Land Use Law Case Law Update

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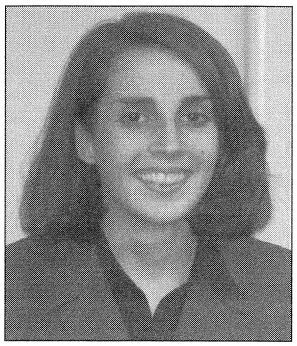
In this issue of the *Municipal Lawyer* we report a number of cases addressing a fair range of issues in the land use context. We are reminded, in two cases, of the importance (for petitioners and practitioners alike) of adhering to the strict letter of procedure. In a SEQRA case involving a project which had been before a planning board for 15 years, the Court of Appeals rejected an attempt to delay the project further when the procedural labyrinth of the statutory scheme threatened to overwhelm the underlying purpose of the statute. In a refreshing number of the reported cases, the rule of reason prevails. In one case, the faulty logic of the court's reasoning is laid bare in a thoughtful dissent.

In all, while this quarter's crop of cases brings no precedent-shattering revelations, and while, as noted in the discussion below, it may leave some questions unanswered, it does include some timely warnings for the unwary, some food for thought on the SEQRA and constitutional fronts, and at least one occasion for head scratching among those of us who deem logic to be the soul of the law.

I. Court of Appeals

A. *Riverkeeper, Inc. v. Planning Board of the Town of Southeast*: Supplemental Environmental Impact Statements

In *Riverkeeper v. Planning Board of the Town of Southeast*,[1] the Court of Appeals took an important step in the direction of injecting the rule of reason into the chaotic and sometimes endless process of environmental review under the State Environmental Quality Review Act ("SEQRA"; collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617). The Court unanimously upheld the decision of the Planning Board of the Town of Southeast (the "Planning Board"), acting as lead agency in the review of a residential subdivision application under SEQRA not to require a *second* Supplemental Environmental Impact Statement ("SEIS"), after SEQRA Findings had been adopted, which Petitioners claimed was needed to address certain regulatory changes adopted following the Planning Board's issuance of its SEQRA Findings and its issuance of final subdivision approval to the applicant. The Court held that (a) the decision whether to require an SEIS (as opposed to a Draft EIS or Final



EIS) lies in the discretion of the lead agency; (b) judicial review of a lead agency's decision to require an SEIS is limited to whether the lead agency took a hard look at the relevant areas of environmental concern and made a reasoned elaboration of the basis for its decision; (c) a lead agency need not wait until all project permits are issued before it issues a Findings statement, provided that it considers the environmental concerns addressed by the particular permits in its review; and (d) generally a lead agency does not have an obligation to seek comments from other involved agencies in its deliberations on whether to require an SEIS to be prepared.

In 1988, Glickenhaus Brewster Development, Inc. ("Glickenhaus") applied to the Planning Board to develop a residential subdivision on a 309-acre parcel of property in the Town of Southeast, Putnam County (the "Property"). A stream that runs through the Property is a tributary to the Muscoot Reservoir, which is a part of the Croton Watershed, a source of drinking water for the City of New York. The Planning Board declared itself lead agency in the SEQRA review of Glickenhaus's application and issued a Positive Declaration, which required the preparation of an Environmental Impact Statement to study the project's potential environmental impacts. Glickenhaus submitted a Draft EIS ("DEIS"), a Final EIS ("FEIS"), a Draft SEIS and a Final SEIS during the SEQRA review of the project, and on February 25, 1991, the Planning Board issued a Findings Statement which found that the project '"minimized or avoid[ed] adverse environmental effects to the maximum extent practicable."'[2]

Preliminary subdivision approval was granted on August 10, 1998 and conditional final subdivision approval was granted on June 10, 2002.[3] Petitioners challenged the Planning Board's issuance of conditional final approval on the grounds that subsequent developments pertaining to, among other things, changes in the regulatory requirements of several state and federal agencies regarding water quality mandated yet a second SEIS and that by failing to require a second SEIS, the Planning Board failed to take a hard look at environmental concerns in its SEQRA review of the project. The Supreme Court invalidated the approval and remanded the case to the Planning Board for that Board to determine whether a second SEIS was required.[4]

The Planning Board's chairman reviewed the project file, which included, among other things, applications for a local wetlands permit, a State Pollutant Discharge Elimination System permit, and a wetlands permit from the United States Army Corps of Engineers. Further, the Planning Board reviewed reports prepared by environmental experts for the applicant and hired independently by the Planning Board. After reviewing this information, on April 14, 2003, the Planning Board determined that a second SEIS was not necessary.[5] On February 23, 2004, the Planning Board granted conditional final subdivision approval for a second time.[6]

