Zoning and Land Use Laws (NY)

A Practical Guidance® Practice Note by Robin A. Kramer, Duval & Stachenfeld LLP

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This practice note discusses New York land use regulations and zoning laws. Discussions of subdivision review, site plans, special permits, conditions, zoning boards of appeals, nonconforming status, and vested rights are included.

For further information on commercial real estate transactions in New York, see Commercial Real Estate Ownership (NY), Purchase and Sale of Air Rights in New York City, and Purchasing and Selling Commercial Real Estate Resource Kit (NY).

Power to Adopt Land Use Regulations

The United States was created by the 13 original colonies, each of which would otherwise form a separate sovereign entity, transferring some of their powers to the new federal government. All powers of the states that were not transferred remained with the states (Constitution of the United States the "U.S. Constitution," Amendment X). Local governments are not mentioned in the U.S. Constitution and have no independent status. As the Supreme Court explained in 1907, "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers . . ." Hunter v. Pittsburgh, 207 U.S. 161 (1907). See Joy Bldrs., Inc. v. Town of Clarkstown, 165 A.D.3d 1084, 1086–87 (2nd Dep't, 2018): "When a town or municipality acts without legislative delegation, [*1087] its acts are ultra vires and void ab initio." Thus, while land use regulations are imposed at the local level, it is necessary to start at the state level to look at the powers the state has given to municipalities.

New York State Local Government System in Land Use

States create local governments and delegate powers to local governments either through the enactment of laws expressly delegating specific powers to such governments and/or by state constitutional provisions providing for home rule powers. New York does both. Article IX of the New York State Constitution (N.Y. Constitution) is titled Local Governments and provides the underlying source of power for local governments. This section of the N.Y. Constitution, generally referred to as the Home Rule provision, contains two sections: Section 1 is the Bill of Rights for local governments and Section 2 provides for the general powers of local governments. Article IX of the N.Y. Constitution also requires the adoption by the state legislature of a Statute of Local Governments. In addition to these laws, New York State has adopted the Municipal Home Rule Law, the General Municipal Law, the County Law, the General City Law, Town Law, and Village Law, which together control local governments' powers, rights, and structures.

Although cities, towns, villages, suburbs, neighborhoods, hamlets, fire districts, school districts, and other similar designations convey both geographical and community characteristics as well as, in some cases, the type of

jurisdictional and administrative entity, only some of these are municipal corporations with associated powers. Four types of governmental entities have power to adopt local laws:

- Counties
- Cities
- Towns –and–
- Villages

Of these, only cities, towns, and villages have the power to adopt zoning regulations. N.Y. Stat. Law § 10(6).

There is no general state authority for the incorporation of new cities in New York, and thus a city must be incorporated by special act of the state legislature, in connection with which the city adopts a charter to serve as the underlying document that establishes the organization, powers, functions, and essential procedures of the city government. Counties may establish charters for themselves in accordance with the County Law. In accordance with its charter, a city's powers with respect to land use (or any other specific matter), and its governing structures, may differ from those that are otherwise allowed by the General Municipal Law or the General City Law. Charter counties similarly may have different powers, structure, and processes. However, in all cases, local governments are limited by the home rule section of the N.Y. Constitution and other state laws. Under the County Law, counties have certain powers with respect to planning, but no powers to adopt zoning or subdivision regulations. However, in those counties that have adopted charters, the county may have powers related to subdivisions that are not otherwise provided in state law. Therefore, to ascertain a municipality's powers in the area of land use regulation, both the state laws described above and, where applicable, a city or county charter, must be reviewed.

Land use regulations, including but not limited to zoning, subdivision regulations, site plan review, and historic preservation, are all derived from the police power, which is an inherent power of New York State and is delegated to municipalities under the home rule provisions of the N.Y. Constitution (see, e.g., N.Y. State Club Ass'n v. City of New York, 69 N.Y.2d 211, 219 (1997), aff'd on other grounds, 487 U.S. 1 (1988)). "With the police power as the predicate for the State's delegation of municipal zoning authority, a zoning ordinance will be struck down if it bears no substantial relation to the police power objective of promoting the public health, safety, morals or general welfare." Trustees of Union Coll. in Town of Schenectady in State of N.Y. v. Members of Schenectady City Council, 91 N.Y.2d 161, 165 (1997).

In addition to the state laws and local laws specifically related to land use, there are general state laws which have additional provisions related to the procedures which a local government and its agencies must follow, and which provide the rules for challenging local actions. One of the most important is the Open Meetings Law, in Article 7 of the Public Officers Law, which establishes the requirements for public meetings held by local governments and their administrative agencies, and violation of which can invalidate a governmental action. Similarly, the Freedom of Information Law, in Article 6 of the Executive Law, provides the means by which someone can obtain records and other documents from a local government. A challenge to a decision of a local government requires compliance with the Civil Practice Law and Rules, in particular Article 78, Proceeding Against Body or Officer. Article 8 of the Environmental Conservation Law, and the regulations promulgated in 6 NYCRR Part 617 State Environmental Quality Review (SEQR), mandates that all state and local agencies comply with the procedures for environmental review and consideration established by such law and the rules promulgated thereunder in connection with making decisions. Discretionary actions, including rezonings, variances, site plan approvals, and subdivision review, among other actions, must comply with SEQR requirements.

Specific Provisions of State Law

The specific powers that New York local governments have and the procedures that local governments must follow in connection with zoning is set forth, for cities, in Article 5-A of the General City Law (Buildings and Use Districts); for towns, in Article 16 of the Town Law (Zoning and Planning); and for villages, in Article 7 of the Village Law (Building Zones). Failure to comply with such procedures may render a law invalid. Thus, you should always look to the specific mechanisms in the applicable state law both if you're trying to get a local government to take a land use action that it has not previously taken or if you're looking to challenge a specific land use law or a decision of an administrative agency.

The GCL, the Town Law, and the Village Law all contain provisions authorizing local governments to use incentive zoning (N.Y. Gen. City Law § 81-D, N.Y. Town Law § 261-B, N.Y. Village Law § 7-703); planned unit development zoning districts (N.Y. Gen. City Law § 81-F, N.Y. Town Law § 261-C, N.Y. Village Law § 7-703-A); and transfers of development rights (N.Y. Gen. City Law § 20-F, N.Y. Town Law § 261-A, N.Y. Village Law § 7-701). These laws also include the processes and limitations on such actions by local governments.

