case involved an agreement between the Town and owners of a motorcycle safety training facility to permit the owners to host certain events at the facility in 2013 that were allegedly not among the uses authorized by the site plan. The agreement expired by its own terms in 2013. The court observed that where the passage of time or a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy, the claim must be dismissed. Thus, because the agreement pertained solely to land uses during 2013 and expired at the end of that year, the court ruled that the cause of action became moot when the agreement expired.

Ballard's ruling on the open meeting law violation is summarized above.

The Third Department also affirmed dismissal on mootness grounds in *Citizens for St. Patrick's v. City of Watervliet*.⁴⁹ This case involved challenges by individuals who opposed a development to the City's SEQRA and rezoning determinations. In 2012, defendant PCP Watervliet, LLC, a subsidiary of defendant Nigro Companies, purchased a parcel of property containing a church, school and rectory that were no longer in use in the City of Watervliet. Nigro petitioned the City Council to rezone the parcel from residential to commercial, and, following public hearings, the City issued a negative declaration and amended its zoning map as requested. Individuals then brought a challenge alleging that the City failed to comply with SEQRA, engaged in illegal spot zoning and violated the Open Meetings Law. The trial court granted the defendants' motions for summary judgment.

As a preliminary matter, the court found that plaintiffs Carol Falaro and Patrick Falaro presumptively established their standing to challenge the City's determinations because their residence is located across the street from Nigro's parcel and they will suffer direct harm different from the general public, even without allegations of individual harm.

But, the Court held that the plaintiffs' challenges to the SEQRA and rezoning determinations were moot because they did not seek any injunctive relief from the Court during the pendency of the appeal, and the church buildings had been demolished and a grocery

store was fully constructed and operational on the property. The rezoning determination had also been superseded by the City's adoption of a new zoning code in 2013, under which Nigro's use of the parcel is permitted as of right, and the plaintiffs did not raise any challenge to the new code.

For another disposition based on a lack of standing, see the discussion of *Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals*⁵⁰ under Variances below.

Variances

In *Mimassi v. Town of Whitestown Zoning Bd. of Appeals*⁵¹ the Appellate Division, Fourth Department, reversed the lower court's denial of a petition to annul the ZBA's denial of an application for an area variance and remitted the application to the ZBA for a de novo determination. The court began by rejecting the petitioner's argument that the determination of the ZBA was arbitrary and capricious because the Town failed to adhere to its precedent, finding instead that the petitioner failed to establish that a previous decision by the Town on another case was based on essentially the same facts as petitioner's claim. However, the court held that the lower court's denial of the petition was nevertheless error because the ZBA did not "weigh the benefit to [petitioner] of granting the variance[] against any detriment to the health, safety and welfare of the neighborhood or community affected thereby, taking into account the five factors set forth in Town Law § 267-b(3)(b)"⁵²; rather, the ZBA based its determination on the no-longer-followed "practical difficulty" test.

In *John Hatgis, LLC v. DeChance*⁵³ the Appellate Division, Second Department, affirmed the trial court's dismissal of petitioner's claims, holding that the ZBA of the Town of Brookhaven properly engaged in the balancing test prescribed by Town Law § 267-b(3)(b) when denying the petitioner's application for an area variance to maintain an accessory apartment on the subject premises. Rejecting the petitioner's argument that the ZBA failed to satisfactorily address all five statutory factors, the court reasoned that "no single statutory factor is determinative, but merely one consideration in a broader balancing test. Moreover, the ZBA is entitled to consider the effect its decision would have as precedent."⁵⁴

The court also held that the ZBA's conclusions in support of its determination were not arbitrary or capricious. Specifically, the ZBA's conclusion that the grant of the variance would produce an undesirable change in the character of the neighborhood and a detriment to nearby properties was based on the testimony of the attendees at the public hearing and the ZBA's own familiarity with local conditions; the hardship alleged by the petitioner was self-created, as the petitioner acquired the property subject to the restric-

tion; and, the ZBA's conclusion that a feasible alternative to the variance existed was supported by the fact that the petitioner could have easily reduced the size of the accessory apartment. The court also noted without explanation that the ZBA's determination that the requested variance was substantial was not arbitrary or capricious.

