Effective Weapon or Blunt Tool: The Amorphous Role of Administrative Precedent in the Land Use Approval Process

By Adam L. Wekstein

I. Introduction

If you are a land use practitioner, you have likely been approached by a prospective client who insists that he or she has an absolute right to obtain a zoning variance because the facts of his or her application resemble those on which prior variances were granted for other properties in a different zoning district on the other side of town a number of years earlier. He or she indignantly espouses the legal theory that a denial would equate to impermissible discrimination. Also likely is that you have been asked to pursue an application for an approval where a board has denied one or more similar applications on properties near to your potential client's lot or even one relating to that individual's parcel itself. Is the former client's impenetrable self-righteousness justified and the latter's possibly naive hopes doomed? The definitive answer to both inquiries is "it depends."[1]

If quoted to the former prospective client, an important principle applicable to variances and certain other land use approvals, will result in frustration (and perhaps him or her shopping for another attorney). Specifically, established law is that:

> the mere fact that one property owner is denied a variance while others similarly situated are granted variances does not, in itself, suffice to establish that the difference in result is due either to impermissible discrimination or to arbitrary action.[2]

The latter client can take at least some comfort in the fact that if the board acts favorably on his or her application, the board's prior inconsistent determinations do not necessarily mandate invalidation of his variance or approval. Rather, evaluation of the precedential force of prior decisions is inherently fact specific and presents questions that need to be considered on a case-by-case basis, with the ultimate outcome being dependent to a significant degree on how artfully the board frames the rationale for its determination.

As is discussed in this article, prior decisions of a land use board regarding properties situated similarly to one that is the subject of an application are often accorded precedential effect, but absent, among other things, a close correlation between the facts involved in each matter, they are unlikely to be binding. Even a prior decision regarding the same property, while sometimes entitled to *stare decisis* or even *res judicata* or collateral estoppel treatment,[3] is not always outcome determinative. Minor differences in factual circumstances or changes in the applicable land use law can lead to divergent outcomes. Even without such distinctions, a rational explanation by a board as to why it is deviating from its prior decision(s) may obviate the need to act consistently with earlier determinations – explanations which include, but are not limited to, "oops, we made a mistake on the previous go round" – may suffice.

Of course, the rules not only have implications for the lawyer representing a private client applying for or opposing an approval, but for counsel for a board that may want to deviate from or adhere to its precedent. It puts a premium on skillful drafting of so much of a decision as explains why prior precedent binds the board or need not be followed. To be defensible a resolution of a board faced with a track record of decisions based on substantially similar or essentially identical facts should include a discussion of those factors discussed in this article that are relevant to the particular application, explaining why the board has chosen to treat its former dispositions as binding or immaterial.

II. Basic Rule of Administrative Precedent

The short version of the rule regarding administrative precedent, characterized by the Court of Appeals as a species of *stare decisis* in the oft-cited case of *Matter of Charles A. Field Delivery, Inc*, is "absent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious."[4] In order to deviate from its prior decision, an agency's explanation for doing so must be included in its resolution and cannot be raised for the first time in litigation[5] or supplied after-the-fact by a court.[6] In discussing the basis for this requirement, New York's highest court explained the parallels between administrative and judicial proceedings in the following passage:

> The policy reasons for consistent results, given essentially similar facts, are . . . largely the same whether the proceeding be administrative or judicial – to provide guidance

> for those governed by the determination made . . . to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice. . . . The underlying precept is that in administrative, as in judicial, proceedings "justice demands that cases with like antecedents should breed like consequences . . . "[7]

The court emphasized that in light of such policy considerations, if an agency chooses to "alter its prior stated course" it must state its reasons for doing so, and without such an explanation "a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision."[8] It follows that absent an express explanation "a failure to conform to agency precedent require(s) reversal on the law" even where there is substantial evidence to support the agency's determination.[9]

Of note is that both inside and outside of the land use context, case law provides that the imperative to treat prior administrative determinations as precedent is confined to "quasi-judicial,"[10] rather than other administrative, determinations. It is a limitation that is neither necessarily straightforward nor rigid.