In May 2003, petitioners commenced *Riverkeeper, Inc. v Planning Board of the Town of Southeast*,[7] in which they challenged the Planning Board's determination not to require a second SEIS on the grounds that, among other things (a) the Planning Board improperly delegated its SEQRA responsibilities by taking into account the recommendation of its own consultants regarding the environmental concerns addressed by permits to be issued by other involved agencies, and by making its determination that a second SEIS was not required before applications for such involved agency permits were decided, and (b) that the Planning Board failed to solicit comments from other involved and interested agencies before it decided not to require an SEIS.[8] In March 2004, petitioners challenged the February 23, 2004 issuance of conditional final subdivision approval in a case captioned *Ingraham v. Planning Board of the Town of Southeast*,[9] on the ground that the Planning Board violated the Town's subdivision regulations when granting the approval.[10]

The Supreme Court dismissed the petitions in both cases. In *Riverkeeper, Inc.*, the lower court held that the Planning Board took the requisite hard look and made the required reasoned elaboration of its basis not to require a second SEIS. In *Ingraham*, the lower court held that the Planning Board did not violate the Town's subdivision regulations when granting the February 2004 conditional final subdivision approval.[11] However, in both cases the Appellate Division reversed. In *Riverkeeper, Inc.*, the Appellate Division held that the Planning Board "'could not have met its obligation under SEQRA without requiring a [second] SEIS to analyze the current subdivision plat in light of the change in circumstances since 1991.'"[12] In *Ingraham*, the Appellate Division, while agreeing with the lower court that the Planning Board did not violate the Town's subdivision regulations, annulled the approval based on the Planning Board's failure to require a second SEIS.[13]

The Court of Appeals consolidated the cases, granted leave to appeal, and reversed the decisions of the Appellate Division. The Court of Appeals held that the Planning Board was not obligated to require Glickenhaus to prepare a second SEIS and reinstated the conditional final subdivision approval, since it had been annulled on the sole ground that no SEIS was prepared.[14]

The Court began its analysis by describing that the SEQRA regulations provide lead agencies with broad discretion regarding whether to require an SEIS as a part of the SEQRA review of a project, looking to the express language of the SEQRA regulations that "[t]he lead agency *may* require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (*a*) changes proposed for the project; (*b*) newly discovered information; or (*c*) a change in circumstances related to the project."[15] Further, a court, when reviewing the lead agency's decision, is limited to "'whether the agency identified the relevant areas of environmental concern, took a hard look at them and made a reasoned elaboration of the basis for its determination[,]'" the standard that applies to review of a lead agency's ultimate SEQRA Findings.[16] Here, the Court held that in reviewing the voluminous record before it, the Planning Board took a hard look at the relevant areas of environmental concern and provided a reasoned elaboration of the basis for its decision not to require a second SEIS. The Planning Board, after reviewing its project file including all of the original SEQRA materials, applications for environmental permits, and wetlands and engineering reports, found that the changes made to the proposed plan actually anticipated and sought to minimize environmental impacts, particularly the impacts on the Muscoot Reservoir and the Croton Watershed. Since the changes were more protective of the environment than the actions proposed as a part of the initial SEQRA materials, the Board reasonably determined that no SEIS was necessary.[17]

Addressing the issue of improper delegation of SEQRA responsibilities, the Court stated that

> A lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decisionmaking [citing cases]. . . . While a lead agency is encouraged to consider the opinions of experts and other agencies, it must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment. Though the SEQRA process and individual agency permitting processes are intertwined, they are two distinct avenues of environmental review. Provided that a lead agency sufficiently considers the environmental concerns addressed by particular permits, the lead agency need not

> await another agency's permitting decision before exercising its independent judgment on that issue.[18]

In this case, the Planning Board reviewed the permitting applications and other reports and studies relevant to its determination of whether to require a second SEIS. Because it reviewed and independently evaluated the relevant material, it was not required to wait for a determination on another agency's environmental permits before deciding whether a second SEIS would be required.[19]

Finally, the Court dismissed Petitioner's contention that the Planning Board was required to notify and solicit comments from other involved and interested agencies before making its determination regarding whether to require a second SEIS. The Court held that SEQRA does not expressly require lead agencies to seek comments from other agencies when considering whether to require an SEIS, noting that while SEQRA encourages the interchange of information among agencies, the benefit of such an interchange must be evaluated against "SEQRA's mandate that the regulations be implemented 'with minimum procedural and administrative delay . . . [and] in the interest of prompt review.'"[20] The Court recognized that failure to solicit input from other agencies may evidence a failure to take a "hard look" at the relevant areas of environmental concern, but that had not occurred in this case.[21]

In concluding her opinion, Chief Judge Kaye noted in passing the astounding fact that the project had been before the Planning Board for 15 years, perhaps implicitly recognizing (and seeking to halt) the transmogrification of SEQRA from its original salutary purpose to protect the environment into an instrument of limitless oppression and delay.