In another case involving area variances (and standing), *Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals*,⁵⁵ the Appellate Division, Third Department affirmed the ZBA's determination that the petitioner, an engineering firm with no discernible connection to the project at issue, lacked standing to challenge the ZBA's granting of area variances to a residential property owner, and found that the ZBA had a rational basis for granting the area variances. In order to facilitate the construction of a residence on the subject property, respondents applied to the ZBA for area variances requesting relief from requirements regarding removal of vegetation and setbacks for stormwater infiltration devices. The ZBA granted the variances. The petitioner, a professional engineer who claimed to be representing a number of neighbors opposed to the project, requested and received determinations from the Town's zoning administrator on a number of issues, and appealed to the ZBA, which dismissed the appeal for lack of standing.

Since neither the petitioner nor his firm (which was listed on the notice of appeal as appellant) exhibited any specialized harm and did not own property near the subject property, and the petitioner failed to identify the neighbors he claimed to represent, the court found that the petitioner did not have standing in his individual capacity or as an agent for his firm. The court based its holding on its interpretation of a Town Code provision that permits appeals by "any person aggrieved" by, among other things, the zoning administrator's decisions. The court found that this language appears to have been taken from Town Law § 267-a(4), which "has been consistently interpreted to mean a person who has sustained special damage, different in kind and degree from the community generally," which can be shown "if he or she falls within the statute's zone of interests and his or her property is sufficiently proximate to the property at issue."⁵⁶

Despite the petitioner's lack of standing, the court went on to consider the merits, noting that, although the ZBA's resolution failed to set forth specific factual findings, the ZBA's decision to grant the area variances had a rational basis because the resolution and hearing minutes show that the ZBA engaged in the statutorily prescribed balancing test. The court reasoned that

[W]e need not annul the determination or remit the matter if the record, including the ZBA's formal return in the CPLR article 78 proceeding,

demonstrates that the ZBA did make specific factual findings supporting its determination.... Although the evidence as to the statutory factors seems somewhat evenly split, courts do not engage in their own balancing of the factors, but must yield to the ZBA's discretion and weighing of the evidence.⁵⁷

In *People, Inc. v. City of Tonawanda Zoning Bd. of Appeals*,⁵⁸ the Appellate Division, Fourth Department reversed the trial court, which had granted the developer petitioner's CPLR article 78 petition. The court held that substantial evidence in the record supported the ZBA's conclusion that granting two requested area variances would cause increased population density from the presence of an apartment building in a neighborhood comprised of single-family homes, that the variances necessary to accommodate an apartment building would be substantial, and that the petitioners' difficulty was self-created because they were aware of the property's zoning classification when they purchased the property. Because the board reviewed the prescribed statutory factors in making its determination, and rendered its determination after properly weighing the benefit to petitioners against the detriment to the health, safety and welfare of the neighborhood or community if the variances were granted, the court concluded that the action taken by the Board was not illegal, arbitrary or capricious, or an abuse of discretion.

In April 2015, the Appellate Division, Third Department, in *Nemeth v. Village of Hancock Zoning Board of Appeals*,⁵⁹ overruled the lower court, ruling that the ZBA should not have granted a use variance where the respondent's proof consisted of bare conclusory statements that their business would fail without a use variance. Petitioners in the case owned property adjacent to the property owned by the respondents, on which the respondents operated an industrial manufacturing business as a nonconforming use. The respondent property owners had applied for and received a use variance from respondent Village of Hancock ZBA, allowing the continued use of an addition in the manufacturing process made in 2001 after a zoning code was enacted prohibiting manufacturing in the zone where the property was located. The lower court dismissed the petitioner's claim.

