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# 2006 Land Use Cases:
# Courts Have Decided a Wide Range of Issues

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**Abstract:** In 2006, as in most years, the New York courts have decided a broad range of land use issues. This article summarizes the impacts of several of these important decisions. Specifically, this article covers the following land use topics: affordable housing, statute of limitations, res judicata, standing to sue, enforcement of injunctions, takings law, vested rights, property annexation, religious land uses, New York's State Environmental Quality Review Act (SEQRA), and judicial review of local board actions.

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This column collects and describes over two dozen of the most significant land use cases decided by the New York courts during 2006.

### *Affordable Housing*

In *Land Master Montgomery I, LLC v. Town of Montgomery*, the court struck down Montgomery's zoning law after the town board eliminated all as-of-right provisions for multi-family development. 821 N.Y.S.2d 432 (N.Y. Sup. Ct. 2006). Petitioners submitted two mixed-use multi-family development proposals for land located in the eliminated zoning districts. In April of 2002, the town board created a special board to review its comprehensive plan and in May it imposed a moratorium on all residential developments proposing more than three residences. These actions halted the town planning board's review of the petitioners' projects. The court, noting the lack of as-of-right multi-family provisions in the amended zoning law, held that "Given [the] housing needs, the operative test becomes whether or not the zoning ordinances constitute a balanced and well-ordered plan for the community which adequately considers the acknowledged regional needs and requirements for affordable housing. The court believes that the existing zoning structure fails this test." The court, finally, dismissed a variety of discretionary and "narrow" methods of providing smaller lots, adult communities, mobile home parks, and incentives as vesting almost total discretion in the town board and creating "the illusion of affordable housing availability." The effect of the court's holding is to restore the multi-family zones to the ordinance leaving the petitioners free to pursue their approvals and the town free to consider how to react to the court's declaration of unconstitutionality.

*In the Matter of Anderson v. Lenz as the Mayor of the City of Saratoga Springs and as Chairperson of the Saratoga Springs City Council et al.*, the city council changed the zoning of a privately owned 44-acre parcel from high-density residential to rural residential. 811 N.Y.S.2d 210 (N.Y. App. Div. 2006). Petitioners challenged the rezoning claiming that the council failed to take a "hard look" at the rezoning's impact on affordable housing as required by SEQRA. The court held that the council discharged its obligation under SEQRA. The council determined that the new zone would allow for two-family units and that numerous other opportunities existed in the city to create new infill affordable housing or to create more affordable housing through the renovation of existing properties.

In *Mendel v. Henry Phipps Plaza W., Inc.*, the Court of Appeals found that plaintiffs, a small group of low and moderate income tenants, did not have standing to enforce a provision of a Land Disposition Agreement (LDA) as third-party beneficiaries. 811 N.Y.S.2d 294 (N.Y. 2006). The tenants claimed that the LDA required Henry Phipps Plaza to maintain the complex as housing for low and moderate income families. The LDA indicated that the purpose of conveying the land was to construct a residential apartment complex and the residential uses were to be devoted to the uses specified in the urban renewal plan for the area. The urban renewal plan provided for development of housing for low and moderate income families. The court found that the "Plaintiffs failed to establish that the LDA was intended for their benefit." In fact, the LDA provision at issue "explicitly negate[d] any intent to permit its enforcement by third parties such as plaintiffs."

***Statute of Limitations***

*In the Matter of Boland v. Town of Northampton*, the court dismissed petitioner's Article 78 based on the statute of limitations. 807 N.Y.S.2d 205 (N.Y. App. Div. 2006). The petitioner challenged the Town of Northampton Zoning Board of Appeals' issuance of a special use permit for the construction of residential condominiums under the town's revised zoning ordinance and map, which designates that area as "Medium Density Residential." Petitioner claimed the town failed to comply with Town Law requirements in revising the map in 1986, claiming, therefore, that the 1973 "Lakefront Residential" zone and map remain in full force and effect. The claim was time barred because the statute of limitations began to run on the date the map was revised. Additionally, the court held that to contest the revisions, petitioner should have joined all necessary parties, which include "the numerous property owners who might be adversely affected by a potential judgment invalidating such revisions."

*In Matter of Arrandale Civic Ass'n v. Zoning Bd. of Appeals of the Vill. of Great Neck*, the court dismissed petitioner's Article 78 petition to review the zoning board of appeals' approval of a use variance. 812 N.Y.S.2d 133 (N.Y. App. Div. 2006). It found that pursuant to Village Law § 7-712-c(1), "a proceeding pursuant to CPLR Article 78 to review a determination of a board of appeals 'shall be instituted within thirty days after the filing of a decision of the board in the office of the village clerk.'" Failure to indicate how each board member voted in the filed record does not delay the running of the statute of limitations.