Limits on Municipal Exercise of Home Rule and Other Powers

Land use regulations, like other laws, cannot conflict with the U.S. Constitution or with the N.Y. Constitution. Article IX of the N.Y. Constitution provides, in Section 2c, that every local government has the power to adopt and amend local laws (1) "not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government," and (2) "not inconsistent with the provisions of this constitution or any general law relating to" a specified list of subjects. The state retains power to adopt laws relating to the property, affairs, or government of any local government by general law (defined in Section 3 of Article IX of the N.Y. Constitution as a law which applies to all counties—except counties entirely within a city, all cities, all towns, or all villages), or by special law (a law relating to a specific city, county, town, or village), but in the latter case only where the affected municipality has adopted what is called a home rule message, or the law is adopted by certain special processes. The Statute of Local Governments, in Section 11(4), states that the state legislature retains the power to adopt laws that reduce the powers granted to local governments if such law relates to any matters other than the property, affairs, or government of local governments.

However, under judicial interpretations, this seemingly limited role for New York's state government has been expanded to allow the state to regulate a broad variety of matters. First, in 1929, in the case of Adler v. Deegan, 251 N.Y. 467, the Court of Appeals created the doctrine of substantial state concern, under which, where the interests of the city and the state overlap, the state can adopt regulations relating to the property, affairs, or government of local governments. "The test is rather this, that if the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality." Adler, 251 N.Y. at 491. Thus, for example, New York State has adopted the Multiple Dwelling Law, established regulations for certain taxi services in New York City, and prohibited the adoption by New York City of laws relating to the use of plastic bags, notwithstanding there was no home rule message and the state did not comply with the required special procedure.

A local government also cannot adopt an ordinance if the state has, by express provision in a state law, stated its intent to control all regulation in a specified area (express preemption), or a local law would conflict with a state law or the state has, to all practical purposes, adopted a law that would completely cover a subject (implied preemption). Where the local law conflicts with the state law, the implied preemption is called conflict preemption, and where the state has completely occupied a subject matter, the implied preemption is called field preemption. Between the concept of substantial concern and preemption, as interpreted by the courts, the state has garnered for itself a broad power to legislate within cities. See Balbuena v. IDR Realty LLC, 6 N.Y.3d 338 (2006).

Zoning

Zoning Basics

Zoning is the process by which a community is divided into districts in order to establish the permitted uses in each district and the permitted sizes, densities, and other aspects of development of the land in each district. A zoning ordinance comprises two necessary parts:

- A zoning map, which provides the location of each district –and–
- The zoning text, which establishes the rules that are then applied in accordance with the zoning map

If there is no zoning map, then the zoning districts and other provisions in the text cannot be applied anywhere, and if there is no zoning text, then there is no way to know the location of the districts listed on the map. A local law which is not a "comprehensive or master plan for dividing the community into zones where specified uses are permitted but rather is directed at one particular activity no matter where in the town it is carried out" is not a zoning ordinance. Niagara Recycling v. Town of Niagara, 443 N.Y.S.2d 939, 945 fn 2 (1981).

Zoning laws are strictly construed by the courts because they are in derogation of common-law rights. See FGL & L Property Corp. v. Rye, 66 N.Y.2d 111, 115 (1985). They are to be construed against the local government if there is any doubt. However, as a legislative act they are accorded general deference; it is in the interpretation and applicability to a specific piece of land of the provisions of an ordinance rather than the provisions themselves where a property owner is more likely to be victorious against the local government.

Traditional zoning, which emphasizes the division of a city into districts based on use, and in which the regulations are uniform for all land in that district, is called Euclidean zoning, not after the mathematician but after the 1926 U.S. Supreme Court case that upheld comprehensive zoning (Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)). Over the last 30 years, an alternative approach to zoning, called a form-based code, has been developed. Under a form-based code, the emphasis is on the physical character of neighborhoods and the physical form of buildings rather

than use. Although use is also regulated, the controls are not aimed at segregating uses but encouraging mixed use areas as a way of advancing walkable and compact neighborhoods. Form-based codes have been adopted by some cities, including Buffalo, and are being considered by many more cities, towns, and villages. Often, a form-based code will not be applied to an entire municipality but just a particular neighborhood. In a form-based code, in addition or instead of a traditional zoning map, the code will have a regulating plan. Two other types of zoning codes, conditional and performance zoning, were developed in the 1960s and 70s, but have only been adopted by a handful of cities, all outside of New York.

Zoning ordinances list permitted uses. Such uses may be permitted without discretionary review (i.e., "as of right") or they may require a special use permit or special exception. The general rule is that if a use is not listed, it is not permitted without a variance. Many zoning ordinances were written years ago and have not been updated to include modern uses or changes in the patterns of use. In such cases, whether a particular use will be permitted will depend on whether the use can be fitted within existing language. For example, even if software development is not a permitted use, it will likely be permitted as an office. A veterinary hospital may be permitted in a district where hospital use is permitted, if the word hospital is not defined so as to exclude animals. Creativity may be the key in such cases.

In addition to controls on use, zoning regulations establish "bulk regulations," the rules for the physical layout of buildings. The most common bulk controls include any and all of the following:

- Square foot limitations (either as an absolute number, e.g., not larger or smaller than a certain square foot amount, or a ratio of the lot size to the building square footage, called FAR, floor area ratio) for buildings and other structures, sometimes including signs
- Height and setback requirements for buildings (which can be based on a specific height and/or on the number of stories), establishing the maximum envelope of a building
- Location on a lot (which can be controlled by yard requirements and setbacks from street frontages) –and–
- Requirements for open space, including minimum yards

Other bulk controls may apply to size of window openings or ground floor building design, and anything else related to the way a building looks, its size, and its siting on a lot.

In a form-based code, there are more likely to be minimum as well as maximum dimensions and sizes, in order to control appearances, as well as controls on the public street and the character of a neighborhood.

Zoning ordinances also include parking regulations, and may include sign regulations (which may be in a separate ordinance). These regulations control the location of, and standards for same. Zoning ordinances may also contain some sections that are not clearly use or bulk. For example, requirements to provide affordable housing seem to be closer to bulk regulations in that they are controls on specific aspects of the units, and the use as a residence does not change because the income level of the tenants is lower, but affordability requirements are not the normal limitations on size or placement of a unit.

