

Ulster County Planning  
Recent Land Use Cases

George Lithco  
Jacobowitz and Gubits, LLP  
Walden, New York  
(845) 778-2121  
gwl@jacobowitz.com

Limits on Modifying a Final Plan: Rescinding Final Approval...

Memorandum: Plaintiff commenced this action seeking, inter alia, a judgment declaring that the final plat filed by Rockingham Estates, LLC (defendant) in the Erie County Clerk's Office is null and void. Plaintiff contends on its appeal that Supreme Court erred in denying its motion for summary judgment on the complaint, and defendant contends on its cross appeal that the court erred in denying its cross motion for summary judgment dismissing the complaint. We agree with plaintiff that the court erred in denying that part of its motion seeking a declaration that defendant's final plat is null and void, and we therefore modify the order accordingly.

Plaintiff established, and defendant did not dispute, that the preliminary plat submitted by defendant and approved by the Town of Amherst Planning Board (Planning Board) included a public sanitary sewer easement. The final plat, however, described the sewer easement as private, rather than public. Town Law § 276 (4) (b) and (d) define a preliminary and final plat, as do the pertinent provisions of the Town of Amherst Subdivision Regulations ([Regulations]; see Regulations former part II, §§ 1-16.5, 1-16.6). Those definitions support plaintiff's contention that a final plat should differ from the preliminary plat, if at all, only by any modifications that were required by the Planning Board at the time of approval of the preliminary plat. Indeed, "a planning board may not modify a preliminary plat and then disapprove of the layout of a final plat that conforms to the modifications prescribed by the board' and absent new information, a subsequent modification or rejection of a preliminarily approved subdivision layout is an arbitrary and capricious act subject [\*3] to invalidation" (Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven, 78 NY2d 608, 612, 585 N.E.2d 778, 578 N.Y.S.2d 466, quoting Matter of Sun Beach Real Estate Dev. Corp. v Anderson, 98 AD2d 367, 373, 469 N.Y.S.2d 964, aff'd 62 NY2d 965, 468 N.E.2d 296, 479 N.Y.S.2d 341).

In addition, former part III, section 5-1 of the Regulations provides that "[t]he final plat shall conform to the layout shown on the approved preliminary plat plus any recommendations made by the Planning Board." That was not the case here because the material submitted with the preliminary plat depicted a public easement, but the final plat depicted a private easement despite the absence of any Planning Board requirement for such a modification. We therefore agree with plaintiff that the Planning Board may rescind its approval of the final plat, which was approved in error (see Matter of Reiss v Keator, 150 AD2d 939, 941-942, 541 N.Y.S.2d 864; see generally Matter of Parkview Assoc. v City of New York, 71 NY2d 274, 281-282, 519 N.E.2d 1372, 525 N.Y.S.2d 176, rearg denied 71 NY2d 995, 524 N.E.2d 879, 529 N.Y.S.2d 278; cert denied 488 U.S. 801, 109 S. Ct. 30, 102 L. Ed. 2d 9).

Town of Amherst v Rockingham Estates, LLC, 2012 N.Y. App. Div. LEXIS 6359, 1-3 (N.Y. App. Div. 4th Dep't Sept. 28, 2012)

Zoning a Spot is not necessarily Spot Zoning

The Supreme Court incorrectly determined that the adoption by the Board of Trustees of the Village of Wesley Hills (hereinafter the Board) of a resolution enacting Local Law No. 3 (2006) of the Village of Wesley Hills (hereinafter the Local Law) constituted unlawful spot zoning. "The Local Law [, which added] Arborist Services, Landscape Services, and/or Wholesale Nurseries' as a special permit use within the R-35 zoning district" (Matter of Marcus v Board of Trustees of Vil. of Wesley Hills, 62 AD3d at 801) did not allow for a use which was totally different from that allowed in the surrounding area and was in conformity with the comprehensive plan of the Village of Wesley Hills (see Rodgers v Village of Tarrytown, 302 NY 115, 96 N.E.2d 731; Matter of Stone v Scarpato, 285 AD2d 467, 728 N.Y.S.2d 61). Although there is no doubt that the Local Law was adopted primarily for the benefit of the plant nursery and arborist business operated by Ira Wickes and Rockland Tree Expert, Inc.,

doing business as Ira [\*\*593] Wickes Arborist (hereinafter together Wickes), zoning changes are not invalid merely because a single parcel is [\*1065] involved in or benefitted by said changes (see *Rodgers v Village of Tarrytown*, 302 NY at 124). In any event, the Local Law applies to all parcels in the R-35 zoning district which meet certain requirements, and it is undisputed that the special permit it authorizes could be [\*\*\*4] utilized by two other properties within the Village (id.). Also, there is no evidence in the record that Wickes's use of the property in compliance with the Local Law and a special permit issued thereunder would be detrimental to owners of other properties in the area (id.).

*Matter of Marcus v. Board of Trustees of Vil. of Wesley Hills*, 96 A.D.3d 1063, 1064-1065 (N.Y. App. Div. 2d Dep't 2012)

#### Upholding Conditions

The Supreme Court should have also denied those branches of the petition which were to annul conditions 6, 21, 22, and so much of conditions 5 and 15 as relate to on-site improvements. Conditions may be properly imposed upon subdivision approval "so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property" (*Matter of International Innovative Tech. Group Corp. v Planning Bd. of Town of Woodbury, N.Y.*, 20 AD3d 531, 533, 799 N.Y.S.2d 544, quoting *Matter of Mackall v White*, 85 AD2d 696, 696, 445 N.Y.S.2d 486; see *Town Law* § 276; *Code of the Town of Cortlandt* § 265-8).

Here, requisite findings were made for the imposition of a recreational fee (see *Town Law* § 277[4]; *Code of the Town of Cortlandt* § 265-11[B][3]; [\*\*\*7] *Matter of Bayswater Realty & Capital Corp. v Planning Bd. of Town of Lewisboro*, 76 NY2d 460, 467-469, 560 N.E.2d 1300, 560 N.Y.S.2d 623; *Matter of Sepco Ventures v Planning Bd. of Town of Woodbury*, 230 AD2d 913, 646 N.Y.S.2d 862). In addition, the inspection fee was proper (see *Kencar Assoc., LLC v Town of Kent*, 27 AD3d 423, 812 N.Y.S.2d 587). Moreover, those conditions which required completion of specific construction details to the satisfaction of the Town's Director of Technical Services were proper, and not an unconstitutional delegation of authority (see *Code of the Town of Cortlandt* § 77-2). The additional conditions challenged by the petitioner were properly upheld.