B. *City of Utica v. Town of Frankfort*: Municipal Annexations

In *City of Utica v. Town of Frankfort*,[22] the Court of Appeals (issuing a strict warning to practitioners) held that strict compliance with General Municipal Law Section 713—which requires that a special election be held before a municipal annexation can be completed—is required "no matter how few eligible voters there are or how superfluous such election might be[;]"[23] reminding practitioners that strict compliance with the procedural requirements provided by statute in land use matters is essential.

In *City of Utica*, the City of Utica sought to annex 225 acres of property, owned by intervenors-respondents Masonic Care Community ("MCC") (the proponent of the annexation), into the City from the Town of Frankfort and Herkimer County pursuant to the Municipal Annexation Law (General Municipal Law Article 17).[24] The issue of whether annexation was in the overall public interest was, in accordance with the statutory scheme, submitted to three referees appointed by the Appellate Division, who issued a report recommending the annexation. The Appellate Division entered a judgment to that effect. MCC, after the entry of the judgment, obtained the election records of the area to be annexed and determined that there were 65 eligible voters in the area. It then proceeded to obtain the signatures of 53 of the 65 persons entitled to vote on a petition in support of the annexation.[25]

The Town of Frankfort and Herkimer County moved for reargument or leave to appeal to the Court of Appeals. MCC cross-moved for, among other things, an order dispensing with the requirement that a special election be held on the annexation. The Appellate Division denied the Town's motion to reargue and granted MCC's cross-motion. The Court of Appeals granted the County's motion for leave to appeal.[26]

The Court of Appeals affirmed the Appellate Division's finding that the annexation was in the overall public interest, but reversed its decision granting the City's cross-motion to dispense with the special-election requirement.[27] With regard to the Appellate Division's finding that the annexation was in the overall public interest, the Court of Appeals stated that when the Appellate Division is asked to determine whether an annexation is in the overall public interest, it is acting in a quasi-legislative capacity and its decision will not be overturned unless it lacks a rational basis. Here, the Appellate Division correctly applied the "overall public interest" standard and had a rational basis for its finding that annexation was in the overall public interest since, among other things, the City was better equipped to provide municipal services to the area to be annexed and that annexation would have only a minimal impact to the Town and County.[28] With regard to the special election, the Court held that the special election before annexation is required by the Municipal Annexation Law, the New York State Constitution, and the Election Law and that it is beyond the Appellate Division's discretion to dispense with that requirement, "no matter how few eligible voters there are or how superfluous such election might be[,]" thus confirming that, at least in the realm of municipal annexation, adhering to form over substance can be a virtue.[29]

C. *Haberman v. Zoning Board of Appeals of City of Long Beach*: Variance Amendments; Authority of Counsel

In *Haberman v. Zoning Board of Appeals of City of Long Beach*,[30] the Court of Appeals held that a zoning board of appeals' attorney, when acting with actual or apparent authority, could extend the duration of a variance granted by the zoning board of appeals without

the board holding a public hearing and vote on the extension. However, a reading of the case suggests that its holding may be dependent upon its unique factual context, and thus the applicability of the Court's holding is unclear.

In *Haberman*, Sinclair Haberman ("Haberman") sought and obtained a variance from the City of Long Beach Zoning Board of Appeals (the "ZBA") to develop a four-building multi-family residential complex in the City of Long Beach.[31] After the first building was constructed, an issue arose regarding the other three buildings, which resulted in litigation brought by Haberman against the City, its Building Commissioner, and its Zoning Board of Appeals.[32] The litigation was settled by a stipulation of settlement in which, among other things, Haberman agreed to apply for a new variance and the City agreed to install infrastructure to serve the proposed buildings after receiving funding from Haberman for the public improvements.[33] Haberman's obligations under the stipulation required him to apply for building permits within a certain time after the variance was granted, and the City was obligated to commence the installation of the infrastructure within a certain time after receiving the funding from Haberman.[34]

Haberman applied for and received a new variance and made the required payments to the City. However, the City did not meet its deadline to install the infrastructure improvements and asked Haberman for an extension of time. Haberman agreed on the condition that the time within which he was required to apply for building permits would be similarly extended.[35] The terms of this agreement were memorialized in a letter dated April 7, 1992, which was signed by the City's Corporation Counsel, who represented all defendants in the litigation on this matter, and which indicated that the Corporation Counsel was signing on behalf of all defendants, including the ZBA. The letter was attached to a new stipulation which modified the 1989 stipulation and was so ordered by the Supreme Court.[36]

In 2002, after the time within which he was originally required to apply for a building permit for the second building under the 1989 stipulation had expired, but within the time required under the 1992 stipulation, Haberman applied for a building permit to construct the second building. The building permit was granted in 2003.[37] However, the ZBA, at the request of the cooperative corporation which owned the first building constructed on the property, revoked the permit on the grounds that Haberman did not comply with the schedule in the 1989 stipulation. With regard to the 1992 amendment, the ZBA took the position that it did not effectively extend the time within which Haberman had to apply for building permits since it was not ratified by the ZBA after a public hearing.[38] Haberman brought the instant litigation to annul the findings of the ZBA and for the reinstatement of the building permit. The Supreme Court granted Haberman's petition and annulled the ZBA's decision, but the Second Department reversed.[39] The Court of Appeals granted leave to appeal to answer the following question:

> [W]hether the ZBA is bound by the Corporation Counsel's agreement, as its attorney, to the April 1992 letter extending Haberman's time to apply for building permits.[40]

The Court held that the Corporation Counsel had the authority to bind the ZBA and that ratification of the extension by the ZBA was not required.[41] In so holding, the Court, relying on a prior holding in *New York Life Insurance Company v. Galvin*,[42] reasoned that "once a variance has been issued, the same formality is not required to extend the variance's duration."[43] Furthermore, the ZBA could point to no authority for the rule that it had to ratify an agreement entered into by its counsel extending the applicable time limitations included in the variance. Here, the Corporation Counsel acted with at least apparent authority from Haberman's perspective to extend the time limitation on which the variance was conditioned, and the Corporation Counsel did not act contrary to the instruction of the ZBA or try to conceal his action from the Board. Accordingly, it would be unfair to undo an agreement, extensively negotiated and benefiting both parties, entered into in writing, and approved by the Court, based on the ZBA's argument that it was required to ratify the extension, when that argument had no basis in statute, precedent, or other authority.[44]

The general applicability of this case is unclear at best. Here the Court was faced with a situation where the ZBA was apparently trying to free itself from an obligation agreed to by its attorney for which the City received a benefit—an extension of the time within which it was to complete the utility improvements it was required to install. The agreement was negotiated and agreed to by the parties and approved by the Court. In light of these facts, it is not clear from this case whether a zoning board of appeals' attorney—in the ordinary course of representation, but not in the context of a negotiated, bilateral stipulation of settlement—has the authority to unilaterally extend an approval granted by the zoning board of appeals without the board's formal consent. Although some language underlying the Court's reasoning would seem to answer the question in the affirmative, the specific facts of the case, including the fact that Petitioner had performed his side of the bargain that the ZBA was now seeking to repudiate, leaves some question as to the broader applicability of the decision.

D. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*: Issuance of Building Permits; Anticipatory Rejection

In *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*,[45] the Court of Appeals upheld the determination of the New York City Department of Buildings to withhold a building permit where the petitioner could not show that it could use the proposed building for a lawful purpose.[46] In so doing, the Court clarified the rule, previously enunciated in the decisions of the Court of Appeals and the Appellate Division, Second Department,[47] that a building permit cannot be withheld because of concern that the building would be used illegally.

Petitioner had purchased a parcel of property in the City of New York, the use of which, pursuant to a deed restriction, was limited to "Community Facility Use," as that term was defined in the New York City Zoning Resolution. Community facility uses, including college or school student dormitories, were permitted on the property under the New York City Zoning Resolution. The petitioner applied to the New York City Department of Buildings for a building permit to construct a 19-story dormitory on the property, which would be configured much like an ordinary apartment building. Apartment buildings were also permitted in the district in which the property was located; however, they were limited to 10 stories, and, with regard to petitioner's property, would have been prohibited by the deed restriction.[48] The Department of Buildings took the position that in order for a building to qualify as a dormitory, it must be operated by or on behalf of at least one college or school. Accordingly, the Department of Buildings asked petitioner to provide it with evidence to substantiate its claim that the building would be used as a dormitory by proving a connection with an educational institution.[49] Petitioner could not establish that it had a relationship with a qualified educational institution and the Department of Buildings refused to issue petitioner a building permit.[50]

Petitioner appealed to the New York City Board of Standards and Appeals (the "BSA"), but petitioner's appeal was denied. Petitioner then commenced an Article 78 proceeding to have the BSA's determination annulled. The Supreme Court upheld the decision of the BSA, but a divided Appellate Division reversed, finding that the Department of Buildings' denial was '"an impermissible administrative anticipatory punishment."'[51] In so holding, the Appellate Division relied on *Di Milia v. Bennett*[52] and *Baskin v. Zoning Board of Appeals of the Town of Ramapo*[53] for the proposition that "a building permit could not be denied on the basis of 'a possible future illegal use.'"[54] The BSA appealed as of right and the Court of Appeals reversed.