The court first discussed that an applicant for a use variance bears the burden of demonstrating, among other things, that the property cannot yield a reasonable return if used for any of the purposes permitted as it is currently zoned. Such an inability to yield a reasonable return must be established through the submission of "dollars and cents" proof with respect to each permitted use. In this case, however, respondent's proof consisted of conclusory statements that an additional "10 to 20 percent" of revenue would be needed to find a simi-

larly sized location to house the equipment and that “we would go out of business” without the addition. Because there was insufficient proof, the court held that the ZBA should not have granted the variance.

Judge Lynch wrote a dissenting opinion, noting that “[j]udicial review of a zoning board determination is limited to an examination of whether it has a rational basis and is supported by substantial evidence,”⁶⁰ and arguing that the determination here met this standard.

In an instance, as here, where a use variance is required to expand a nonconforming use the applicant must demonstrate that the land cannot yield a reasonable return if used *as it then exists* or for any other use allowed in the zone. As such, ...[t]he core question remains whether respondents established that the property could not yield a reasonable rate of return without utilizing the addition in the manufacturing process, or otherwise utilizing the entire parcel for residential purposes.... In considering the property as it then exists, ...we must account for the fact that the addition had been utilized in the manufacturing process since 2001, until precluded by this Court’s decision in 2012. Respondent [ZBA]...concluded that the cost of converting the addition to a residential use, relocating the facility and/or shutting down manufacturing in the addition demonstrated that respondents could not realize a reasonable return on the property without a use variance for the addition. The ZBA relied upon documented proof...that a renovation of the addition for residential use... would cost over \$160,000, resulting in a net monthly loss of \$333. In addition, the Delaware County Department of Economic Development estimated the cost of relocating the manufacturing facility at between \$1.5 and \$2.2 million. [Respondent] Perry Kuehn testified that, without the addition, respondents would have to conduct part of the manufacturing process in a separate location off site, resulting in an estimated 10% to 20% extra cost that would put them out of business. Moreover, as a practical matter, given the prohibitive cost of relocating the manufacturing facility, a conversion of the entire property to a residential use would effect a closure of the business, which employs approximately

12 people. As such, it is manifest that a residential conversion would not yield a reasonable rate of return, such that specific dollars and cents proof for a residential option is simply unnecessary.⁶¹

Judge Lynch also noted that the ZBA could have rationally concluded that the property was unique and the proposed use would not alter the character of the neighborhood, because the property contained a long-standing, nonconforming industrial use that had included the addition since 2001, and that the hardship was not self-imposed because the Kuehns purchased the property before the Village enacted its zoning code.

In *Traendly v. Zoning Bd. of Appeals of Town of Southold*,⁶² the Appellate Division, Second Department held that the denial by the ZBA of the petitioners’ application for area and lot-width variances to build a single-family dwelling had a rational basis and was supported by evidence in the record. The court overruled the trial court, which had granted the applicant’s Article 78 petition, annulled the ZBA’s determination, and directed the ZBA to grant the application.

Without discussion of the record evidence, the court found that the granting of the variances would have resulted in the creation of “the most nonconforming lot in a unique neighborhood,”⁶³ the requested variances were substantial, and the petitioners’ hardship was self-created. The court also found that the ZBA’s granting of a particular prior application for an area variance did not constitute a precedent from which the ZBA was required to explain a departure, because the petitioners had failed to establish that the prior application bore sufficient factual similarity to the subject application.

Vested Rights

In *Cobleskill Stone Products, Inc. v. Town of Schoharie*,⁶⁴ the Appellate Division, Third Department, held that the failure to obtain a special permit does not preclude the ability to establish a vested right to mine on property. The petitioner in this case operated a quarry in the Town of Schoharie, which had been in operation since the 1890s. Pursuant to respondent Town of Schoharie’s 1975 zoning ordinance, “commercial excavation or mining” was a permitted use upon receipt of a special permit from the Town. Petitioner purchased an additional parcel of real property to the south of the areas that it actively mined, and then commenced this combined CPLR article 78 proceeding and declaratory judgment action seeking a judgment declaring that it had a vested right to quarry as a preexisting nonconforming use under Local Law No. 2 and any subsequently enacted prohibitory zoning amendment.