*Matter of Matter of Kirquel Dev., Ltd. v Planning Bd. of Town of Cortlandt*, 96 A.D.3d 754, 756 (N.Y. App. Div. 2d Dep't 2012)

#### Reversing ZBA Denial of a Special Exception Use

"Unlike a use variance, a special exception allows the property owner to put his property to a use expressly permitted by the ordinance . . . subject only to "conditions" attached to its use to minimize its impact on the surrounding area" (*Matter of Capriola v Wright*, 73 AD3d 1043, 1045, 900 N.Y.S.2d 754, quoting *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243-244, 282 N.E.2d 606, 331 N.Y.S.2d 645; see *Matter of Navaretta v Town of Oyster Bay*, 72 AD3d 823, 825, 898 N.Y.S.2d 237). "The significance of this distinction is that the inclusion 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" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195, 774 N.E.2d 727, 746 N.Y.S.2d 662, quoting *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d at 243). "Thus, the burden of proof on an owner seeking a special exception is lighter than that on an owner seeking a variance" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d at 195). An owner seeking a special exception permit is only "required to show compliance with any legislatively imposed conditions on an otherwise permitted use" (id.).

Here, the ZBA's conclusion that the proposed development would fail to comply with the applicable legislatively imposed conditions (see *Code of the Town of Islip* §§ 68-416, 68-417), and its concomitant determination to deny the petitioner's application, was arbitrary and capricious. The neighboring property owners claimed that the granting of the special exception permit would, among other things, exacerbate existing traffic congestion and decrease the value of their properties. However, these claims were uncorroborated by empirical data, and were contradicted by the expert testimony offered by the petitioner, as well as the opinion of the Town of Islip Department of Planning and Development. Accordingly, the ZBA's determination to deny the petitioner's application lacked a rational basis, and the Supreme Court should have granted the

petition. Thus, we remit the matter to the ZBA for the purpose of issuing the special exception permit, subject to any conditions or restrictions as may be appropriate.

Matter of Kabro Assoc., LLC v. Town of Islip Zoning Bd. of Appeals, 95 A.D.3d 1118, 1119-1120 (N.Y. App. Div. 2d Dep't 2012)

Another Municipality Can Challenge GML 239 Procedures

The Supreme Court also properly granted those branches of the respective motions of the Town defendants and Scenic which [\*1105] were pursuant to CPLR 3211(a)(7) and 7804(f) to dismiss the sixth cause of action, which alleged that the rezoning violated General Municipal Law § 239-nn and, thus, was affected by error of law (see CPLR 7803[3]). That section of the General Municipal Law provides, in pertinent part, that HN2a legislative body having jurisdiction in a municipality shall give notice to an adjacent municipality when hearings are to take place regarding various proposed zoning actions affecting land located within five hundred feet of the adjacent municipality, and that "[s]uch adjacent municipality may appear and be heard" at the hearings (General Municipal Law § 239-nn[5]; see General Municipal Law § 239-nn[3]). The purpose of the statute is to provide "an opportunity for abutting municipalities to participate in a public hearing held by the municipality [undertaking planning and zoning actions which may impact on those neighboring municipalities] and provide their input on the proposed planning or zoning action [so as to] encourage intergovernmental cooperation and area planning for land use among neighboring municipalities in New York state" (Senate Introducer Mem in Support, Bill Jacket, L 2005, ch 658, at 3). It is undisputed that notice was provided here and that the Village did, in fact, participate in the public hearings relating to the subject zoning action. The Supreme Court properly concluded that the statute does not create a right of action based on the Town's alleged disregard of the public policy of encouragement of the spirit of cooperation articulated in the statute.

Moreover, the Village has standing to assert the fourth cause of action. The purpose of General Municipal Law § 239-m, which governs the review process by a county planning agency [\*\*\*12] of a municipality's proposed planning and zoning actions, is to "bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction" (General Municipal Law § 239-l[2]) and by so doing to facilitate regional review of land use proposals [\*\*152] that may be of regional concern" (*Matter of Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d at 88-89). "Because [an] adjoining municipalit[y] necessarily [has] the same interest [as Individual neighbors] in the regional review that General Municipal Law § 239-m requires, the Village[ ] also [has] standing to assert such claims" (*id.* at 89).

*Village of Pomona v Town of Ramapo*, 94 A.D.3d 1103, 1104-1105 (N.Y. App. Div. 2d Dep't 2012)

Town Board conditions on site plan invalid

We agree with petitioners, however, that the Town Board abused its discretion and acted arbitrarily and capriciously in imposing conditions three through eight, i.e., the conditions for a special permit, upon its approval of the amended site plan. HN4 "It is uncontroverted that a town . . . board [may] impose reasonable conditions on the approval of a site plan to further the health, safety and general welfare of the community . . . and its decision, 'if made within the scope of the authority granted it by the local government, will not be set aside unless it is arbitrary or unlawful'" (*Matter of Castle Props. Co. v Ackerson*, 163 AD2d 785, 786, 558 NYS2d 334 [1990]; see also *Matter of Twin Town Little League v Town of Poestenkill*, 249 AD2d 811, 813, 671 NYS2d 831 [1998], lv denied 92 NY2d 806, 700 NE2d 320, 677 NYS2d 781 [1998]). Indeed, pursuant to Town Law § 274-a (4), "[t]he authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan." Such conditions, however, "must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it." (*Matter of St. Onge v Donovan*, 71 NY2d 507, 515, 522 NE2d 1019, 527 NYS2d 721 [1988], quoting *Matter of Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105, 324 NE2d 870, 365 NYS2d 506 [1975]). Further, "[a] planning board may not impose conditions that are not reasonably designed to mitigate some demonstrable defect" (*Matter of Richter v Delmond*, 33 AD3d 1008, 1010, 824 NYS2d 327 [2006]).

Here, conditions three through eight of the resolution required petitioners to modify their site plan "[i]n accordance with the special conditions set forth in" Town Code § 240-25 (D) (4)-(5), i.e., the

special conditions for a special permit to operate a motor vehicle service and repair facility or motor vehicle sales facility. HN5 Pursuant to section 240-25 (A), the Town Zoning Board of Appeals "may authorize the issuance of a special permit for those uses requiring a special permit pursuant to each zoning district's regulations" (emphasis added). Here, however, the properties are located in a Commercial C: Heavy Commercial District, in which motor vehicle sales, service and repair are permitted uses upon [\*\*\*9] site plan review (§ 240-17 [A] [4]-[5]). Thus, a special permit is not required. Indeed, respondent Emanuele Falcone, Town Supervisor, admitted in his affidavit in support of the Town's motion to dismiss the petition that "the Town Board took note that motor vehicle service and repair and motor vehicle sales facilities are subject to special permit approval in every zoning district wherein such uses are permitted, except the Commercial C: Heavy Commercial District" (emphasis added). Nevertheless, Falcone stated that, "given the long and continuing history of noncompliance with Town Code provisions by . . . Thad Kempisty, the Town Board decided to adopt and apply the special permit conditions relating to the operation of motor vehicle sales and motor vehicle service and repair, as set forth in [section 240-25 (D)] . . . ."