One of the most important sections of a zoning ordinance is the definitions, usually found at the beginning or end of the ordinance. Whether a use is defined and how it is defined may clearly tell you what and where uses are permitted, or may require an interpretation from the zoning board of appeals (ZBA). The definition may also tell a potential user how to design its building. The difference in definition can mean one use but not a similar use is allowed in different districts. For example, the Village of Portchester zoning code (which is a form-based code) defines restaurant simply as "an establishment engaged in preparing, serving and selling food and beverages at retail for on premises or off premises consumption." Portchester Code Section 345, Article 10. There is a separate definition of retail food sales for establishments selling food for off premises consumption, which may not have more than six seats (and is included in the definition of restaurant). In the City of Kingston code, there are separate definitions for each "restaurant, standard" and "restaurant, fast food." The former requires that food be consumed in the restaurant, while fast food may be for on or off premises consumption of food that is served "in a ready to consume" manner. The Village of Mamaroneck code (Section 342-3) has separate definitions of food service establishments (which includes all types of such establishments), restaurants, brew pubs, carry-out, and fast food. Given each of the three codes, a "fast-casual" restaurant would probably be permitted in Portchester as a restaurant, although it could be retail food sales—if there are fewer than six seats. In Kingston, the use would appear to be a fast-food restaurant. But in Mamaroneck, a fast-casual restaurant does not fit in any of the definitions, other than the food service establishment category, which is not actually listed as a permitted use in any district.

Special Permits

Special permits (sometimes called special exceptions) denote a use or structure that is permitted pursuant to the local zoning ordinance but only after consideration of the specific location proposed by an applicant to ensure that such site has been reviewed and approved in order to ensure that the proposed location is appropriate for the specific proposed development. Cities, towns, and villages are all expressly authorized to issue special permits. "Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right. . . . [I]nclusion of the permitted use in the ordinance 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." Retail Prop. Trust v. Bd. of Zoning Appeals, 98 N.Y.2d 190, 195 (2002). The ordinance will list the findings/standards that must be considered for each such special permit use. A local government has the power to decide whether special permits are issued by the local legislature, a planning board, or a ZBA, and the applicable decision maker may differ depending on the specific subject of a special permit.

Whether the decision is to be made by a planning board, a legislative body, or a ZBA, the determination is based on whether applicable criteria have been met, as demonstrated by substantial evidence. See Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000 (1997). Thus, even if the local legislature is the decision maker, it must review the application based on the criteria in the law, and may not simply decide on a special permit because the proposed use or condition is good for the community. An applicant must provide evidence as to all of the findings, and the applicable decision maker must consider each of the findings/standards in the ordinance. Unlike an area variance, if even one of the criteria set forth in a zoning ordinance is not met, the special permit may be denied. See, e.g., Wegmans Enterprises, Inc. v. Lansing, 72 N.Y.2d 1000 (1988).

Zoning and a Comprehensive Plan

In 1922, the U.S. Department of Commerce first issued the "Standard Zoning Enabling Act," which was a model law that states could adopt to give cities the power to adopt zoning regulations; New York, as well as the other 47 then existing states adopted the SZEA, during the 1920s and 1930s. Section 3 of the SZEA states "Such [zoning] regulations shall be consistent with a comprehensive plan . . . ," and such language remains part of New York law and has been recognized by numerous court decisions. As the Court of Appeals has said: "the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use." Udell v. Haas, 21 N.Y.2d 463, 469. "The power to zone is derived from the Legislature and must be exercised in the case of towns and villages in accord with a 'comprehensive plan' (see N.Y. Town Law § 263; N.Y. Village Law § 7-704) or in the case of cities in accord with a 'well-considered plan.' General City Law § 20 [25]." Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 131 (1988).

Although zoning must be adopted in accordance with a comprehensive plan, New York does not require that a local government adopt a separate comprehensive plan or engage in comprehensive planning separate from the preparation of the zoning ordinance. Municipalities are encouraged to adopt a comprehensive plan, and where they have done so, then all of the land use regulations of that municipality must be in accordance with such plan. N.Y. Gen. City Law § 28-a(12)(a); N.Y. Town Law § 272-a(11)(a); N.Y. Village Law § 7-722(11)(a). New York courts recognized that the requisite comprehensive plan could be found by examining a community's zoning map, zoning text, and any other related documents.

A comprehensive plan is defined in New York law as the "materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development" of the community. N.Y. Village Law § 7-722(1)(a); N.Y. Town Law § 272-a(2)(a); N.Y. Gen. City Law § 28-a(3)(a). If a plaintiff challenges a rezoning for inconsistency with a comprehensive plan, they must establish a clear conflict. Restuccio v. City of Oswego, 979 N.Y.S.2d 749, 750 (4th Dep't 2014).

Zoning is a legislative act. Thus, a court will defer to a local legislature's determination as to the appropriate zoning and the comprehensive plan for a city. The "decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it." Rodgers v. Tarrytown, 302 N.Y. 115 (1950).

For a discussion of planning and zoning matters generally, see Planning and Zoning.

Zoning Board of Appeals (ZBA)

Each of the General City Law (GCL) (Sections 81 through 81-C); the Town Law (Sections 267 through 267-C); and the Village Law (Sections 7-712 through 7-712-C) provides that a local government that has adopted zoning must create a ZBA. These sections establish the process by which members of a ZBA are appointed, the basic operating rules of a ZBA, the powers of a ZBA, and the process for challenging a decision of a ZBA. ZBAs may "reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken." The key here is that a ZBA has appellate power only. This applies even to such actions for which a determination of a building inspector would not seem necessary. Although ZBAs may take requests for an interpretation of a zoning ordinance without a building department determination, this can be challenged: "[w]ithout a determination from the Building Inspector, a ZBA has no jurisdiction to consider an application for an interpretation." Chestnut Ridge Assoc., LLC v. 30 Sephar Lane, Inc., 94 N.Y.S.3d 596 (2nd Dep't 2019). Best practice would therefore be for an applicant to always first go to the building department, regardless of the topic, before going to the ZBA.

NYS law establishes certain rules for ZBA procedure, including provisions relating to a default denial, which occurs when a ZBA does not act within 62 days of the closure of a public hearing. If an applicant does not want its application to be denied, she will need to grant an extension to the ZBA to give it extra time to make its determination.

A ZBA (or another agency making a determination on a special permit, or on-site plan review) can use the evidence of neighbors, including specific, detailed testimony of neighbors based on personal knowledge, although it cannot make its decision based simply on generalized community opposition. However, if the applicant has expert opinion to support its position, then neighbor testimony may not be sufficient to overcome such evidence, particularly if it is in the nature of conclusory. See e.g., Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh, 68 A.D.3d 62 (2nd Dep't 2009); Matter of Ramapo Pinnacle Props., LLC v. Village of Airmont Planning Bd., 145 A.D.3d 729 (2nd Dep't 2016).