On appeal from the Supreme Court's order granting the petitioner's motion for partial summary judgment, the Third Department reasoned that, although a special permit was required for mining operations between 1975 and 2005, petitioner's failure to obtain one did not, as a matter of law, preclude it from establishing that it had a vested right to mine on its property notwithstanding a current or future prohibitive zoning ordinance. Because of this, the court found the Supreme Court erred in granting partial summary judgment to respondents dismissing the vested right cause of action based on petitioner's failure to obtain a special permit pursuant to the 1975 zoning ordinance. Additionally, the court found that the Supreme Court's judgment, partially granting the petition and annulling Local Law No. 2, did not render the appeal moot, because, if a new zoning ordinance with the same prohibition against mining were to be enacted, a declaration that petitioner had a vested right as against the earlier law would affect the rights of the parties. Accordingly, the court dismissed the order of the Supreme Court.

Wireless Broadband

Patricia Salkin's *Law of the Land* blog⁶⁵ provided an excellent summary of a January 2015 U.S. Supreme Court opinion on the Telecommunications Act's "in writing" requirement for land use decisions relating to the siting of cell towers, as follows:

*T-Mobile South, LLC v. City of Roswell*⁶⁶ was a case brought by a "personal wireless service provider" under the Telecommunications Act of 1996 (TCA) which, among other things, supported rapid deployment of personal communications devices (e.g., cell phones) by requiring that land use decisions on matters relating to such things as cell towers be "in writing" and supported by substantial evidence from a written record. In this case defendant City denied plaintiff's cell tower application by letter, informing plaintiff that it could find the reasons for the denial in the City Council minutes. There was a 30-day appeal period under the TCA; however, the City's draft minutes were not approved until four days before the appeal period ran. Nevertheless, plaintiff challenged the denial in federal court on the "in writing" requirement and also alleged the denial was not supported by substantial evidence. The trial court found for the plaintiff but the Eleventh Circuit, following a majority of circuits, found the letter and reference to the minutes to be

sufficient. The Supreme Court granted certiorari.

Justice Sotomayor wrote for the Court and interpreted the "in writing" and "substantial evidence" requirements to require reasons to be given for judicial review purposes. ... [The Court explained that [t]he use of "substantial evidence" in the TCA was a "term of art," describing how an administrative record was to be reviewed by a court under the TCA. The Court inferred that Congress required findings to be derived from the administrative process, rejecting the City's contention that this requirement would deprive it of its local zoning authority [and] finding that Congress meant to interfere with local zoning processes to this extent, but stressing that the reasons need not be elaborate—just sufficiently clear to enable judicial review.

Moreover, the Court determined that the TCA did not require that the reasons be found in the decision or be in any particular form, as the TCA stated it did not otherwise affect the authority of a local zoning authority.... However, the Court did [find that the TCA's text and structure] require that the reasons be given either in the decision or essentially contemporaneous with the same. By waiting until 26 days after its decision to issue detailed approved minutes, the City failed its statutory obligations and the decision of the Eleventh Circuit was reversed.

Justice Alito concurred, adding that it would be sufficient for the City to state simply that the proposal was "esthetically incompatible with the surrounding area," [and] that plaintiff was not injured by the City's delay in providing the final version of the minutes (which he viewed as harmless error)....

Chief Justice Roberts authored a dissent, in which Justices Ginsburg and Thomas joined, stating that, while findings or reasons for the decision were required, they need not be issued "essentially contemporaneously" with the decision, as such a requirement was not in the TCA, noting that Congress has in other legislation, such as the Administrative Procedures Act and other sections of the TCA itself, made

such a specific requirement. Moreover, the dissent observed that the “sole issue” before the court was the “in writing” requirement and not the timing of the findings, an issue not raised below. While agreeing that findings were implicitly required by the use of the “substantial evidence” standard, if they were not given or [were] inadequate, remand would be justified, rejecting the contention that plaintiff needed to see the reasons in order to decide whether to appeal[.]