Thus, it is apparent from the record that the Town's determination to impose special permit conditions on its approval of the amended site plan was based upon Thad Kempisty's alleged history of zoning violations and the acrimonious relationship between the Town and petitioners, rather than upon the need to "minimiz[e] [any] adverse impact that might result from the grant of the [application]" (Twin Town Little League, 249 AD2d at 813; see Richter, 33 AD3d at 1010). The Town's determination with respect to conditions three through eight runs afoul of the "fundamental principle" that HN6"conditions imposed on the [approval of a site plan] must relate only to the use of the property that is the subject of the [site plan] without regard to the person who owns or occupies that property" (St. Onge, 71 NY2d at 511).

Matter of Kempisty v. Town of Geddes, 93 A.D.3d 1167, 1169-1171 (N.Y. App. Div. 4th Dep't 2012)

#### ZBA Interpretation on Mining Use Invalidated

In support of their argument that mineral resource uses are prohibited in an agricultural district, respondents note that "[i]t is a basic tenet of zoning jurisprudence [\*\*\*6] that an ordinance which lists permitted uses excludes any uses that are not listed" (Incorporated Vil. of Old Westbury v Alljay Farms, 100 AD2d 574, 575, 473 NYS2d 505 [1984], mod 64 NY2d 798, 476 NE2d 315, 486 NYS2d 916 [1985]; see Matter of Moody Hill Farms v Zoning Bd. of Appeals of Town of N. East, 199 AD2d 954, 956, 605 NYS2d 560 [1993], lv denied 83 NY2d 755, 634 NE2d 979, 612 NYS2d 378 [1994]). As mineral resource uses are not listed on the zoning schedule as permitted uses in an agricultural district (either as of right or with a special use permit), the argument continues, it necessarily follows that such uses are prohibited.

The flaw in respondents' argument on this point is that mineral resource uses are not expressly listed as permitted uses anywhere in the zoning schedule. Hence, a literal application of the foregoing legal principle to the Town's zoning schedule would lead to the inevitable conclusion that mining or quarrying operations are not permissible anywhere in the Town, which plainly is not the case--as evidenced by, among other things, the existing mining/quarrying operations on the west side of Quarry Road.n2 That mineral resource uses are both permissible under and contemplated by the Town's zoning law--albeit in some undefined location--also [\*\*\*7] is apparent upon review of the provision of the law governing the issuance of special use permits (see Town of Sullivan Zoning Law art V, § 9 [C]). HN3This provision sets forth the additional standards of review that are to be employed when evaluating an application for a special use permit for certain expressly delineated uses--including, insofar as is relevant here, mineral resource uses. Simply put, if the issuance [\*1187] of a special use permit for mineral resource uses was not permissible under the Town's zoning law, there would be no need to specify the particular standards to be considered in the evaluation thereof. Although respondents argue that this section of the Town's zoning law only speaks to the issuance of special use permits for mineral resource uses where such uses are allowed, that claim only begs the question of where--on the face of the zoning schedule--that might be.

Although we appreciate that a municipality cannot be expected--when crafting a zoning ordinance--to anticipate each and every potential use to which a property [\*\*\*686] owner may wish to put his or her property, the zoning law here is, in our view, so poorly written with respect to identifying the zoning district(s) within which mineral resource uses are permitted as to be ambiguous. As such ambiguity must be resolved in favor of petitioners (see Matter of Arceri v Town of Islip Zoning Bd. of

Appeals, 16 AD3d at 412; Matter of Nicklin-McKay v Town of Marlborough Planning Bd., 14 AD3d at 863; Matter of Bonded Concrete v Zoning Bd. of Appeals of Town of Saugerties, 268 AD2d at 774), we conclude that the ZBA's determination that "mineral resource uses are prohibited in agricultural districts under the 1979 [zoning law], either with or without the issuance of a special use permit," is unreasonable and irrational. Accordingly, the ZBA's determination is annulled, and the underlying petition is granted to that extent.

Matter of Subdivisions, Inc. v. Town of Sullivan, 92 A.D.3d 1184, 1186-1187 (N.Y. App. Div. 3d Dep't 2012)

Positive Declaration Based on Future Use Invalidated

Here, the Board properly determined that petitioner's proposal was an unlisted action (see generally Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie, 3 NY3d 508, 518, 822 NE2d 339, 789 NYS2d 88, n 8 [2004]). As such, a DEIS was required only if the Board rationally determined that petitioner's proposed action included the potential for at least one significant adverse environmental impact (see ECL 8-0109 [2]; 6 NYCRR 617.7 [a] [1]; Matter of Rafferty v Town of Colonie, 300 AD2d 719, 722, 752 NYS2d 725 [2002]). On the record before us, we find that the Board failed to provide a reasoned elaboration for its determination to require a DEIS. The only "action" for which petitioner sought approval from the Board was the legal division of one parcel of land into two separate parcels of land. There is absolutely no record evidence that petitioner--or, indeed, any prospective purchaser--had any solidified plans to develop either parcel. Nor is there any evidence to establish, and the Board completely failed to articulate, how the proposed action--the simple division of the property on a map--could potentially alter drainage flow or patterns or surface water runoff, affect air quality, affect public health and safety, result in the diminution of open space or affect the character of the existing community by changing the density of land use. The concerns of the Village respondents regarding petitioner's possible future abandonment of the property containing the building with asbestos are purely speculative and do not provide a rational basis for the Board's determination (see generally Seaview Assn. of Fire Is. v Department of Env'tl. Conservation of State of N.Y., 123 AD2d 619, 620, 506 NYS2d 775 [1986]). Nor do we find persuasive their contention that petitioner's application constitutes improper segmentation. Inasmuch as we [\*1454] find the Board's determination to be arbitrary and capricious, it must be reversed.

Matter of Center of Deposit, Inc. v. Village of Deposit, 90 A.D.3d 1450, 1453-1454 (N.Y. App. Div. 3d Dep't 2011)

ZBA Appellate Authority

Authority to hear appeals. Any person allegedly aggrieved by a decision, determination, act or refusal to act, of the Building Inspector may, within 60 days of such decision, determination, act or failure to act, file an appeal with the Board of Appeals. Such request shall clearly state the decision, determination, act or failure to act, of the Building Inspector from which the appeal is taken.

Authority to interpret. The Board of Appeals shall, upon proper request, interpret any provision of this chapter about which there is uncertainty, lack of understanding or misunderstanding, ambiguity or disagreement, and shall determine the exact location of any zoning district boundary about which there may be uncertainty or disagreement.

Subdivision Waiver

Subdivision waivers. The Planning Board may waive, subject to appropriate conditions, the requirements of these regulations relative to the provisions and design of any or all such public lands and improvements which, in its judgment of the special circumstances of a particular plat or plats, are not requisite to the interests of the public health, safety and general welfare of the Town or are not appropriate because of inadequacy or lack of connecting facilities to or in the proximity of the proposed subdivision.

-----  
Authority to hear appeals. Appeals. The Board of Appeals shall hear and decide appeals from and review any order, requirement, decision or determination made by the Building Inspector under this chapter in accordance with the procedure set forth herewith.