*In Matter of Haberman v. Zoning Bd. of Appeals of City of Long Beach*, the court determined that "the Zoning Board of Appeals had a rational basis for finding that the stipulation

purporting to extend the prior variance was unenforceable." 813 N.Y.S.2d 460 (N.Y. App. Div. 2006). The ZBA had awarded the petitioners a variance. Petitioners were to request a building permit within five years from the issuance of the variance. More than five years later, the petitioners were issued a building permit pursuant to a stipulation with the City of Long Beach. The ZBA never ratified the stipulation and the building permit was subsequently revoked. Finding for the city, the court stated that "'[t]he purpose for imposing a time limitation in the grant of a special permit or variance…is to ensure that in the event conditions have changed at the expiration of the period prescribed, the board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances if the latter still desires to proceed.'"

***Res judicata***

*In Matter of Hunt v. Bd. of Zoning Appeals of Inc. Vill. of Malverne*, the court found that the ZBA properly treated the variance application as "materially different" from a previous application by the same property owners. 812 N.Y.S.2d 581 (N.Y. App. Div. 2006). Thus, the ZBA proceeding was not precluded by the doctrine of res judicata, which binds a tribunal from hearing and determining an issue that has already been decided. Additionally, because the present application was "materially different," it did not "implicate the unanimity requirement for rehearings under Village Law § 7-712-a(12)," which requires "[a] unanimous vote of all members of the [ZBA] then present" for such a rehearing to occur. *Kreisberg v. Scheyer*, 808 N.Y.S.2d 889 (N.Y. Sup. Ct. 2006) (res judicata does not bar landowner request for a set back variance when earlier request was denied, but the facts are not identical and ownership has changed).

***Standing***

Village had standing to challenge town planning board's findings under SEQRA. The village board of trustees was able to demonstrate a showing of an in-fact injury that fell within the zone of interest sought to be protected by SEQRA. The court found that the village board had standing to challenge the town planning board's findings regarding an application by Wal-Mart under SEQRA because it would suffer environmental harm different in kind and nature from that suffered by the general public. The village was concerned about the traffic impacts of the development. *Village of Liverpool v. Town of Salina Planning Board*, 821 N.Y.S.2d 875 (N.Y. Sup. Ct. 2006).

***Enforcement***

In *Bd. of Trustees of Vill. of Sackets Harbor v. Sackets Harbor Leasing Co., LLC*, the defendant appealed from a supreme court order, which "directed defendant to remove docks installed in violation of the Village of Sackets Harbor Waterfront Management Law ("WML")." 809 N.Y.S.2d 356 (N.Y. App. Div. 2006), affirmed 808 N.Y.S.2d 126. The court found that plaintiff met its initial burden for an injunction by establishing, as a matter of law, that defendant (a) failed to obtain the necessary permits for the construction of the new docks, (b) secretly constructed the docks, with the knowledge that they did so without

authority, and (c) constructed the docks in violation of the WML length and setback requirements.

***Takings***

City's adoption of road widening map did not amount to an unconstitutional taking of property. Plaintiffs failed to show that their property had lost all of its value as a result of the new map. Plaintiffs claimed they were unable to sell their home. They had not advertised it in the newspaper, placed a for sale sign in front of their home, or entered into an agreement with a broker to sell the home. This constituted a failure to carry their burden of proving complete loss of economic value. *Royal v. City of New York*, 822 N.Y.S.2d 427 (N.Y. Sup. Ct. 2006).

***Vested Rights***

Property owner had a vested interest in a building permit. The permit had been legally issued, and the petitioner had made substantial improvements and incurred substantial expenses in reliance on the issued permit. The permit had been illegally revoked in 1994 and the town zoning board's decision not to renew the permit was arbitrary and capricious, denying the plaintiff due process of the law. *Vecce v. Town of Babylon*, 822 N.Y.S.2d 94 (N.Y. App. Div. 2006).

***Annexation***

*In Matter of City of Kingston Common Council v. Town of Ulster*, the Third Department was called upon to determine "whether the proposed annexation of certain property now located in the Town of Ulster to the City of Kingston is in the overall public interest," pursuant to General Municipal Law § 712. 807 N.Y.S.2d 708 (N.Y. App. Div. 2006). The court noted that the "over-all public interest" test considers the benefit or detriment to (a) the annexing municipality, (b) the territory proposed to be annexed, and (c) the remaining governmental unit from which the territory would be taken. The court found that the land owners proved they would personally benefit from the annexation, but failed to carry the statutory burden of showing that the annexation was in the overall public interest. The landowner was interested in connecting to the city's water and sewer because it is less expensive than the options available in the town. The same school district covered the lot whether located in the city or the town and there are no significant differences in the town and city fire departments. In addition, the annexation would not significantly increase tax revenues or stimulate development in the city.

***Religious Uses***

The Court of Appeals held that the landowner's use of property for religious training purposes complied with town's zoning ordinance that allowed for a conference and training center. Prior owners used the property as a training and conference center without objection from the town. The property was sold to a church, a tax-exempt entity, which sought to use the property for the same purposes. The town objected to the use of the property by the

church without a special permit, arguing that a two-year course of study to be offered on the property was better described as a college or seminary rather than a conference and training center. The Appellate Division found that the only difference between the prior and present uses was the duration of the visitors' presence. The court found that nothing in the zoning code stated expressly or implied that only short-term visitation was permitted. *Town of Mount Pleasant v. Legion of Christ, Inc.*, 818 N.Y.S.2d 171 (N.Y. 2006).