Finally, the dissent suggests that impacts of this case on local governments will be “small”—they need only hold back the final decision until the minutes [are] transcribed or reasons given.

It appears the entire Court would conclude that the TCA requires reasons for a land use decision involving cell towers; however, the justices disagree on the required timing of those reasons. This result may come as a surprise for some local governments.

In *Orange County-Poughkeepsie Limited Partnership v. Town of Fishkill*,⁶⁷ the U.S. District Court for the Southern District of New York found that the plaintiffs Orange County–Poughkeepsie Limited Partnership d/b/a Verizon Wireless and Homeland Towers, LLC satisfied their obligation to make an effort to evaluate alternative locations for a communications tower, the Board’s denial of the plaintiffs’ application for a special permit left the plaintiffs with no feasible means of filling the gap in wireless coverage, and the Board’s denial of the application on grounds that the proposed 150-foot tall monopole wireless facility would decrease property values was not supported by substantial evidence.

In this case, Verizon had sought to construct a new wireless telecommunications facility within an R-1 Residential Zoning District. Under the Town of East Fishkill’s Zoning Code, a special permit was required for the construction of a wireless communication facility within the residential zoning district and the maximum height of a freestanding tower in a residential area was 110 feet. The plaintiffs submitted a joint application for a special permit with requests for a 40-foot height variance. The Board retained a wireless consultant, which advised the Board that “the proposed site only provides approximately 20% new coverage (un-duplicated) and nearly 80% overlaps with existing coverage,” and denied the application.

The court began by granting summary judgment on the plaintiffs’ effective prohibition claim. Under the

TCA, local governments retain authority over “decisions regarding the placement, construction, and modification of personal wireless service facilities,” but may not “prohibit or have the effect of prohibiting the provision of personal wireless services.”⁶⁸ The first prong of the *Willoth* effective prohibition test, which requires a plaintiff to establish that a significant gap in wireless coverage exists, was satisfied by the defendants’ concession of that fact. The second prong of the test recognizes that a local government may deny an applicant’s proposal if an applicant may “select a less sensitive site,... reduce the tower height,... use a preexisting structure or... camouflage the tower and/or antennae.”⁶⁹ The court found that the second prong was also satisfied because the record demonstrated that the plaintiffs evaluated alternative locations and the Board’s denial of the plaintiffs’ application left the plaintiffs with no feasible means of filling the gap in wireless coverage.

The court then found that the Board’s denial of the application on the grounds that the proposed tower would lower property values was not supported by substantial evidence and ordered the Board to grant the application. The record showed that the proposed site was near four large ham radio towers in the neighborhood and the neighbors opposing the application acknowledged that the towers existed at the time they purchased their homes.

Written Requests (Town Law)

In another case involving a failed attempt to rely on board minutes as a writing, *Smith v. Stephens Media Group-Watertown, LLC*,⁷⁰ the Appellate Division, Fourth Department held that the written record of an oral request in the minutes of a town board meeting was not sufficient to satisfy the written request requirement set forth in Town Law § 268(2). The plaintiff landowners commenced this action seeking enforcement of the Town of Rutland Code § 130–48(E)(1)(g), which requires that “the minimum setback distance of a communications tower from all property lines shall be equal to 100% of the height of the communications tower.” The plaintiffs alleged that the size of the parcel owned by the defendant was insufficient to permit its 370-foot radio transmission tower to meet the minimum setback distance. The plaintiffs sought injunctive relief enjoining the alleged violation.