-----  
ZBA Referrals to the Planning Board. At least 20 days before the date of hearing held in connection with any appeal or application submitted to the Board of Appeals, said Board shall transmit to the Planning Board a copy of said appeal or application and shall request that the Planning Board submit to the Board of Appeals its advisory opinion on said appeal or application. The Planning Board shall submit a report of such advisory opinion prior to the date of said public hearing. The failure of the Planning Board to submit such report shall be interpreted as a favorable opinion for the appeal or application.

Zoning Amendment: advisory report by Planning Board. Every proposed amendment, unless initiated by the Planning Board, shall be referred to the Planning Board. The Planning Board shall report its recommendations thereon to the Town Board, accompanied by a full statement of the reasons for such recommendations, prior to the public hearing. If the Planning Board fails to report within a period of 45 days from the date of receipt of notice or such longer time as may have been agreed upon by it and the Town Board, the Town Board may act without such report. If the Planning Board disapproves the proposed amendment or recommends modification thereof, the Town Board shall not act contrary to such disapproval or recommendation except by the adoption of a resolution fully setting forth the reasons for such contrary action.

What's the difference between a site plan and a subdivision plan?

"A site plan is not a subdivision plat. A site plan usually evidences the proposed development of a single lot, whether for one principal building and permitted accessory buildings, or for a [\*\*\*561] group of buildings (such as a group residential [\*\*1079] development or an industrial park), intended to remain in one ownership. A subdivision plat contemplates division of one tract into a number of smaller lots with eventual separate ownership of each such lot. The authority which may be conferred upon planning boards with respect to subdivision plats, and the collateral powers of the board and consequences of its determination with respect thereto, are set forth specifically in the planning enabling acts. Site plans are not even mentioned in such acts. A site plan is a plan required to be submitted by the builder, showing the proposed location of the buildings, parking areas, and other installations on the plot, and their relation to existing conditions, such as roads, neighboring land uses, natural features, public facilities, ingress and egress roads, interior roads, and similar features" (2 Rathkopf, Zoning and Planning [4th ed], § 30.04[1], pp 30-13 -- 30-14

Can Planning Boards interpret zoning laws? Yes.

"We accord great deference to a planning board's interpretation of a zoning ordinance" (Matter of North Country Citizens for Responsible Growth, Inc. v Town of Potsdam Planning Bd., 39 AD3d 1098, 1100, 834 NYS2d 568 [2007]; see Appelbaum v Deutsch, 66 NY2d 975, 977-978, 489 NE2d 1275, 499 NYS2d 373 [1985]; Matter of Committee to Protect Overlook, Inc. v Town of Woodstock Zoning Bd. of Appeals, 24 AD3d 1103, 1104, 806 NYS2d 748 [2005], lv denied [\*\*651] 6 NY3d 714, 856 NE2d 919, 823 NYS2d 355 [2006]), and will uphold its reasonable construction of a term that is not otherwise defined in the zoning code (see Appelbaum v Deutsch, 66 NY2d at 977-978). Here, petitioners rely on definitions of a "complete" application as found in the Town Law (see Town Law § 276 [5] [c]), SEQRA (see ECL 8-0109 [5]), and the Ulster County Land Use Referral Guide to support their claim that the Planning Board could not rationally have interpreted the savings clause to include Wal-Mart's applications. However, the Planning Board was not required to import a definition from other statutes or sources having purposes different from the savings clause at issue here (see Appelbaum v Deutsch, 66 NY2d at 978). Rather, given both its own experience and the clear purpose of the savings clause to preserve the status quo for certain applications made under the former code, it was reasonable for the Planning Board to consider applications such as Wal-Mart's--where the former code's submission requirements were met and several public hearings had been held prior to the new code's enactment--to be "complete" (see id.). Accordingly, the Planning Board's decision to review the applications under the former code was not irrational and the approvals granted thereon will not be annulled (see Matter of North Country Citizens for Responsible Growth, Inc. v Town of Potsdam Planning Bd., 39 AD3d at 1100).

Matter of Shop-Rite Supermarkets, Inc. v. Planning Bd. of The Town of Wawarsing, 82 A.D.3d 1384, 1387 (N.Y. App. Div. 3d Dep't 2011)

Can Planning Boards interpret zoning laws? No.

While the petitioners are correct that HN1a town planning board is not authorized to interpret the provisions of the local zoning law (see Matter of Gershowitz v Planning Bd. of Town of Brookhaven, 52 NY2d 763, 765, 417 NE2d 1000, 436 NYS2d 612 [1980]; Matter of Jamil v Village of Scarsdale Planning Bd., 24 AD3d 552, 554, 808 NYS2d 260 [2005]), nothing in the Planning Board's resolution approving the site plan purports to evaluate the proposed use of the property in light of the zoning code or to otherwise interpret the provisions of the zoning code. The petitioners' suggestion that the Planning Board necessarily made an implicit interpretation of the zoning code merely by approving the site plan is both unsound as a general proposition and unsupported by the record.

East Moriches Prop. Owners' Assn. v. Planning Bd. of Town of Brookhaven, 66 A.D.3d 895, 897 (N.Y. App. Div. 2d Dep't 2009)

Can Planning Boards ignore variances? No\*.

To the extent that respondent's denial of the site plan application was based on the ground that the proposed store was a nonconforming use under the Zoning Law, we note that respondent was bound by [\*1259] the use variance previously granted by the Town of Erwin Zoning Board for the construction of the store (see *Matter of Gershowitz v Planning Bd. of Town of Brookhaven*, 52 NY2d 763, 765, 417 NE2d 1000, 436 NYS2d 612 [1980]; [\*\*806] *Matter of Jamil v Village of Scarsdale Planning Bd.*, 24 AD3d 552, 554, 808 NYS2d 260 [2005]).

Matter of Lodge Hotel, Inc. v. Town of Erwin Planning Bd., 62 A.D.3d 1257, 1258-1259 (N.Y. App. Div. 4th Dep't 2009)

Can Planning Boards interpret zoning? No.

Next, we find merit in petitioners' argument that the Planning Board lacked jurisdiction to determine that the water collection and transport proposed by Good Water was a special permit use. The Code identifies the relevant special permit uses as "Water bottling and related uses." In its final form, however, the use proposed by Good Water involved the sale of spring water for nonpotable purposes, such as filling swimming pools, and it did not involve the bottling of water at any location. Thus, there simply was no water bottling to which any use of the Poncics' land could be related. As a result, Good Water's application presented the preliminary [\*\*655] question of whether the proposed use was sufficiently similar to the uses permitted by the Code. Significantly, HN3only the ZBA is authorized to interpret the Code's provisions (see Town Zoning Code §116-68 [A]), and HN4the Code expressly provides that a special use not specifically listed shall be considered prohibited unless it is deemed a "similar use" by the ZBA (see Town Zoning Code §116-10 [B]). Even though petitioners called the Planning Board's attention to these provisions and its obligation to request an interpretation of the Code from the ZBA (see Town Zoning Code §116-68 [A] [2] [a]), the Planning Board made no such request and instead determined on its own that Good Water's application was for a permitted use.