The Court of Appeals held that the Appellate Division's and Petitioner's reliance on *Di Milia* and *Baskin* was misplaced. In those cases, the municipal zoning authorities denied permits for one-family dwellings on the grounds that the houses could be converted to two-family dwellings in violation of the municipal zoning ordinances. However, in those cases, the facts did not establish that the use of the property for a permitted use, a one-family dwelling, was unlikely or impractical. Rather, there was just a generalized suspicion that the dwellings would not be so used. In both of those cases the court held that the mere suspicion a building may be used for an illegal use is not grounds enough to deny a permit. In this case, the Court reasoned that unlike in *Di Milia* and *Baskin*, where the proposed building could have been used for a use permitted under local zoning, petitioners could not (in the absence of an affiliation with an educational institution) reasonably show that the proposed building could be used for *any* lawful purpose, since all possible uses of the building, given its height and location, were precluded either by the City's Zoning Resolution or the deed restriction limiting the uses of the property. Accordingly, the Department of Buildings was not required to issue a permit which would create the problem of a 19-story building that could be used for no lawful purpose.[55]

II. County Planning Board Referrals Under General Municipal Law Section 239-m

In *Annabi v. City Council of the City of Yonkers*,[56] the Appellate Division, Second Department held that a procedural amendment to a city's zoning ordinance governing the city's obligations with regard to referrals to the county planning board under General Municipal Law Section 239-m ("GML § 239-m") requires referral to the county planning board for review pursuant to that section.

On November 22, 2005, the City Council of the City of Yonkers adopted an amendment to the Yonkers Zoning Ordinance which changed the vote required to overcome the County Planning Board's negative recommendation on a project referred to it pursuant to GML § 239-m from a majority plus one vote to a simple majority vote ("Local Law 12-2005"), thus bringing Yonkers into line with all other Westchester municipalities.[57] The City Council did not refer Local Law 12-2005 to the Westchester County Planning Board pursuant to GML § 239-m before its adoption. Dissenting members of the City Council ("Plaintiffs") filed an action against the City Council of the City of Yonkers, the City of Yonkers, and the City's Mayor and Clerk ("Defendants"), arguing that Local Law 12-2005 should be invalidated since it was adopted without referral to the Westchester County Planning Board pursuant to GML § 239-m.

GML § 239-m provides, in pertinent part, as follows:

> Proposed actions subject to referral. (a) The following proposed actions shall

> be subject to the referral requirements of this section [referral to a county planning board], if they apply to real property set forth in paragraph (b) of this subdivision: *** (ii) adoption or amendment of a zoning ordinance or local law; *** (b) The proposed actions set forth in paragraph (a) of this subdivision shall be subject to the referral requirements of this section if they apply to real property within five hundred feet of the following: (i) the boundary of any city, village or town; or (ii) the boundary of any existing or proposed county or state park or any other recreation area; or (iii) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; or (iv) the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; or (v) the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or (vi) the boundary of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the agriculture and markets law, except this subparagraph shall not apply to the granting of area variances.[58]

Defendants argued that Local Law 12-2005 did not apply to any property in the City in that it did not change either the permitted uses or the dimensional limitations applicable to any property and thus did not reach any of the threshold referral requirements of GML § 239-m.[59]

The Supreme Court, Westchester County granted Summary Judgment to Plaintiffs and invalidated Local Law 12-2005, and the Appellate Division, Second Department affirmed. The Second Department reasoned that

> General Municipal Law § 239-m essentially requires that all zoning actions and amendments affecting real property within 500 feet from the boundary of any city, village, town or existing or proposed county or state park or road, be referred to the County Planning Board for review. Contrary to the defendants' contention, there is no difficulty in determining whether the challenged law is the type of enactment subject to review under General Municipal Law § 239-m. By its very terms, the challenged law affects a change in regulations applying to all real property within the City of Yonkers, and necessarily includes that real property which is situated within 500 feet of the boundaries . . . set forth in the statute.[60]

Accordingly, the Second Department upheld the Supreme Court's decision to invalidate Local Law 12-2005, citing the well-established rule that failure to make a required referral under GML § 239-m is a jurisdictional defect which renders the law adopted pursuant to the defective procedure invalid.[61]

The most instructive, and the most well-reasoned, aspect of the *Annabi* case is found in the learned dissent by Justice Lifson who (in the opinion of your authors) clearly got it right. Justice Lifson reasoned that

> The problem is that in each case cited by the majority, and indeed in all such cases, the change at issue was substantive, i.e., it had a direct and an immediate bearing upon the use of the land in question. The change at issue here is merely procedural and does not require both review by the County Planning Board and the invocation of a super majority to override that recommendation by the County Planning Board.[62]

Under the holding in *Annabi*, any procedural amendment to a municipal code which affects the zoning chapter of that code would have to be referred to a county planning board. As with the amendment at issue in the *Annabi* case, the County Planning Board has no basis on which to evaluate a procedural amendment since, manifestly, such amendment does not (in a planning sense) affect the use of land. Indeed, the majority's reading of GML § 239-m so broadens the application of that section as to entirely defeat its purpose, which is to include the county when land is so located that legislative or administrative action affecting its use is likely to have impacts beyond a municipal border. One is hard-pressed to understand how the county-wide or inter-municipal concerns relate to the manner in which a particular municipality chooses to enact its own legislation, so long as the relevant State-enabling statutes and the State Constitution are adhered to.