Challenges to a ZBA decision may be brought by a property owner/applicant where a variance is denied or where the ZBA has imposed conditions with which the applicant disagrees, or by a neighboring property owner challenging the grant of the variance, pursuant to the procedures set forth in Article 78 of the Civil Practice Law and Rules. Such appeals are based on whether there is substantial evidence to support the decision (in the case of variances; see Matter of Sasso v. Osgood, 86 N.Y.2d 374 (1995)), and on the reasonableness of the decision (in the case of interpretations, as there is no specific evidence that must be evaluated); in all cases, there must be a rational basis.

Although state law provides that only a ZBA has the power to issue variances, a local town law that authorized a planning board to issue variances related to garbage collection and garbage dumps was upheld on the basis that such law was not a zoning law but a law adopted under N.Y. Town Law § 136, which authorizes town boards to regulate such activities and that the New York State Environmental Conservation Law also expressly allows local governments to adopt laws relating to sanitation. N.Y. Envtl. Conserv. § 27-0711. See Islip v. Zalak, 165 A.D.2d 83 (1991).

Allowing a Non-permitted Use or Structure

Rezonings and Amendments

As discussed above, a court will defer to a local legislature's decision to rezone land or to amend a zoning ordinance. "When a zoning ordinance is amended, the court decides whether it accords with a well-considered plan . . . by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole as opposed to benefiting individuals or a group of individuals." Asian Americans for Equality, 72 N.Y.2d at 102, 131.

The most significant limitation on any rezoning is spot zoning, which is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. Spot zoning is void ab initio, so if a rezoning is determined to be spot zoning, then it will be set aside as if it were not adopted. In determining if a particular rezoning is spot zoning, the size of the rezoned parcel is relevant but is not determinative. The more important question is the extent to which the rezoned parcel differs from the surrounding land and the effect of such rezoning on the surrounding land. "The

requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land." Asian Americans for Equality, 72 N.Y.2d at 102, 131.

In applying for a rezoning, both an applicant and the municipality need to ensure that the rezoned parcel is not significantly different from nearby properties. One way to control this may be to rezone a larger area than might otherwise be rezoned so that the land rezoned is simply an extension of similar nearby zoning districts. If a rezoning is undertaken pursuant to a comprehensive plan, for the general community welfare, and not solely to benefit individual property owners, then it is likely valid. See Rodgers v. Tarrytown, 302 N.Y. 115 (1950). Consistency with a comprehensive plan will eliminate any possibility that a rezoning is spot zoning.

When a zoning ordinance is amended during pendency of an application for a rezoning that has been submitted to the municipality, the law in effect at the time the application is reviewed by a buildings department and not the law in effect at the time the application was filed will generally be applied (but see below with respect to vested rights). However, if the municipality engaged in actions to delay the normal review process so that the municipality had time to amend its zoning ordinance, the municipality may be required by a court to apply the ordinance in effect at the time the application was filed, not the amended ordinance in effect at the time the application is decided, under what is called the special facts exception. See, e.g., Pokoik v. Silsdorf, 40 N.Y.2d 769 (1976). For the special facts exception to apply, there must have been "extensive delay indicative of bad faith," "unjustifiable actions" by the municipal officials, or "abuse of administrative procedures." Rocky Point Drive-In, L.P. v. Town of Brookhaven, 21 N.Y.3d 729, 737 (2013) (internal citations omitted). Adoption by a city of a moratorium to consider a rezoning that would have no longer allowed the requested development was deemed an adequate basis for applying the special facts exception. Matter of Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. of Appeals of Vil. of Mamaroneck, 53 A.D.3d 494 (2nd Dep't 2008). It is critical to keep good records of the dates of all submittals and communications with the buildings department or other agency making a determination if you think this may be an issue.

The special facts exception may also be applied to applications for special permits, which would then be decided according to the processes in effect at the time the application was submitted. See Matter of Elam Sand & Gravel Corp. v. Town of W. Bloomfield, 33 N.Y.S.3d 625 (4th Dep't 2016).

Variances

The GCL, the Town Law, and the Village Law all authorize the respective local governments to grant both use and area variances. A use variance is appropriate where the essential use of the property is to be changed. Area variances are appropriate where an application seeks to modify a physical or dimensional standard or characteristic. However, the distinction is often not obvious, and the courts have resolved some of these issues. For example, the Court of Appeals ruled that applications to modify off-street parking standards are subject to the procedures for area variances as long as the underlying use is permitted in the zoning district; use variance rules apply only if the underlying use not allowed in the district. Matter of Colin Realty Co., LLC v. Town of N. Hempstead, 24 N.Y.3d 96, 112 (2014). Similarly, a requirement that a use have its principal frontage on a public highway was determined by the Appellate District to be a physical requirement not a use requirement and thus an area variance was appropriate. Matter of Route 17K Real Estate, LLC v. Zoning Bd. of Appeals of the Town of Newburgh, 93 N.Y.S.3d 107 (2nd Dep't 2019), lv. to app. den'd, 33 N.Y.3d 905 (2019).

Unfortunately, courts are not always clear as to why an area variance is appropriate. Where a village code required that a property be owner-occupied in order to get a special use permit for a tourist apartment (short-term rental), and the owner applied for an area variance to remove the owner occupancy requirement, the court upheld the denial of the variance based on the failure of the applicant to demonstrate that he or she satisfied the area variance factors, without considering whether the area variance criteria and not use criteria were appropriate. Matter of Cooperstown Eagles, LLC v. Village of Cooperstown Zoning Bd. of Appeals, 77 N.Y.S.3d 716 (3d Dep't 2018).

Use Variances

Use variances require a showing by the applicant that the applicable zoning regulations have caused unnecessary hardship. Such unnecessary hardship must be established by evidence that, for all uses permitted under the zoning ordinance for the district in which the property is located, (1) the applicant cannot achieve a reasonable return by development in accordance with the ordinance; (2) the property is uniquely affected by the alleged hardship, and the condition does not apply to a substantial portion of the district or neighborhood; (3) the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) the alleged hardship has not been self-created. An approved variance must be the minimum variance from the regulations that will allow the applicant to achieve a reasonable return.