Supreme Court did not address this issue of whether the Planning Board was authorized to interpret the Code. Rather, the court justified the grant of a special permit by its own interpretation of the Code's provision regarding water bottling to include the use proposed by [\*\*\*5] Good Water. However, because the Code makes clear that such an interpretation is for the ZBA to make in the first instance and the ZBA has not done so here, the court's reading of the Code's provision was premature (see *Matter of Barreca v DeSantis*, 226 AD2d 1085, 1086, 641 NYS2d 953 [1996]).

Absent a referral to the ZBA, the Planning Board's approval of Good Water's application was in excess of its authority and is of no effect (see e.g. *Matter of Eastport Alliance v Lofaro*, 13 AD3d 527, 528-529, 787 NYS2d 346 [2004], lv dismissed 5 NY3d 846, 847, 839 NE2d 900, 805 NYS2d 546 [2005]; *Matter of DeMarco v Village of Elbridge*, 251 AD2d 991, 992, 674 NYS2d 245 [1998]; *Matter of Moriarty v Planning Bd. of Vil. of Sloatsburg*, 119 AD2d 188, 196-197, 506 NYS2d 184 [1986], lv denied 69 NY2d 603, 504 NE2d 396, 512 NYS2d 1026 [1987]). For that reason, Supreme Court should have granted the petition to the extent of remitting the matter to the Planning Board with the direction that it request a decision by the ZBA as to whether Good Water's proposed use is a "similar use," and thereafter make a new ruling on Good Water's application (see *Matter of Eastport Alliance v Lofaro*, 13 AD3d at 529; *Matter of Moriarty v Planning Bd. of Vil. of Sloatsburg*, 119 AD2d at 199).

Matter of Woodland Community Assn. v. Planning Bd. of Town of Shandaken, 52 A.D.3d 991, 992-993 (N.Y. App. Div. 3d Dep't 2008)

*Can Planning Boards interpret subdivision regulations? Yes. PS. And the ZBA can't...*

Contrary to the petitioner's contention, the Planning Board's interpretation of its subdivision regulations was not unreasonable or irrational (see *Matter of Hoag v Zoning Bd. of Appeals of Town of Clinton*, 27 AD3d 742, 815 NYS2d 603 [2006]; *Matter of Olivieri v Planning Bd. of Town of Greenburgh*, 229 AD2d 584, 645 NYS2d 545 [1996]).

*Matter of Spears v. Town of Cortlandt Planning Bd., 44 A.D.3d 866, 867 (2d Dep't 2007)*

*Can Planning Boards interpret zoning regulations? Yes, as long as they're deeming....*

First, the individual petitioners contend that the Planning Board's approval of the Wal-Mart Supercenter should be annulled as irrational, arbitrary and capricious because the Wal-Mart Supercenter is neither an appropriate use in the C-C and R-A zoning districts, nor in the P-D overlay district. HN1We accord great deference to a planning board's interpretation of a zoning ordinance and "its determination will be upheld if it has a rational basis and is supported by substantial evidence" (*Matter of Committee to Protect Overlook, Inc. v Town of Woodstock Zoning Bd. of Appeals*, 24 AD3d 1103, 1104-1105, 806 NYS2d 748 [2005], lv denied 6 NY3d 714, 856 NE2d 919, 823 NYS2d 355 [2006]; see *Appelbaum v Deutsch*, 66 NY2d 975, 977-978, 489 NE2d 1275, 499 NYS2d 373 [1985]; *Matter of Kantor v Olsen*, 9 AD3d 814, 815, 780 NYS2d 443 [2004]). Also, "[w]here substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196, 774 NE2d 727, 746 NYS2d 662 [2002]).

Pursuant to Town of Potsdam Zoning Code §110-7 (C) (8) (c), "[u]ses otherwise permitted in the R-A and C-C districts and uses permitted by special exception in the R-A and C-C districts as well as those uses deemed appropriate by the Town Planning Board . . . may be permitted in the P-D overlay district." Retail stores are a permitted use in a C-C district (see Town of Potsdam Zoning Code § 110-7 [C] [4] [b] [8]), while parking lots, gasoline stations and garages are permitted in a C-C district by special exception (see Town of Potsdam Zoning Code § 110-7 [C] [4] [c] [5], [18]). Accordingly, the Planning Board deemed Wal-Mart's proposed use as an "appropriate use[ ] within the P-D District . . . in accordance with the review procedures outlined in [Town of Potsdam Zoning Code § 110-7 (C) (8) (d)]." The use was deemed appropriate [\*\*\*6] upon a finding that the Wal-Mart site plan was "in harmony with the orderly development of the district" and was not "more objectionable to nearby properties . . . than would be the operations of any permitted use" (Town of Potsdam Zoning Code § 110-8 [A] [4] [a], [b]). Also, the Wal-Mart [\*1101] Supercenter proposal met the purpose of a P-D overlay district, which is "[t]o encourage planned development in the transportation corridor between Route 11 and the Conrail Railroad between Canton and Potsdam" (Town of Potsdam Zoning Code § 110-7 [C] [8] [a]).

Indeed, the Town of Potsdam's Community Development Strategy, published in 2004, specifically stated that "[r]etail development of all sizes should be encouraged in the highway corridor areas" [emphasis added], which includes the location of the proposed Wal-Mart. Although the Wal-Mart site plan certainly involves more intense uses than those currently in the area, there was nonetheless substantial evidence to support a finding that such use was permitted within a P-D overlay district. While a contrary determination may well have been supported by this record, there was a rational basis supporting the Planning Board's determination, which, therefore, must be upheld (see *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, supra at 196).

*Matter of North Country Citizens for Responsible Growth, Inc. v. Town of Potsdam Planning Bd., 39 A.D.3d 1098, 1100-1101 (N.Y. App. Div. 3d Dep't 2007)*

Realm, LLC (hereinafter Realm), is the owner of a parcel of real property, located primarily in the Village of Scarsdale, upon which it seeks to construct an assisted living facility for senior citizens. The portion of the property lying within the Village is situated within a residential zone in which a hospital or a nursing home may be constructed pursuant to a special use permit (see Scarsdale Village Code § 310-7F[3], [\*\*261] [4]; § 310-89A). The Scarsdale Village Code does not include a provision for the construction of an assisted living facility. In 1998, however, in reviewing Realm's proposal, the Village's building inspector determined that an assisted living facility was a variety of nursing home and, thus, was a permitted use of Realm's property, subject to the issuance of a special use permit by the Village of Scarsdale Planning Board.

During the planning and environmental review process, the petitioners, who reside in a home adjacent to Realm's property, added their voices to the [\*\*\*3] opposition. In 2002 the petitioners challenged the building inspector's determination that Realm's proposed assisted living facility was a variety of nursing home, but the Village of Scarsdale Zoning Board of Appeals rejected their challenge as untimely. The Supreme Court upheld that determination in 2003 and dismissed the petitioners' prior CPLR article 78 proceeding. The petitioners' appeal from that order was dismissed for neglect to prosecute.