The appellate court found that the court below erred in denying the part of the defendant’s motion seeking summary judgment dismissing the plaintiffs’ claim pursuant to Town Law § 268(2), which provides “upon the failure or refusal of the proper local officer, board or body of the town to institute [any appropriate action or proceedings to prevent or restrain the violation of its zoning laws] for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town who are jointly or severally aggrieved by such violation, may

institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do.” The court explained that, because the written record of their oral request in the minutes of the town board meeting did not satisfy the requirement of a written request and the plaintiffs failed to show that they made any other written request contemplated by the statute, they “failed to satisfy a condition precedent to maintaining their claim pursuant to the statute.”⁷¹ The plaintiff’s appeal was therefore dismissed, and the defendant’s motion to dismiss was granted.

Zoning Interpretation

In *Boni Enterprises, LLC v. Zoning Bd. of Appeals of Town of Clifton Park*,⁷² the Appellate Division, Third Department held the ZBA erred in finding that the Town Code prohibited petitioners Boni Enterprises, LLC and Country Club Acres, Inc. from constructing 74 one-family dwellings. Petitioners, who owned contiguous parcels of property in the Town of Clifton Park, submitted a revised application for site plan review to the planning board, outlining a plan to build 74 dwellings and 15 commercial buildings. The Planning Board contended that it was unable to consider the application because the Town’s Zoning Enforcement Officer concluded that there were zoning issues with petitioners’ site plan and the ZBA agreed that the town code prohibited construction of multiple single-family dwellings on the Boni Enterprises parcel. Petitioners responded with a combined CPLR article 78 proceeding and action for declaratory judgment.

The court first noted that the lower court erred in granting deference to the ZBA because no deference is allowed if the issue is one of pure legal interpretation of the zoning law. The court then found that, pursuant to the town code’s definitions of “dwelling” and “building,” the word “buildings” in the code provision that allows “[m]ultiple buildings on a lot” includes one-family dwellings. The court noted,

[T]he words building and dwelling are not synonymous and cannot be used interchangeably, because a dwelling is a subset of the broader term building. Stated another way, not every building is a dwelling, but every dwelling is a building. We agree with respondents that respondent Town of Clifton Park probably never envisioned a landowner being able to build 74 one-family dwellings on a single, unsubdivided parcel in a business district. Nevertheless, the plain language of the Town Code, strictly construed against the municipality, must be interpreted as permitting multiple buildings—including one-family dwellings—on a

single lot as long as they do not exceed the density limitations.⁷³

The court also considered and rejected arguments that the Town had provided inadequate notice of proposed Local Law No. 8 (which amended the zoning ordinance to create a business district covering an area that contains the Country Club Acres parcel) and that the failure of the town to update its zoning map, which is unofficial and available merely as a reference tool, invalidated the local law. The court therefore reversed the dismissal of the petitioner Boni Enterprises’ claims and declared that the Town Code does not prohibit Boni Enterprises from constructing multiple one-family dwellings on a single lot in the B-1 district, Local Law No. 8 was properly enacted, and petitioner Country Club Acres’ parcel is located in the zoning districts as set forth by Local Law No. 8.