Applicants for a use variance "must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses. . . . And, the dollars and cents evidence must show that no permissible use will yield a reasonable return." Village Bd. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 256, 257 (1981). If an applicant does not prove that there is no economically viable permitted use, the variance is likely to be overturned by a court.

An applicant needs more than a real estate broker or an architect discussing the decreased value if the variance were not granted. Instead, an applicant should provide a ZBA with an appraisal of the property at the time of acquisition and the cost paid by the applicant to demonstrate that the applicant paid market value. An appraiser and broker should provide evidence of the value of other lots in the neighborhood and the expected income from the project with and without the variance. An engineer and cost consultant should provide evidence of the cost of construction in accordance with the zoning ordinance and the cost if the variance is granted. All of the above will provide the actual dollars and cents evidence.

The property that is the subject of the application does not have to be the only property affected by the condition but the condition may not be "so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed (internal citations omitted)." Matter of 54 Marion Ave., LLC v. City of Saratoga Springs, 108 N.Y.S.3d 497, 499 (3d Dep't 2019). An applicant should calculate the number of properties in the relevant area that have the condition. If many properties are affected by a particular condition, it may be more appropriate to seek a rezoning.

With respect to a hardship claim, because a permitted use that allows for a lower return or expected profit than some other use is not enough to satisfy the hardship finding. Similarly, the fact that the zoning-compliant development is not the highest and best use does not demonstrate the required degree of hardship. The applicant must demonstrate an inability to obtain a reasonable return from the permitted uses. See Matter of DeFeo v. Zoning Bd. of Appeals of Town of Bedford, 28 N.Y.S.3d 111 (2nd Dep't 2016). There is no set definition of reasonable return. Although the letter of the law requires that none of the permitted uses can be developed without the variance, ZBAs are not always so particular and do sometimes grant variances without consideration of the full range of permitted uses.

Area Variances

Area variances do not require that there be an unnecessary hardship. Instead, state law has established a balancing test, in which a ZBA considers:

> [T]he benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also 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.
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> N.Y. Comp. Codes R. & Regs. tit. 6, § 666.9.

For both use and area variances, the ZBA can only approve the minimum variance required.

It is not necessary that an application for an area variance satisfy all of the five factors, as the ZBA balances benefit to applicant to harm to neighborhood. This is particularly true with respect to the factors relating to substantiality and self-created nature of the hardship. An application that is substantial may still be approved if, notwithstanding the substantiality, there would be no adverse effect on the character of the neighborhood or the physical or environmental conditions in the neighborhood. The applicant or its representative should explain the rationale to the ZBA so that the members of the ZBA can make the required determination. For example, a variance allowing a setback of 302 feet instead of the maximum allowed 5 feet was held to be substantial, but it was not an abuse for the ZBA to make the other findings and grant the variance. Matter of Beekman Delamater Props., LLC v. Village of Rhinebeck Zoning Bd. of Appeals 57 N.Y.S.3d 57 (2nd Dep't 2017). Similarly, a "zoning board, in applying the balancing test, is not required to justify its determination with supporting evidence for each of the five statutory factors, as long as its determination balancing the relevant

considerations is rational." Matter of Teixeira v. DeChance, 131 N.Y.S.3d 396 (2nd Dep't 2020).

The failure of a resolution to explain what factors were considered by a ZBA in granting or denying a variance can lead its being overturned.

There is no standard for determining if a variance is substantial. Courts are involved in only a limited number of cases and when a court reviews a variance it only considers the specific application. A 33.3% deficiency in lot area was held to be substantial in Pecoraro, but there is no way to determine at what point a variance would not have been substantial. Where a variance could be considered substantial, an applicant should focus on the other factors in making the application.

General Considerations Applicable to Variances

Local zoning boards have broad discretion in considering applications for variances. Thus, a ZBA's determination is likely be sustained on judicial review if it has a rational basis and is supported by evidence in the record. Courts generally hold that a variance should only be overturned if the ZBA acted illegally or arbitrarily, or abused its discretion, or simply "succumbed to generalized community pressure." See Pecoraro v. Bd. of Appeals, 2 N.Y.3d 608, 613 (2004).

An aspect of a project will be considered to be a self-created situation if the owner or its predecessor took some action that led to the need for variance. For example, construction of a building too close to the lot line is a self-created condition. The purchase of property with knowledge of the zoning has been held relevant to a determination of self-created hardship (Matter of Kaye v. Zoning Bd. of Appeals of the Vil. of N. Haven, 185 A.D.3d 820 (2d Dep't 2020)), but this question will not be material to many boards.

Conditions on Approvals

In granting a variance or special permit, the approving agency may impose reasonable conditions and restrictions that are "directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit." Matter of St. Onge v. Donovan, 71 N.Y.2d 507, 516 (1988) [internal citations omitted]. Conditions that are related to a particular user of the land are not permissible conditions. Where a variance or special permit is conditioned on impermissible conditions which are subsequently overturned by a court, the variance or special permit may still be valid. Id. An applicant should, therefore, continue to pursue a variance or special permit even if she believes there will be conditions that are personal or otherwise unrelated to the use of the land, and if the conditions are material, she can go to court to overturn the conditions. Conditions requiring the work to be done within a specified period of time are reasonable and thus valid (Holthaus v. Zoning Bd. Of Appeals, 619 N.Y.S.2d 160 (2d Dep't 1994)), as were the following:

- Prohibition on overnight parking related to the use of the property, although a requirement that the parking lot be chained at night was not a reasonable condition. Matter of Voetsch v. Craven, 48 A.D.3d 585 (2d Dep't, 2008).
- A limit on the total number of seats in a restaurant. C.K. Olivers, Inc. v. Williston Park, 153 A.D.2d 548 (2d Dep't 1989).
- Conditions requiring valet parking and limiting the petitioner's hours of operation to coincide with the hours of access to the 40 off-street parking spaces were proper because the conditions related directly to the use of the land and were intended to protect the neighboring commercial properties from the potential adverse effects of the petitioner's operation, such as the anticipated increase in traffic congestion and parking problems. Matter of Bonefish Grill, LLC v. Zoning Bd. Of Appeals of the Vil. Of Rockville Ctr., 61 N.Y.S.3d 623 (2d Dep't 2017). –and–
- Conditions limiting hours of operation are reasonable where they are intended to reduce impact on neighboring properties from increased traffic and noise. Matter of Milt-Nik Land Corp. v. City of Yonkers, 24 A.D.3d 446 (2d Dep't 2005).