Insofar as relevant to this appeal, the Planning Board issued the requested special use permit and related approvals in April 2003, incorporating the 1998 determination of the Village's building inspector that Realm's proposed assisted living facility [\*554] is a variety of nursing home permitted in the subject residential district. The petitioners commenced this proceeding, inter alia, to challenge that determination. The Supreme Court denied the petition and dismissed the proceeding. We affirm.

Contrary to the petitioners' contentions, the Planning Board did not act in an arbitrary and capricious manner insofar as it relied upon the determination of the building inspector that a proposed facility was permitted as a special use within the relevant residential zone.HN1The Planning Board is without power to interpret the provisions of the local zoning law, a power which is vested exclusively in the building inspector and the Zoning Board of Appeals. Thus, contrary to the petitioners' contention, the Planning Board was without authority to deny the approvals sought by Realm based upon a contrary interpretation of the zoning ordinance.HN2

In any event, the building inspector's interpretation of the zoning law, which is entitled to deference, was not irrational (see *Matter of New York Botanical Garden v Board of Stds. & Appeals of the City of N.Y.*, 91 NY2d 413, 419, 694 NE2d 424, 671 NYS2d 423 [1998]).

*Matter of Jamil v. Village of Scarsdale Planning Bd.*, 24 A.D.3d 552, 553-554 (N.Y. App. Div. 2d Dep't 2005)

*Can a Planning Board act on the Building Inspector's interpretation. Yes.*

HN2The Planning Board is empowered to assure the health, [\*471] safety, and general welfare of the people of the Town of East Hampton. In doing so, it must consider standards and appropriate specifications in accordance with the Comprehensive Plan, the Town Code, and the rules and regulations of various coordinating agencies (see, East Hampton Town Code § 131-1.05 [F]). For example, stripping of natural ground [\*\*\*5] cover must be minimized, appropriate setbacks are required to preserve natural features and systems, and all stormwater drainage and runoff from buildings and driveways must be contained within the perimeter lines of a site (see, East Hampton Town Code § 131-1.05 [I], [J]). Generally, a planning board is within its power in imposing conditions related to fences, safety devices, landscaping, access roads, and other factors incidental to comfort, peace, enjoyment, health, or safety of the surrounding area (see, 2 Anderson, *New York Zoning Law and Practice* § 21.04, 21.09-21.18 [3d ed]).

*Koncelik v. Planning Bd. of E. Hampton*, 188 A.D.2d 469, 470-471 (N.Y. App. Div. 2d Dep't 1992)

*Can a Planning Board waive a bond for subdivision improvements? No.*

Finally, with respect to Karner Meadows, all parties concede that this [\*\*832] court's decision in *Matter of Friends of Pine Bush v Planning Bd.* (86 AD2d 246, affd on opn below 59 NY2d 849) makes [\*\*10] it necessary to declare the waiver of construction of improvements or the posting of a performance bond illegal. Respondents, however, argue that the remedy is simply to remit the matter to respondent planning board for compliance, rather than to nullify the plat approval. HN5Section 33 of the General City Law provides for prospective compliance, using language such as "[before] the approval by the planning board", "[in] approving such plats", and "[in] making such determination". The decision of this court also stated that: " section 33 of the General City Law requires that owners install improvements or post a performance bond sufficient to cover the full cost thereof prior to approval of a subdivision by the City of Albany Planning Board" ( *Matter of Friends of Pine Bush v Planning Bd.*, supra, p 250; emphasis added). Consequently, Special Term acted properly in determining that the approval should be nullified on this ground.

*Save Pine Bush, Inc. v. Planning Bd. of Albany, 96 A.D.2d 986, 988 (N.Y. App. Div. 3d Dep't 1983)*

*More on waiving subdivision improvements. Still no.*

In the instant case, the improvements were not installed when application for subdivision plat approval was made and the board waived the requirement that the developers post a performance bond for the Dunes and Pinehurst subdivisions. This was done to enable the developers to petition the Common Council of the City of Albany to have the city install the necessary improvements and assess back the costs thereof to the benefited property owners.

This procedure followed by the board was clearly violative of the provisions of section 33 of the General City Law. The only construction that can be given to the statutory language of section 33 of the General City Law is that the owner of the land shall install the improvements, or alternatively, post a bond to cover the costs thereof. This interpretation is harmonious with the legislative intent so clearly evident in the 1938 amendment to section 33 (L 1938, ch 205) which added the provision that a city planning board require, as a condition of approval of a subdivision plat, that such improvements be installed or that a performance bond shall be furnished by the owner (see *Matter of Brous v Smith*, 304 NY 164, 169). Contrary to respondents' contention, this procedure, designed to assure soundly conceived subdivisions of stable character in contrast to excessive subdivision of lands not yet ready for building improvement, resulting in serious economic loss to purchasers and severe tax delinquencies and impairment of municipal credit, cannot be waived by the planning board. To

*Friends of Pine Bush v. Planning Bd. of Albany, 86 A.D.2d 246, 248-249 (N.Y. App. Div. 3d Dep't 1982)*

*Coordination Can Avoid Spot Zoning*

Nor do LL5/10 or the Restated Permit constitute spot zoning. "Spot zoning is the process of singling out a small parcel of land, for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners (see *Rodgers v Village of Tarrytown*, 302 NY 115, 123, 96 N.E.2d 731 [1951])." *Little Joseph Realty, Inc. v Town Bd. of Town of Babylon*, 52 AD3d 478, 479, 859 N.Y.S.2d 696 (2nd Dep't 2008) lv denied 11 N.Y.3d 706, 896 N.E.2d 95, 866 N.Y.S.2d 609 (2008). Spot zoning is unlawful because it fails to satisfy the requirement in Town Law 263 that land use regulations "shall be made in accordance with a comprehensive plan." See *Little Joseph Realty, Inc. v Town Bd. of Town of Babylon*, 52 AD3d at 479. Thus, "[w]hile numerous factors are taken into account in evaluating such a claim, the ultimate inquiry is whether the challenged zoning is other than [\*\*44] part of a well-considered and comprehensive plan calculated to serve the general welfare of the community." *Matter of Baumgarten v Town Bd. of Town of Northampton*, 35 AD3d 1081,

1084, 826 N.Y.S.2d 811 (3rd Dep't 2006) (internal citations and source of quotation omitted); see also *Rodgers v Vill. of Tarrytown*, 302 NY 115, 124, 96 N.E.2d 731 (1951).