III. Regulatory Takings

In *Noghrey v. Town of Brookhaven*,[63] the Appellate Division, Second Department reviewed the standard that courts must apply when considering a regulatory takings claim under the *Penn Central Transportation Co.*

v. City of New York[64] balancing test. In rejecting a poorly phrased jury charge in which the trial court attempted to articulate the applicable regulatory takings standard for the jury, the Appellate Division, adopting language from *Lucas v. South Carolina Coastal Council*,[65] set the bar for a regulatory taking in New York so high as to be well nigh insurmountable. While the Appellate Division's articulation of the rule is not new, and the adopted language is from federal post-*Penn Central* cases, the language is stark and unyielding, and it is difficult to imagine where *any* rezoning of a parcel of land in New York, so long as it permits any use which can yield any value, will rise to a regulatory taking, at least in the Second Department.

In *Noghrey*, plaintiff purchased two parcels of property in the Town of Brookhaven with the intent of developing a shopping center, which was a permitted use in the zoning district in which the properties were located (the J-2 Business District). The Town of Brookhaven subsequently enacted a moratorium on commercial development in the Town so that it could update the Town's master plan. After the review, the Town rezoned several parcels, including plaintiff's, from the J-2 Business District to a residence district. Plaintiff brought an action alleging that the rezoning effectuated a taking of his property.[66]

During the trial, the court instructed the jury as follows with regard to whether the rezoning of plaintiff's property amounted to a taking:

> With respect to the first factor; that is, the economic impact of the regulation, [the plaintiff] claims that the values of his properties were reduced substantially. You may consider the values of the properties immediately before and immediately after the rezoning, and whether or not this reduction in value was a *substantial reduction* relative to the value before the properties were rezoned. [The plaintiff] must prove by a preponderance of the evidence that the rezoning deprived him of any use permitted by the residential zoning classification and this resulted in . . . a near total or *substantial decrease or significant reduction in value*.[67]

Relying on, among other things, the above-quoted instruction, the jury found that the rezoning of plaintiff's property amounted to a partial regulatory taking under *Penn Central*.[68]

The Second Department reversed the jury's finding and remitted the case to the Supreme Court, Suffolk County for a new trial, reasoning that the above-quoted jury instruction did not accurately reflect the showing required under *Penn Central* to constitute a regulatory taking. The Second Department instructed the lower court as follows:

> Upon the retrial, the Supreme Court should instruct the jury that the economic impact factor of the *Penn Central* analysis requires a loss in value which is "one step short of complete." . . . The court should make clear that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking" . . . , and that a land use restriction "is not rendered unconstitutional merely because it causes the property's value to be 'substantially reduced.'" . . . It should instruct the jury that the proper inquiry is whether the regulation left only a "bare residue" of value, or use similar language which would properly convey to the jury the high threshold of loss necessary to support a partial regulatory taking. . . .[69]

It is difficult to imagine any zone change (excepting, perhaps, the creation of a zone permitting no uses at all, or permitting only uses that are manifestly impossible as, for example, an "Ocean-front Recreation" zone in the Adirondacks) that will not leave a "bare residue" of value in a property.

IV. Vested Rights

In *Exeter Building Corp. v. Town of Newburgh*,[70] the Appellate Division, Second Department held that a property owner who obtained an approval for a lot line change in November 2005 was shielded from the impact of a rezoning of its property pursuant to Town Law § 265-a, which grants owners of property for which subdivision approval has been granted a vested rights period during which the property owner is permitted to develop the property in a manner consistent with the zoning of the property at the time of the approval, notwithstanding subsequent rezoning.[71]

Petitioner-plaintiff owned property in the Town of Newburgh, Orange County for which it obtained a lot line change from the Town of Newburgh Planning Board in November 2005 (the "Property"). In March 2006, the Town of Newburgh Town Board adopted Local Law 3, which rezoned several properties in the Town, including the Property. The zoning applicable to the Property pursuant to Local Law 3 would have prohibited Petitioner from developing the Property for its intended use. Petitioner commenced a hybrid Article 78 proceeding/declaratory judgment action asking the Court to, among other things, declare that it had a statutory and common law right to develop the Property under the prior zoning. The Appellate Division, Second Department held that although the petitioner failed to establish a common law vested right since it

could not show "substantial improvements or expenditures[,]" it did have a statutory vested right to develop the Property under the terms of the zoning that applied at the time the lot line change approval was granted.[72] In so holding, the Court reasoned that the lot line change approval was a "subdivision" under Town Law § 276(4)(a) and Town of Newburgh Code § 163-2. Town Law § 276(4)(a) allows a town to define the term subdivision by local law, ordinance, rule or regulation, and permits, but does not require, a lot line change to be included in the definition of subdivision.[73] Pursuant to that authority, the Town of Newburgh has included a lot line change in the definition of subdivision in its Subdivision Ordinance.[74] Because the Town of Newburgh Code includes a lot line change in the definition of subdivision, the Court did not have occasion to reach the question of whether statutory vested rights would attach to a lot line change approval granted in a municipality that does not expressly include a lot line change in the definition of subdivision, but permits such changes by abbreviated procedures short of subdivision.