Endnotes

1. This land use law update borrows heavily (with permission) from Touro Law Center Dean Patricia Salkin’s blog Law of the Land, which provides updates on state and federal land use decisions throughout the United States. See LAW OF THE LAND, <https://lawoftheland.wordpress.com> (last visited May 20, 2015).
2. 124 A.D.3d 902, 3 N.Y.S.3d 69 (2d Dep’t 2015).
3. *Id.* at 903 (internal quotation marks and citations omitted).
4. *Id.* at 904 (internal quotation marks and citation omitted).
5. 127 A.D.3d 1095, 8 N.Y.S.3d 355 (2d Dep’t 2015).
6. *Id.* at 1096.
7. *Id.* at 1098 (internal quotation marks and citations omitted), quoting and citing zoning code.
8. 127 A.D.3d 1216, 8 N.Y.S.3d 365 (2d Dep’t Apr. 29, 2015).
9. *Id.* at *1217.
10. 126 A.D.3d 1073, 5 N.Y.S.3d 542 (3d Dep’t 2015).
11. *Id.* at 1077.
12. *Id.*
13. *Id.*
14. *Id.*
15. No. 12-CV-8778 (ER), 2015 WL 1427206 (S.D.N.Y. Mar. 27, 2015).
16. Nos. 08-CV-156, 12-CV-8856 (KMK), 2015 WL 139993 (S.D.N.Y. Mar. 27, 2015). For a thorough summary of the case, see *Suit by “Interested,” Neighboring Municipalities to Enforce SEQRA Requirements Does Not “Impose or Implement” a Land Use Regulation or Constitute a “Government Practice” and does not Violate RLUIPA*, RLUIPA DEFENSE BLOG, Apr. 15, 2015, <http://www.rluipa-defense.com/2015/04/suit-by-interested-neighboring-municipalities-to-enforce-seqra-requirements-does-not-impose-or-implement-a-land-use-regulation-or-constitute-a-government/>.
17. 694 F. 3d 208 (2d Cir. 2012). [Eds.: This case is too new to have pincites. We’ll be able to fill in the missing pincites at the galley stage.]
18. *Id.* at 218.
19. *Id.* at 221.
20. *Id.* at 227.
21. *Id.* (citation omitted), quoting 146 Cong. Rec. S7775 (daily ed. July 27, 2000).