Moreover, evidence that the law at issue **[\*\*45]** was the product of an extensive review undertaken by the municipality with sufficient forethought to insure that it would be in keeping with a comprehensive plan calculated to serve the general welfare of the community is indicative that it is not spot zoning. See *Little Joseph Realty, Inc. v Town Bd. of Town of Babylon*, 52 AD3d at 479; *Matter of Baumgarten v Town Bd. of Town of Northampton*, 35 AD3d at 1083-1084. Evidentiary material adduced in support of the instant motions establishes that the Town Bd's review of TRO's August 2008 application and its determination thereof met that standard, and petitioners have submitted no evidence to the contrary. Compare with, e.g., *Matter of West Branch Conservation Assn. v Town of Ramapo*, 284 AD2d 401, 403, 726 N.Y.S.2d 137 (2nd Dep't 2001) (holding that amendment constituted spot zoning where petitioners presented evidence that it "was contrary to goals of the Town's Development Plan[, and that] development of the subject property was contrary to the trend in the subject area") and **[\*\*\*16]** *Matter of Cannon v Murphy*, 196 AD2d 498, 500-501, 600 N.Y.S.2d 965 (2nd Dep't 1993) (holding that zoning was invalid where "there was a variety of evidence tending to establish the negative impacts **[\*\*46]** . . . on the neighbors and the community at large," and no evidence that it had been enacted with regard to such considerations). Therefore, neither that LL5/10 or the Restated Permit constitute spot zoning.

Matter of Tuxedo Land Trust Inc. v Town of Tuxedo, 34 Misc. 3d 1235A (N.Y. Sup. Ct. 2012)

#### Waivers are not Variances

The Commission's approval of the Walgreen's store was based on its authority for project site review in city zoning regulations. Ladd Aff. P 6; Lamendola Aff. P 6; Zoning Ordinance Part C, § 1, Art. 10 (Ex. A to Ladd Aff.). Project site review requires a point by point analysis of the proposal that includes, **[\*\*\*3]** where applicable, comparison of the project with "specifically required adopted design criteria." Art. 10.VI.G.3. The Walgreens site was subject to "specifically required adopted design criteria" known as the "James Street Overlay District."

According to the project site review ordinance, the Planning Commission has "authority to grant waivers of area, number, or design requirements" for properties under review. Art. 10.VII. In making the waiver decision, "the Commission must find that practical difficulties would occur with respect to the economic and functional utilization of the property under consideration and that reasonable alternatives otherwise permitted do not exist." Id. In addition, "[p]ractical difficulties affecting the property under consideration must be weighed against the impact the Waiver would have on the character of the surrounding area." Id. The James Street Overlay regulations identifies an identical standard for consideration of "exceptions" to its basic standards and design requirements.

Petitioner contends that the practical difficulties standard applied in this matter was improper, citing *Sasso v. Osgood*, 86 NY2d 374, 657 N.E.2d 254, 633 N.Y.S.2d 259 (1995). **[\*\*\*4]** *Sasso* concerned interpretation of NY Town Law § 267-b with respect to area variances. *Sasso*, 86 NY2d at 381-82. The city agrees that, pursuant to *Sasso*, the practical difficulties standard cannot be applied to an area variance application. It contends, however, that petitioner's application did not involve an area variance, so *Sasso* does not apply. Instead, petitioner sought a waiver to design requirements under the city's site plan review ordinance.

Section 27-a of the General City Law gives city planning boards authority to conduct site plan review. Section 27-a(3) provides that application for an area variance in the context of a proposed site plan must be made to the zoning board of appeals. The statute defines an "area variance" as "authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations." NY Gen. City Law § 81-b(1)(b).

There is no evidence that petitioner's sign application concerned an area variance. Point Five

made the application to the Planning Commission, not the Zoning Board of Appeals. The only evidence in the record shows that the application was part of the larger project site review process. Ladd Aff. PP 6, 11, 13, 17-18, see also first "whereas" clause of 7/20/09 resolution (Pet. Ex. D). Finally, the sign application was not an area variance under the statutory definition.

Similarly, there is no evidence to support petitioner's conclusory assertion that its sign request was a separate special permit application. Point Five's self-serving statements that its latest sign application was separate from the overall project site review process is contrary to the specific language of the Planning Commission's resolutions and the record as a whole.

Section 27-a(5) gives the planning board power to waive requirements in the context of site plan review. The Syracuse project site review ordinance contains this power. Unlike Section 267-b of the Town Law, the statute does not require the planning board to adopt a particular standard in making its analysis. Thus, Syracuse's project site review ordinance is not invalid based on its adoption of the practical difficulties standard in assessing waivers.

Furthermore, substantial evidence supported the planning commission's rejection of petitioner's waiver application. A local zoning board's factual determination must be confirmed if it has a rational basis and substantial evidence supports it. *Toys R Us v. Silva*, 89 NY2d 411, 423, 676 N.E.2d 862, 654 N.Y.S.2d 100 (1996); *Cowan v. Kern*, 41 NY2d 591, 598, 363 N.E.2d 305, 394 N.Y.S.2d 579 (1977). A reviewing court may not substitute its judgment for that of the zoning board. *Silva*, 89 NY2d at 423.

The record contains ample evidence from which the Planning Commission could rationally conclude that the projecting sign with its changeable LED display, especially when combined with the signs already approved for the Walgreen's store, was out of character with the Eastwood neighborhood. There also was evidence that, among other things, the sign would have been distracting to motorists, obscured by existing traffic poles and not even necessary for a motorist driving west on James Street to recognize the store. Return at 23-38; 42-49; see also Return Ex. 2 (public hearing transcript). Point Five supplied only speculation that the sign was needed to maximize profits at the store. Return Ex. 2 at 10-11, 25-26.

Matter of Point Five Dev. Grant & James LLC v City of Syracuse Planning Commn., 27 Misc. 3d 1225A (N.Y. Sup. Ct. 2010)

#### *How Do You Justify a Waiver?*

During that same meeting, the Planning Board adopted a resolution that granted Turk Hill a waiver to Town Subdivision Law section 123-35(D)(2) regarding a dead-end road of 1,000 feet long to service the 12 homes rather than the statutory maximum of 10 homes on such a road. The reasons the Planning Board gave for their grant of this waiver included: (1) that the common driveway was safe (wide enough for emergency vehicles); (2) that it would not adversely impact the health and safety of surrounding properties; (3) that the common driveway was further subject to a driveway easement and maintenance agreement; (4) that the extension of the Town Road to serve lots 7-10 would create a hardship to applicant by increasing costs to applicant; and, most importantly (5) that this "waiver will result in less overall site disturbance, less impervious surface and is conducive to a rural atmosphere, all goals of the Comprehensive Plan and Zoning Ordinance as confirmed by findings of both the Planning Board and the Town Board in granting the moratorium variance request for the Project

\*\*\*

Similarly, the decision by the Planning Board to waive the requirement that all dead end roads of 1000 feet serve 10 rather than 12 houses prior to its adoption of the CND is similarly not an action subject to SEQRA review pursuant to 6 NYCRR § 617.2(b)(2) - i.e., it was not a final step committing the Planning Board to a course of conduct with regard to approving this subdivision. Moreover, even if it could be deemed an action, it clearly falls within the exempted Type II actions since it involved the Planning Board's "engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination entitles or permits the project sponsor to commence the action unless and until all requirements of this

part have been fulfilled." (6 NYCRR § 617.5(c) (28)). Finally, because the waiver occurred on February 10, 2003, any alleged SEQRA violation arising out of this waiver is similarly time-barred by the four month statute of limitations.