***SEQRA***

The developer applied for final subdivision approval more than 12 years after final and supplemental environmental impact statements were issued and after several regulatory changes that affected the site. Under SEQRA, the lead agency, in these circumstances, does not meet its obligations if it issues the subdivision approval without further environmental impact analysis. The planning board failed to take the requisite "hard look" at all environmental impact issues presented; it should have undertaken another supplemental environmental impact analysis. *In re Riverkeeper, Inc., et al. v. Planning Board of Town of Southeast, et al.*, 820 N.Y.S.2d 113 (N.Y. App. Div. 2006).

***Review of Local Board Actions***

Where a town board decides to designate as a landmark a site that it had previously denied such status, the board must adequately explain its departure from its own precedent, especially where the underlying facts have not changed. "A determination of an administrative agency that neither adheres to its prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." *In re Corona Realty Holdings, LLC v. Town of North Hempstead*, 820 N.Y.S.2d 102 (N.Y. App. Div. 2006).

The zoning board of appeals has broad discretion in determining what uses constitute incidental and subordinate uses accessory to the principal use. Here, the court upheld a ZBA denial of an application to operate a propane filling station as an accessory use to a nursery/garden center. The board's decision will be upheld as long as it is not arbitrary, capricious, or an abuse of discretion. *DeCaro Capital Investment Group, LLC v. Voekler*, 821 N.Y.S.2d 610 (N.Y. App. Div. 2006).

A variance granted by the zoning board of appeals permitting construction of a single-family home that exceeded the maximum height limitation of the village's zoning code was arbitrary and capricious. The court found that the ZBA failed to make issue specific findings supporting its determination to grant the variance and failed to perform the statutorily required balancing test under N.Y. Town Law § 267-b(3). *Margaritis v. Zoning Board of Appeals of the Incorporated Village of Flower Hill*, 821 N.Y.S.2d 611 (N.Y. App. Div. 2006).

The planning commission's denial of an application for re-subdivision and site plan approval was arbitrary and capricious. The commission based its decision to deny approval on certain design features of the proposal "which are intrinsic to a school building or educational use of

the property." The court found that citing these inherent design features amounted to an objection to the use itself, which was permitted by the zoning code, and found that decision was arbitrary and capricious. *Southside Academy Charter School v. City of Syracuse*, 821 N.Y.S.2d 738 (N.Y. App. Div. 2006).

The Town of Marbletown's zoning laws contain a grandfather provision that allows buildings to be constructed on preexisting nonconforming lots. Petitioner challenged the issuance of a building permit to Saddlebrook Development Corp., LLC on the grounds that a boundary line adjustment in 1991 rendered the grandfather clause inapplicable. The court found that the lot line readjustment merely "clarified the common boundary of the property as it had always existed" and that the money exchanged between the parties was for expenses incurred and damages, and not for the land itself. The court affirmed the ZBA's findings that no conveyance occurred and that the property did not lose its preexisting non-conforming use status. *Schupak v. Zoning Board of Appeals of the Town of Marbletown*, 819 N.Y.S.2d 335 (N.Y. App. Div. 2006 *)*.

Other land use cases of interest decided by the New York courts include: *Waldbaum, Inc. v. Inc. Vill. of Great Neck*, 814 N.Y.S.2d 893 (N.Y. Sup. Ct. 2006) (improper segmentation under SEQRA); *Buffalo Southern Railroad Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y. 2006) (preemption of village's exercise of eminent domain of a rail facility under federal statute); *Ryder v. City of New York*, 821 N.Y.S.2d 227 (N.Y. App. Div. 2006) (narrow interpretation of law protecting owners whose buildings are removed under the Public Health Law by order of New York City DEP); *Lafiteau v. Guzewicz*, 2006 NY Slip Op 52046U (conclusory allegations insufficient basis for neighbors' request for preliminary injunction of special use permit); *Eadie v. Town Bd. Of N. Greenbush*, 821 N.Y.S.2d 142 (N.Y. 2006) (Town Law Section 265(1) 100-foot requirement is to be measured from the boundary of the actual rezoned area, not from the border of the affected parcel; statute of limitations for an Article 78 challenge to a rezoning that raises SEQRA issues begins to run when rezoning is adopted rather than from the date of adoption of the SEQRA findings statement); *In re C/S 12th Avenue LLC v. The City of New York*, 815 N.Y.S.2d 516 (N.Y. App. Div. 2006) (city acted in accordance with Eminent Domain Procedural Law (EDPL) Article 2 and met the "hard look" and "reasonable elaboration" requirements under SEQRA); *In re Zupa v. Zoning Board of Appeals of Town of Southold*, 817 N.Y.S.2d 672 (N.Y. App. Div. 2006 ) (zoning board of appeals may attach conditions to the grant of an area variance when the conditions are reasonable, directly related to the use of the property in question, and in accordance the underlying purpose of the zoning ordinance).