22. *Id.* at 228.
23. No. 12 Civ. 647(ER), 2015 WL 1473430 (S.D.N.Y. Mar. 31, 2015).
24. *Troy Sand & Gravel Co. v. Town of Nassau*, 125 A.D.3d 1170, 4 N.Y.S.3d 613 (3d Dep't 2015).
25. 126 A.D.3d 1159, 5 N.Y.S.3d 582 (3d Dep't 2015).
26. No. 5:11-CV-420, 2015 WL 1499506 (N.D.N.Y. Apr. 1, 2015). *See also* Joel Stashenko, *Upstate Town Faulted for Violating Man's Free Speech Rights*, N.Y.L.J., Apr. 10, 2015, <http://www.newyorklawjournal.com/id=1202723075219/Upstate-Town-Faulted-for-Violating-Mans-Free-Speech-Rights>.
27. *See Reed v. Town of Gilbert*, 134 S. Ct. 2900 (2014) (granting certiorari). The Court heard oral argument in *Reed* on January 12, 2015, and a decision is expected by June. An audio recording of the oral argument can be accessed at http://www.supremecourt.gov/oral_arguments/audio/2014/13-502 (last visited Feb. 27, 2015).
28. 29 MUNICIPAL LAWYER 16 (Winter 2015).
29. 125 A.D.3d 866, 5 N.Y.S.3d 127 (2d Dep't 2015).
30. 122 A.D.3d 859, 997 N.Y.S.2d 447 (2d Dep't 2014). For more on this opinion, check out the Inverse Condemnation Blog post by Robert H. Thomas, Esq., and the Bulldozers at Your Doorstep blog by counsel for the prevailing property owners.
31. No. 05-1119L, 2015 WL 2058969 (Fed. Cl. May 1, 2015).
32. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012) (holding that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability"). Prior to *Arkansas Game*, federal courts had generally understood Takings Clause liability as limited to permanent or inevitably recurring flood events. *See Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cl. 2011), *rev'd* by 133 S. Ct. 511 (2012); *but see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987) (holding that invalidation of ordinance, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause").
33. 2015 WL 2058969, at *26.
34. *In re Katrina Canal Breaches Litigation*, 696 F. 3d 436, 444 (5th Cir. 2012) (immunity under Flood Control Act extends to claims stemming from levee breaches caused by dredging of canal); *id.* at 449-52 (discretionary function exception to Federal Tort Claims Act extends to remaining claims).
35. 125 A.D.3d 659, 3 N.Y.S. 3d 98 (2d Dep't 2015).
36. No. CV 14-2017(LDW)(GRB), 2015 WL 918771 (E.D.N.Y. Mar. 2, 2015).
37. *Id.* at *3.
38. *Id.* at *6, quoting *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 124 (2d Cir. 2014).
39. *Id.* at *6, quoting *Sunrise Detox*, 769 F.3d at 124.
40. No. 14-cv-2369 (SJF), 2015 WL 1412655 (E.D.N.Y. Mar. 26, 2015).
41. With respect to the Rule 11 sanctions, the court held that the complaint contained allegations unsupported by the record and that plaintiffs had misrepresented and omitted relevant evidence. The court also noted that plaintiff AMHCA had initiated five lawsuits in state court since 2012 to delay or stop the development and all of those lawsuits had been dismissed. *Id.* at *7. In addition to imposing sanctions, the court warned AMHCA and the plaintiffs' attorney "that if they continue to pursue these matters and engage in vexatious and harassing litigation, they will be subject to a filing injunction." *Id.* at *9.
42. No. 14-cv-800, 2015 WL 2213320 (E.D.N.Y. May 8, 2015), on reconsideration of 2015 WL 1565487 (Apr. 8, 2015).
43. 2015 WL 2213320, at *5 (internal quotation marks and citation omitted).
44. *Id.*
45. *Id.* (internal quotation marks and citation omitted).
46. *Id.* (internal quotation marks and citation omitted; bracketed text in original).
47. *Id.* at *7-8.
48. 126 A.D.3d 1073, 5 N.Y.S.3d 542 (3d Dep't 2015).
49. 126 A.D.3d 1159, 5 N.Y.S.3d 582 (3d Dep't 2015).
50. 126 A.D.3d 1152, 6 N.Y.S.3d 171 (3d Dep't 2015).
51. 124 A.D.3d 1329, 997 N.Y.S.2d 888 (4th Dep't 2015).
52. *Id.* at 1330, quoting *In re Conway v. Town of Irondequoit Zoning Bd. of Appeals*, 38 A.D.3d 1279, 1279-1280, 831 N.Y.S.2d 818, 819 (2007).
53. 126 A.D.3d 702, 5 N.Y.S.3d 236 (2d Dep't 2015).
54. *Id.* at 703-04 (citations and internal quotation marks omitted).
55. 126 A.D.3d 1152, 6 N.Y.S.3d 171 (3d Dep't 2015).
56. *Id.* at 1153 (citations and internal quotation marks omitted).
57. *Id.* at 1154-55 (citations and internal quotation marks omitted).
58. 126 A.D.3d 1334, 6 N.Y.S.3d 817 (4th Dep't 2015).
59. 127 A.D.3d 1360, 7 N.Y.S.3d 626 (3d Dep't 2015). [Eds.: This case is too new to have pincites. We'll be able to fill in the missing pincites at the galley stage.]
60. *Id.* at 1363 (Lynch, J., dissenting).
61. *Id.* at 1363-64 (citations and internal quotation marks omitted).
62. 127 A.D.3d 1218, 7 N.Y.S.3d 544 (2d Dep't 2015).
63. *Id.* at 1219.
64. 126 A.D.3d 1094, 6 N.Y.S.3d 305 (3d Dep't 2015).
65. Patricia Salkin, *US Supreme Court Gives Life to the "In Writing" Requirement of the TCA*, LAW OF THE LAND: A BLOG ON LAND USE LAW AND ZONING, Jan. 18, 2015, <https://lawoftheland.wordpress.com/2015/01/18/us-supreme-court-gives-life-to-the-in-writing-requirement-of-the-tca/>.
66. 135 S. Ct. 808 (2015).
67. Case No. 13-CV-4791(KMK), 2015 WL 409260 (S.D.N.Y. Jan. 30, 2015).
68. 47 U.S.C. § 332(c)(7)(A).
69. 2015 WL 409260, at *22, quoting *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (citations omitted).
70. 125 A.D.3d 1370, 3 N.Y.S.3d 515 (4th Dep't 2015).
71. *Id.* at 1372.
72. 124 A.D.3d 1052, 2 N.Y.S.3d 631 (3d Dep't 2015).
73. *Id.* at 1054 (citations omitted).

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