V. Zoning Boards of Appeal

A. Conditional Variances

In *Voetsch v. Craven*,[75] the Second Department demonstrated that courts will not hesitate to annul conditions to an area variance where such conditions are unreasonable or improper.[76] In that case, the Town of Harrison Zoning Board of Appeals granted in part petitioners' application for area variance for, among other things, a parking lot on their property on the condition that they prohibit overnight parking in the parking lot and install a chain across the entrance of the parking lot at night to prevent overnight parking. Petitioners appealed, among other things, the conditions to the variance.[77] The Second Department upheld the condition that petitioners prohibit overnight parking in the lot, but invalidated the condition they install a chain across the parking lot entrance to prevent overnight parking as unreasonable, since overnight parking was already prohibited by the affirmed condition.[78]

B. Failure to Exhaust Administrative Remedies

In *Charest v. Morrison*,[79] the Fourth Department held that a party who wishes to challenge the issuance of a building permit to another must appeal to the municipal zoning board of appeals before challenging the issuance of the permit in court.[80] Therein, the petitioners asked the Court to direct the zoning enforcement officer of the Town of Ellery to revoke a building permit issued to respondent. The building permit allowed respondent to develop a single-family home on a lot created as a part of a residential subdivision.[81] Petitioners challenged the issuance of the permit on the grounds that it allowed construction to proceed in violation of the Town's front-yard setback requirements. The Supreme Court dismissed the petition, apparently on the grounds that the proposed house did not violate the Town's front-yard setback requirements. The Fourth Department affirmed the Supreme Court's dismissal, but on the grounds that petitioners failed to exhaust their administrative remedies before bringing a proceeding in court, citing the principle that it has no discretion to review the merits of the petitioners' claim since petitioners failed to exhaust their administrative remedies.[82]

Endnotes

1. 9 N.Y.3d 219 (2007).
2. *Id.* at 229.
3. *Id.*
4. *Id.* at 229–30.
5. *Id.* at 230.
6. *Id.*
7. *Riverkeeper, Inc. v. Planning Board of the Town of Southeast*, 32 A.D.3d 431, 820 N.Y.S.2d 113 (2d Dep't 2006).
8. *Riverkeeper, Inc.*, 9 N.Y.3d at 230.
9. 36 A.D.3d 911, 828 N.Y.S.2d 568 (2d Dep't 2007).
10. *Riverkeeper, Inc.*, 9 N.Y.3d at 231.
11. *Id.* at 230–31.
12. *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219, 230 (2007) (quoting *Riverkeeper, Inc. v. Planning Board of the Town of Southeast*, 32 A.D.3d 431 (2d Dep't 2006)).
13. *Riverkeeper, Inc.*, 9 N.Y.3d at 230.
14. *Id.* at 235.
15. *Riverkeeper, Inc.*, 9 N.Y.3d at 231 (quoting 6 N.Y.C.R.R. 617.9[a](7)(i)) (emphasis provided by the Court).
16. *Id.* at 231–323.
17. *Id.* at 232.
18. *Id.* at 234.
19. *Id.* at 234–35; *see also Basha Kill Area Association v. Planning Board of the Town of Mamakating*, 46 A.D.3d 1309, 849 N.Y.S.2d 112 (3d Dep't 2007) ("acknowledgement that state and federal permits are required 'does not rise to the level of an improper referral,'" citing *Riverkeeper, Inc., supra*).
20. *Riverkeeper, Inc.*, 9 N.Y.3d at 235 (quoting 6 N.Y.C.R.R. 617.3[h]).
21. *Riverkeeper, Inc.*, 9 N.Y.3d at 235.
22. 10 N.Y.3d 128 (2008).
23. *City of Utica*, 10 N.Y.3d at 134.
24. *Id.* at 132. Municipal Annexation Law, General Municipal Law Article 17.
25. *City of Utica*, 10 N.Y.3d at 132.
26. *Id.*
27. *City of Utica*, 10 N.Y.3d at 133.
28. *Id.*
29. *City of Utica*, 10 N.Y.3d at 133–34.
30. 9 N.Y.3d 269 (2007).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