However, conditions limiting hours of drive through lane were impermissible where there was no evidence that the operation of the drive through window would have greater impact on traffic than other uses during those hours. Old Country Burgers Co. v. Town Bd. Of Oyster Bay, 160 A.D.2d 805 (2d Dep't 1990).

Conditions on special permits issued to airports may not deal with prices, routes or service, where the U.S. Congress has preempted jurisdiction (49 U.S.C. § 41713) but may relate to a city's role as the proprietor of an airport, as long as the conditions are reasonable, nonarbitrary and nondiscriminatory regulations. Thus, regulations related to noise may be valid, but regulations related to, for example, route of a helicopter sightseeing trip, are preempted. See Nat'l Helicopter Corp. of Am. v. City of New York, 137 F.3d 81 (2d Cir. 1998).

Nonconforming Conditions and Vested Rights

Nonconforming Status

After a zoning or subdivision ordinance is amended, whether an existing use or an existing structure that does not comply with the new requirements may continue and whether any changes may be made to it, will depend on whether it is a "legal nonconforming (or noncomplying)" use/structure. A nonconforming (or noncomplying; the terms may vary although nonconforming is the more common term) use or structure is a use or structure that was legally established prior to the adoption of the current provisions of a zoning ordinance. Nonconforming uses are viewed as detrimental to a zoning scheme, and the overriding public policy is aimed at their reasonable restriction and eventual elimination. See Toys "R" Us v. Silva, 89 N.Y.2d 411 (1996). A nonconforming condition must have been legally established and "may not be established through the existing use of land that was commenced or maintained in violation of a prior zoning ordinance." Matter of Tavano v. Zoning Bd. Of Appeals of the Town of Patterson, 51 N.Y.S.3d 175, 176 (2nd Dep't 2017). Thus, merely because a building was constructed or its use began many years ago, it does not become legal by the passage of time. If the use or structure was not legal at the time the building was constructed or the use established, then it cannot continue. A use/structure may not be legal even if it complied with a zoning code, if the owner did not obtain all permits or other approvals required at the time such use/structure began.

A nonconforming use or structure is allowed to continue because of a concern that the required termination would cause substantial financial harm or loss to the property owner. That is also the basis for vested rights, discussed below.

However, a zoning ordinance can provide that particular nonconforming uses may not continue forever but must terminate within a specified period after the use or structure becomes nonconforming, as long as the period, considered an amortization period, is "reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner." Harbison v. Buffalo, 4 N.Y.2d 553, 562–63 (1958); see also People v. Miller, 304 N.Y. 105 (1952). Whether a particular amortization period is valid will depend on the investment in the use and the public benefit to be achieved by requiring termination of the use. Where an owner can demonstrate that the loss resulting from the termination of a nonconforming use at the end of an amortization period is so substantial that it outweighs the public benefit gained by the legislation, then the amortization period is unreasonable. Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468 (1977), app. dismissed, Modjeska Sign Studios, Inc. v. Berle, 439 U.S. 809 (1978). Amortization provisions have been accepted by New York courts for parking lots, a cooperage business in a residential district (see *Harbison*), the keeping of pigeons (see People v. Miller, 304 N.Y. 105 (1952)), adult uses (see Islip v. Caviglia, 73 N.Y.2d 544 (1989)), mobile homes (see Village of Valatie v. Smith, 83 N.Y.2d 396 (1994)), and signs (see Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483 (1977), app. dismissed, 439 U.S. 808 (1978)); none of which uses (other than adult uses) involved substantial construction costs.

A nonconforming use can always be changed to a conforming use, generally provided that it complies with all zoning requirements applicable to such use. The applicable ordinance may allow certain nonconforming uses to change to other nonconforming uses that would have fewer negative externalities. For example, in New York City, the Zoning Resolution provides that a manufacturing use located in a residential district where manufacturing is not permitted may be converted to certain commercial uses that would otherwise not be permitted in such district. Some ordinances may allow a nonconforming use to be extended through a building. Unless there's a specific provision to the contrary, any permitted change of use must comply with all provisions in the zoning ordinance.

Sometimes, it is not clear whether something is a change of use. For example, would a strip mall with eight stores that was proposed to be operated as a single large store, in a zoning district where retail use is no longer permitted, be a change of use? New York courts have looked at whether there has been a change or a continuation of an nonconforming use by considering whether the new use is substantially the same as the prior use, with the same "essential character," or whether the new use would be a "qualitative change." See, e.g., Aboud v. Wallace, 94 A.D.2d 874 (3d Dep't 1983), which held that a change from a doctor's office to a business office was not a change in a nonconforming use as there would not be any restoration or repairs, any change in the building's appearance or structure, or any increase in occupants or clientele.

Noncomplying structures may not be expanded in size, except in compliance with the zoning ordinance. But whether interior alterations are permitted will depend

on the local code. In some municipalities, a building with a nonconforming use may be allowed to undertake interior nonstructural alterations that do not increase the noncompliance as a matter of right, while other municipalities may prohibit all changes other than as required for health and safety without a variance or special permit from the ZBA.

Where operation of a nonconforming use or structure has stopped, whether such use can be restarted depends on whether there has been abandonment of the nonconforming use or building or on the existence of a "lapse provision." A lapse provision is a provision in the ordinance that establishes the maximum period of time that a use or use of a nonconforming building may be stopped before it must terminate and cannot recommence. Lapse provisions are commonly six months to one year, but can be longer; New York City's lapse provision is two years. If there is no lapse provision, then whether a use can be recommenced will depend on whether the stop constitutes an abandonment. "[A]bandonment of a nonconforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment. In New York, however, the inclusion of a lapse period in the zoning provision removes the requirement of intent to abandon—discontinuance of nonconforming activity for the specified period constitutes an abandonment regardless of intent." Toys "R" Us v. Silva, 89 N.Y.2d 411, 421 (1996).

An exception to the absolute time period of a lapse provision may exist where a structure is not used for a period of time if the nonuse was involuntary and caused by some other legal process or requirement. Thus, a nonconforming gas station was allowed to reopen after it was closed for remediation of a gasoline spill (caused by a trucking accident) (Matter of HV Donuts LLC v. Town of LaGrange Zoning Bd. of Appeals, 169 A.D.3d 678 (2nd Dep't 2019)); a nonconforming restaurant was allowed to reopen after it was demolished by fire and was undertaking repairs when the applicable 12-month period expired (Hoffman v. Bd. of Zoning Appeals of Russell Gardens, 155 A.D. 2d 600 (1989)); a nonconforming sign was allowed to be replaced where the sign's removal had been undertaken as part of required façade repairs (149 Fifth Ave. Corp. v. Chin, 305 A.D.2d 194 (1st Dep't 2003)).