Croton Watershed Clean Water Coalition, Inc. v. Planning Bd., 2 Misc. 3d 1010A (N.Y. Sup. Ct. 2004)

Can a Planning Board waive site plan. Yes, if your code allows.

The City of Syracuse Zoning Rules and Regulations and map were amended in 1969 to place the main university campus, including the Archbold Stadium, in a planned institutional district. This showed the existing facilities including Archbold Stadium, which lies within subdistrict number 3 identified "academic" and "related student and faculty services". Before a building permit can be issued for a project within the planned institutional district, the Planning Commission must find that the project plan is in substantial conformity with the district plan. If there is a negative finding, it may amend the district plan upon finding that the amendment would not violate the intent of the planned institutional district including adequate provision for fire and police access, drainage and utilities.

Moreover, the Planning Commission is empowered to waive any development requirements not exceeding 50% of lot coverage, floor area ratio or setback, if such a waiver is not a detriment to adjacent properties or does not jeopardize the intent of the planned institutional district.

The Planning Commission reviewed the project plan for the purpose of making a determination as to whether the plan was in conformity with the approved district plan number 3. On November 5, 1978 the commission in a resolution concluded that the subject proposal is in keeping with the district and subdistrict plan which was approved by the commission on February 4, 1969 and by the Common Council on February 17, 1969. After reviewing the numerous plans and materials submitted, as required by the zoning ordinance, the Planning Commission also found that the proposal on the project met all of the geometric requirements of the planned institutional district with the exception of an increase in lot coverage from 35% to 38%, which increase it waived under the provisions of the zoning law. The Planning Commission also indicated that the existing stadium was in fact part of subdistrict 3 under the category "related student and faculty services" as shown on the district plan number 3, approved in 1969, and that the proposed domed stadium was a land use consistent with the subdistrict plan number 3.

Rickett v. Hackbarth, 98 Misc. 2d 790, 801-802 (N.Y. Sup. Ct. 1979)

When can you stop worrying about an Article 78? When you file minutes showing votes.

We agree with petitioners that the minutes of the meeting of the Zoning Board setting forth the votes of each member on respondent's application for a variance constitute the decision of the Zoning Board and that the filing of those minutes incorporating the decision of the Zoning Board commenced the running of the statute of limitations (see Matter of Kennedy v Zoning Bd. of Appeals of Vil. of Croton-on-Hudson, 78 NY2d 1083, 1084-1085; see also Matter of Bauman, Taub & [\*976] Von Wettberg v Village of Hamilton Zoning Bd. of Appeals, 202 AD2d 840, 841; Matter of Casolaro v Zoning Bd. of Appeals of Vil. of Elmsford, 200 AD2d 742). HN2 Pursuant to Town Law § 267-a (1), a zoning board of appeals must keep minutes of its proceedings "showing the vote of each member upon every question." The failure to comply with the mandate of Town Law § 267-a (1) constitutes a jurisdictional defect and the statute of limitations does not begin to run upon the filing of such a jurisdictionally defective document (see Matter of McCartney v Incorporated Vil. of E. Williston, 149 AD2d 597, 597-598; Rice, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 61, Town Law § 267-c, 2002 Supp Pamph, at 265). Here, however, the minutes of the July 25th meeting properly indicate the vote of each member of the Zoning Board on respondent's application (see Allens Cr./Corbett's Glen Preservation Group, 249 AD2d at 922), whereas the letter to respondent does not. Thus, we conclude that this CPLR article 78 proceeding was timely commenced within 30 days of the filing of those minutes with the Town Clerk (see Town Law § 267-c [1]; Allens Cr./Corbett's Glen Preservation Group, 249 AD2d

at 922). We therefore reverse the judgment, deny respondent's motion and reinstate the petition.

Sullivan v. Dunn, 298 A.D.2d 974, 975-976 (N.Y. App. Div. 4th Dep't 2002)

*When can you stop worrying about a legal challenge if you didn't do GML 239 review. Depends.*

It is undisputed that the respondent, the Incorporated Village of Roslyn (hereinafter the Village), had a duty to comply with the procedural requirements of General Municipal Law § 239-m in order to properly enact its Comprehensive Master Plan and Local Laws, 1997, No. 4 of the Village, which rezoned an area of the Village from commercial to residential. Among other provisions, General Municipal Law § 239-m mandates that the Village refer its proposed planning and zoning actions to the Nassau County Planning Commission (hereinafter NCPC) for review and recommendation (see, General Municipal Law § 239-m [2], [3]). Furthermore, the Village was required to submit to the NCPC the "full statement of such proposed action", including "all materials required by and [\*475] submitted to the referring body as an application on a proposed action, including a completed environmental assessment form" (General Municipal Law § 239-m [1] [c]). In addition, the General Municipal Law requires [\*\*\*3] that the NCPC "shall have" at least 30 days, after receipt, to consider the materials before making its recommendations, if any (General Municipal Law § 239-m [4] [b]).

After referral by the Village, the NCPC should have been in possession of all of the materials which the Village needed in order to pass a new zoning resolution, including the final version and complete text of the proposed new zoning law and the final generic environmental impact statement. However, it is clear that the NCPC did not have these materials for the requisite 30-day period before the Village acted and adopted the subject zoning law. Under such circumstances, the Village did not comply with General Municipal Law § 239-m and, as a consequence, Local Laws, 1997, No. 4 of the Incorporated Village of Roslyn and the Comprehensive Master Plan were improperly adopted and are void (see, *Matter of Ferrari v Town of Pennfield Planning Bd.*, 181 AD2d 149; see also, *Matter of Ernalex Constr. Realty Corp. v Bellssimo*, 256 AD2d 336 of *Ernalex Constr. Realty Corp. v Bellssimo*, 256 AD2d 336).

Contrary to the Village's contention, there were substantial changes between the draft [\*\*\*4] environmental impact statement and the final generic environmental impact statement, and thus new public hearings are warranted (cf., *Caruso v Town of Oyster Bay*, 250 AD2d 639).

LCS Realty Co. v. Inc. Vill. of Roslyn, 273 A.D.2d 474, 474-475 (N.Y. App. Div. 2d Dep't 2000)

*And if you don't make a complete submission, bad things can still happen.*

The Court stated that the purpose of referral is for the County Planning Board to review the same material and make a recommendation to the lead agency. *Batavia First v. Town of Batavia*, supra at 842. Here, however, the respondents are the sponsor of the proposed action and there is no question that the Planning Board did not have in its possession all of the same material that the respondents were considering in making the determination of significance before the Planning Board issued its recommendation. In fact, respondents revised Part 1 of the EAF, revised the proposed Wetlands Law in several aspects, and prepared an engineering report all after it referred the proposed action to the Planning Board. Thus, there was essentially no compliance with GML § 239-m(1)(c).

In re Benanati, 2007 N.Y. Misc. LEXIS 9132 (N.Y. Sup. Ct. Mar. 15, 2007)