35. *Haberman*, 9 N.Y.3d at 273–74.
36. *Id.* at 274.
37. *Id.*
38. *Id.* at 274–75.
39. *Id.* at 275.
40. *Id.*
41. *Haberman*, 9 N.Y.3d at 275.
42. 35 N.Y.2d 52 (1974).
43. *Haberman*, 9 N.Y.3d at 275.
44. *Id.* at 275–76.
45. 10 N.Y. 3d 264 (2008).
46. *Id.*
47. *Baskin v. Zoning Board of Appeals of Town of Ramapo*, 40 N.Y.2d 942 (1976), *rev'g on dissenting mem. of Shapiro, J.*, 48 A.D.2d 667, 367 N.Y.S.2d 829 (2d Dep't 1975); *Di Milia v. Bennett*, 149 A.D.2d 592, 540 N.Y.S.2d 274 (2d Dep't 1989).
48. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*, 2008 WL 762290 (New York Court of Appeals March 25, 2008).
49. *Id.*
50. *Id.*
51. *Id.*
52. 149 A.D.2d 592, 540 N.Y.S.2d 274 (2d Dep't 1989).
53. 40 N.Y.2d 942 (1976), *rev'g on dissenting mem. of Shapiro, J.*, 48 A.D.2d 667, 367 N.Y.S.2d 829 (2d Dep't 1975).
54. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*, 10 N.Y. 3d 264 (2008).
55. *Id.*
56. 47 A.D.3d 856, 850 N.Y.S.2d 625 (2d Dep't 2008).
57. *Annabi*, 47 A.D.3d 856, 850 N.Y.S.2d at 626. Although GML § 239-m[5] provides that if a county planning board "recommends modification or disapproval of a proposed action, the referring body shall not act contrary to such recommendation except by a vote of a majority plus one of all the members thereof[,]" Westchester County Administrative Code § 277.61 requires only that a municipal agency adopt a resolution by a simple majority vote to override a negative recommendation or a suggested modification from the County Planning Board. Since Westchester County Administrative Code § 277.61 is a special law and GML § 239-m[5] is a general law, and where a special law and a general law conflict the special law controls (*see 208 East 30th Street Corp. v. Town of North Salem*, 88 A.D.2d 281 (2d Dep't 1982)), municipalities in Westchester County may override a negative recommendation from the Westchester County Planning Board by a simple majority vote.
58. General Municipal Law § 239-m[3].
59. *Annabi*, 47 A.D.3d 856, 850 N.Y.S.2d at 626–27.
60. *Id.* at 627.
61. *Id.* (citing *Burchetta v. Town Bd. of Town of Carmel*, 167 A.D.2d 339, 340-341, 561 N.Y.S.2d 305; *Old Dock Assoc. v. Sullivan*, 150 A.D.2d 695, 697 (2d Dep't 1989); *Asma v. Curcione*, 31 A.D.2d 883, 884 (4th Dep't 1969)).
62. *Annabi*, 47 A.D.3d 856, 850 N.Y.S.2d at 628.
63. 48 A.D.3d 529, 852 N.Y.S.2d 220 (2d Dep't 2008).
64. 438 U.S. 104 (1978) (holding that a court, when considering whether a law effects a regulatory taking of property, must consider several factors, including the economic impact of the law on the claimant, the extent to which the law interferes with the claimant's investment-backed expectations, and the character of the government's action).
65. 505 U.S. 1003 (1992).
66. *Noghrey*, 48 A.D.3d 529, 852 N.Y.S.2d at 221.
67. *Id.* (emphasis original).
68. *Id.*
69. *Noghrey*, 48 A.D.3d 529, 852 N.Y.S.2d at 222.
70. 2008 WL 740561 (2d Dep't March 18, 2008).
71. *Id.*
72. *Id.*
73. "Subdivision" means the division of any parcel of land into a number of lots, blocks or sites as specified in a local ordinance, law, rule or regulation, with or without streets or highways, for the purpose of sale, transfer of ownership, or development. The term "subdivision" may include any alteration of lot lines or dimensions of any lots or sites shown on a plat previously approved and filed in the office of the county clerk or register of the county in which such plat is located. Subdivisions may be defined and delineated by local regulation, as either "major" or "minor," with the review procedures and criteria for each set forth in such local regulations.

    Town Law § 276[4](a).
74. Town of Newburgh Code § 163-2 defines "subdivision" as "[t]he division of any parcel of land or structure into two (2) or more lots, blocks, sites or units, with or without streets or highways. Such divisions shall include *resubdivision* of parcels of land for which an approved plat has already been filed in the office of the Orange County Clerk and which is entirely or partially undeveloped. . . . (emphasis added)." Section 163-2 defines "resubdivision" as "[a]ny change of an approved or recorded subdivision plat if such change affects any street layout shown on such plat or area reserved thereon for public use *or any change of a lot line* or if it affects any map or plan legally recorded. (emphasis added)"
75. 48 A.D.3d 585, 852 N.Y.S.2d 225 (2d Dep't 2008).
76. *Id.* at 227.
77. *Id.* at 226–27.
78. *Id.* at 227.
79. 852 N.Y.S.2d 503 (4th Dep't 2008).
80. *Id.* at 504.
81. *Id.*
82. *Id.*

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