Vested Rights

Where work on a new building (or alteration) has begun in accordance with a zoning ordinance and the provisions of the ordinance are amended before the construction is completed to prohibit or limit the structure or use, the construction will be allowed to continue only if the building has achieved "vested rights," in accordance with a local ordinance or judicial determination, in which case the owner's rights are considered to have vested and the construction may continue. The common-law principles of vested rights are predicated upon notions of fairness and concerns about the constitutionality of zoning ordinances. See Salkin, New York Zoning Law and Practice 10-6. "The rationale behind [vested rights] is clear. Although every zoning ordinance affects the rights of owners because it restricts utilization of the property in some manner, the right to complete construction of a nonconforming use will be sustained only where the 'property interest . . . is too substantial to justify its deprivation . . . .'" People v. Miller, 304 N.Y. 105, 108 (1952). See also Putnam Armonk, Inc. v. Southeast, 52 A.D.2d 10, 14 (2d Dept. 1976).

There are two procedures that can be used to establish vested rights. First, a zoning ordinance may provide rules for vesting, for example, completion of foundations, which establishes a vested right to continue construction. Whether that condition has been satisfied will be determined by a building inspector or possibly the ZBA. If the local code has such a provision, an applicant will need to prove that the necessary standard has been met. Dated photographs and on-site work progress records will be critical. Second, and regardless of whether a zoning ordinance contains its own procedures or not, and even if a developer does not satisfy the ordinance created standard, an owner may seek the court's determination to establish "common-law vested rights."

The courts have not established a fixed formula for determining whether there has been substantial construction or substantial expenditures. The determination is made on a case-by-case basis, after consideration of whether, under the applicable facts and circumstances, the property owner would suffer serious loss and it would be inequitable to prohibit the owner from completing his project. See Estate of Kadin v. Bennett, 163 A.D. 2d 308, 309 (2d Dept. 1990); Town of Orangetown v. Magee, 88 N.Y.2d 41, 47–48 (1996).

To demonstrate substantial construction, there must have been construction activity that resulted in a tangible physical change to the project site. For new construction, there must have been a significant amount of progress on building excavation and foundation work prior to the applicable amendments. Vested rights have been found where an owner completed excavation and most of the foundations (see, e.g., Glenel Realty Corp. v. Worthington,

4 A.D.2d 702 (2d Dept. 1957), app. dismissed, 13 N.Y.2d 708 (1957), and where excavation of trenches for the foundation was complete, and 80% of the building foundation) see Miller v. Dassler, 155 N.Y.S.2d 975, 978 (Sup. Ct. Westchester Co.), aff'd, 1 A.D.2d 975 (2d Dept. 1956).

In determining whether there has been substantial expenditure, a court will consider amounts actually spent and financial obligations that were incurred. Soft costs, such as architectural fees, development of plans, and the like, are also included in a determination by the courts as to whether there was substantial expenditure. See, e.g., Ageloff v. Young, 282 App. Div. 707 (2d Dept. 1953).

For further information on commercial real estate transactions in New York, see Commercial Real Estate Ownership (NY), Purchase and Sale of Air Rights in New York City, and Purchasing and Selling Commercial Real Estate Resource Kit (NY).

Subdivision and Site Plan

Subdivision Review

Cities, towns, and villages are all authorized to undertake subdivision review and approval. N.Y. Gen. City Law § 32 et seq., N.Y. Town Law § 276 et seq., N.Y. Village Law § 7-728 et seq. Although counties do not have power under the County Law to undertake subdivision review, a county with a charter may have given itself such authority. For example, the Nassau County Planning Commission, which was created pursuant to the County Government Law (Charter) of Nassau County, has planning jurisdiction over all areas of the county outside cities and villages or within a city or village and within 300 feet of the boundary of such city and village and must approve all subdivision plats in the county outside of such areas (Section 1610b). The legislative intent is to grant to the commission "the powers necessary for guiding and accomplishing a coordinated, adjusted and harmonious development of the county, which will * * * best promote health, safety, and the general welfare" (Section 1610, subd. 3). It also gives the planning commission of every city and town in Nassau County (or ZBA if there is no planning commission) the same powers outside of and within 300 feet of the boundary of such cities and villages.

Even if a county does not have its own subdivision power, a county planning board may be authorized to review a subdivision application in a municipality if the proposed subdivision is within 500 feet of certain designated conditions, including the municipality's boundaries, drainage districts, and others. Failure of a municipality to refer the filed plat to the county planning agency will render an approved plat invalid.

While local governments adopt the specific subdivision regulations, state law establishes the basic structures and rules for subdivision review including the basic processes for review of plats by a local planning board or commission, requirements for filing and recording plats, minimum notice and public hearing requirements, and environmental review requirements. If a municipality does not have its own subdivision regulations, it can use the provisions of the state law for both the review standards and the processes.

A planning board or commission may properly consider the impact of a proposed development on the surrounding roads and the impact on traffic patterns as it relates to safety and the general welfare. Matter of Pearson Kent Corp. v. Bear, 28 N.Y.2d 396, 399. While the planning board may consider off-site impacts (Matter of Pearson Kent Corp. v. Bear, 28 N.Y.2d 396) and may condition approval on plan modifications (Matter of Janiak v. Planning Bd., 159 A.D.2d 574; Matter of Ozols v. Henley, 81 A.D.2d 670) such conditions may not include off-site improvements of the public roads (see Matter of Sanford v. Whearty, 216 A.D.2d 399; Matter of Oakwood Co. v. Planning Bd., 89 A.D.2d 606; Valmont Homes v. Town of Huntington, 89 Misc. 2d 702; Matter of Medine v. Burns, 29 Misc. 2d 890).

Compliance with the timeframes in the state subdivision regulations are critical. Unless an applicant agrees to an extension of time, if a planning board does not act within the specified time period, the preliminary or final plat under review will be deemed approved—**a default approval** (N.Y. Gen. City Law § 32 (8), N.Y. Town Law § 276 (8), N.Y. Village Law § 7-728(8)). This is the opposite of the failure to act by a ZBA within 60 days after an application is closed, in which case the failure to act becomes a **default denial**.

Site Plan

Local governments have the power to undertake site plan review (N.Y. Gen. City Law § 27-a, N.Y. Town Law § 274-A, N.Y. Village Law § 7-725-A). Site plan requirements can be adopted as part of a zoning ordinance or other local law. Site plan review is most often undertaken by a planning commission or planning board, but it could be the ZBA or even the legislative body itself; it is up to the legislative body to designate the responsible agency.

"Site plan review reflects 'public interest in environmental and aesthetic considerations, the need to increase the attractiveness of commercial and industrial areas in order to invite economic investment, and the traditional impulse for controls that might preserve the character and value of neighboring residential areas.'" Moriarty v. Planning Bd. of Vil. of Sloatsburg, 119 A.D.2d 188, 190, 506 N.Y.S.2d 184 (1986), lv denied 69 N.Y.2d 603, 504 N.E.2d 396, 512 N.Y.S.2d 1026 (1987). Site plan review enables municipalities to evaluate how sites are being developed and to consider the layout and design of a proposed development on a parcel of land, through review of a plan or drawing. The site plan regulations adopted by a municipality establish the standards for such developments, including considerations for the location/siting of buildings, on-site roads and access, parking, exterior lighting, landscaping, storm water, water, and other utilities.

Other factors, such as loss of agricultural soil, impact on views and vistas of farmland areas, and impact on future subdivision are all relevant (see Matter of Sagaponack Ventures, LLC v. Board of Trustees of the Vil. of Sagaponack, 98 N.Y.S.3d 90 (2nd Dep't 2019)); as is whether the proposed project is consistent with the use of surrounding properties, whether it would bring about a noticeable change in the visual character of the area, and whether the change would be irreversible (Matter of Valentine v. McLaughlin, 87 A.D.3d 1155, 1157 [internal quotation marks and citations omitted] (2nd Dep't 2011)).

Other Land Use Topics

Short-Term Rentals

The Multiple Dwelling Law, which applies in a city of more than 325,000 or in any other city, town or village that has adopted it, prohibits use of a multiple dwelling that is considered a Class A multiple dwelling (requiring stays of longer than 30 days) for stays of less than 30 days. The growth of Airbnb, VRBO, and other short-term/vacation rental platforms has led many municipalities to adopt local code provisions under which such short-term use may not be permitted by the local code.

Determination as to whether a short-term rental use is permitted by the local zoning code may require an analysis of both the uses permitted in the particular district in which the subject property is situated, and the uses permitted in other districts to evaluate whether the use can be prohibited because it more properly fits somewhere else in the community. In Matter of Fruchter v. Zoning Bd. of Appeals of The Town of Hurley, 133 A.D.3d 1174, 1175–76 (2015), the court determined that without the challenged short-term rentals, petitioner's property was a one-family dwelling.

> "The issue thus distills to whether the rentals removed the property from the definition of residential one-family dwellings and whether such activity fits under another definition in the Town Code.
>
> Although the ZBA did not determine the category of use that petitioner's activity constituted under the Town Code, it upheld Hofstatter's determination, which had labeled the use as either a bed and breakfast or hotel. However, petitioner's use of the property does not fall under the definitions in the Town Code of either of these. Petitioner's residence, among other things, did not have "a common exterior entrance or entrances" as set forth in the definition of a hotel. Moreover, since petitioner always rented the entire premises and he did not remain on the premises when rented, it was not an "owner-occupied dwelling" in which only "rooms" were being rented as provided in the definition of a bed-and-breakfast. Although the definitions of "dwelling" and "residences" excluded various activities, including motel, hotel and "transient" occupancy, the term transient is not defined and, when considered in the context of the entire Town Code, does not clearly apply to petitioner's activity. Inasmuch as petitioner's use does not fall within the definition of activities requiring a special use permit, and the Town Code does not otherwise "expressly prohibit[ ] petitioner[ ] from renting [his] residence to vacationers[,] . . . we cannot say that petitioner['s] decision to do so placed [his] otherwise obviously residential structure outside the Town's definition of a [residential one-family dwelling]."

Impact Fees

An impact fee is a one-time charge imposed on a developer to pay the cost of providing off-site improvements needed to serve a new development. Impact fees have been authorized by many states as a way to make new development pay its own costs instead of imposing such costs on existing residents and businesses in the form of increased property taxes. Adoption of impact fees by a city generally requires either express enabling legislation or a judicial interpretation that the police power of a city is broad enough to cover impact fees. New York has no express delegation of power to authorize municipalities to adopt such fees, except with respect to recreation

fees (N.Y. Town Law § 277 (4); N.Y. Village Law § 7-725-a (6); N.Y. Gen. City Law § 27-a), and the courts have not determined either that state enabling legislation is needed for other fees or that impact fees are simply another means of protecting the public health and welfare and no special enabling legislation is necessary. Claims that a particular recreation fee is a taking or otherwise unconstitutional are generally analyzed by a court under the Supreme Court's decisions in Dolan v. City of Tigard, 512 U.S. 374 (1994), and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). Thus, a particular fee will be upheld if there is an essential nexus between the need for recreation and park land in that community, and the plaintiff (a property owner challenging an impact fee) has not provided evidence that the amount of the fee does not have the required rough proportionality. See, e.g., Matter of Joy Bldrs., Inc. v. Town of Clarkstown, 54 A.D.3d 761, 762–63 (2d Dep't 2008), cert. denied, Joy Builders, Inc. v. Town of Clarkstown, 556 U.S. 1184.

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Ms. Kramer has over 25 years of experience in all aspects of land use and real estate development in both New York City and throughout the country. Her practice encompasses a broad range of land use matters for developer, investors, not-for-profit, and institutional clients. Ms. Kramer advises clients on site acquisition and assembly, development feasibility, and zoning related matters, including the purchase and sale of air rights, including High Line and theater district air rights transfers.

Ms. Kramer represents clients in applications to the New York City Planning Commission, the Board of Standards and Appeals, the Department of Buildings and other agencies for entitlements including rezonings, amendments to the Zoning Resolution, certifications, and other discretionary and non-discretionary land use approvals.

Ms. Kramer has represented local governments in New York, California, Florida, Minnesota and Missouri, and drafted an amicus brief on behalf of law professors supporting the City of New London in Kelo v. City of New London at the Supreme Court. Her experience has also included litigation on behalf of local governments, representation of mine operators and gas producers in seeking government approvals, challenging and defending annexations, applications for tax incentive financing, preparation of a county-wide economic development program and preparation of impact fee ordinances.

Ms. Kramer began her career as Assistant Counsel to the New York City Department of City Planning, providing legal advice to the New York City Planning Commission.

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