III. The Role of Precedent in the Land Use Approval Process

The generally applicable rules governing the role of administrative precedent apply to land use decisions.[11] In this regard a summary of the standard for determining whether a land use board has given the mandated regard for its own prior determination is, once again, that a decision which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious," and thus, "[w]here an agency reaches contrary results on substantially similar facts, it must provide an explanation."[12] These two simple phrases give rise to a number of issues. Further, the rule applies both with respect to the precedential value of decisions concerning other properties[13] and earlier determinations as to a property which is the subject of a pending application[14] – albeit, potentially to a different degree. A board's failure to adhere to the rule triggers invalidation of its determination, even where there is otherwise evidence in the record sufficient to support its decision.[15] Review of case law shows that annulment based on a board's failure to explain why its earlier precedent is distinguishable or, alternatively, to specify grounds for its choice to chart an arguably different course, is not unusual.[16]

Nevertheless, of relevance to and much to the disappointment of the hypothetical indignant client referenced at the outset of this article, the courts have uniformly adhered to the rubric that, without more, the fact that another property owner in a parallel situation has succeeded, while the applicant has been denied an approval, does not establish that the result is due either to impermissible discrimination or to arbitrary action and, as a consequence, is an insufficient basis for invalidating the denial.[17]

Not surprisingly, the vast majority of cases that invoke or analyze the role of administrative precedent in the land use approval process relate to the decisions of zoning boards of appeals. In the context of the law of administrative precedent the decisions of such boards are referred to as quasi-judicial.[18] Nonetheless, the principle has been applied beyond such limited confines to other land use boards or permitting authorities, including planning boards,[19] which would commonly not be understood to be quasi-judicial. It has been invoked in reviewing determinations involving interpretations of zoning provisions,[20] area variances,[21] use variances,[22] special use permits,[23] wetlands permits[24] and sign permits.[25] However, precedent plays no role with respect to legislative determinations, such as a city council's decision to enact a rezoning where it had previously denied the same zoning amendment.[26]

IV. The Principle Is Triggered Only When the Facts of an Application Are 'Essentially the Same as' or 'Substantially Similar to' Those on Which a Board's Prior Determination Was Based, in Which Case a Rational Explanation Is Required To Support Deviation From the Earlier Decision

A. What Constitutes Facts That Are 'Substantially Similar' or 'Essentially the Same' and Who Carries the Burden To Show It?

The party seeking to invoke a board's prior decision(s) as precedent sufficient to require that board to adhere to it or explain the departure therefrom has the burden to show that the facts of the application being considered are substantially similar to those which were the subject of the prior determination(s) on which it seeks to rely.[27] Conversely, a failure to meet that burden effectively leaves a board free to act on the record before it without regard to the outcome of prior applications.[28] In such circumstances, the board need not even express a basis for its departure.[29]

A party seeking to establish that a prior determination was decided on essentially the same facts should introduce the earlier written decisions and evidence about them into the administrative record.[30] Where the same applicant who obtained the prior decision is also the current one, he or she must show why a board should entertain a different out-

come.[31] Conversely, a zoning board also cannot invoke the doctrine of *stare decisis* or res judicata to justify a denial based on its prior variance decisions, unless it specifies the basis for doing so.[32] Evidence of and citation to salient earlier decisions cannot be introduced for the first time in court by any party.[33]

What is "essentially the same" seems to a large degree to be within the eye of the beholder; usually the beholder is the land use board. The determination is a highly fact-dependent one that normally falls within the reasonable discretion of the board, which is said to have authority "to give weight to slight differences which are not easily discernable."[34] Sometimes the answer to what constitutes "essentially the same" or "substantially similar" may be fairly obvious, possibly when it involves a recent prior decision relating to the same property. In closer cases the practitioner will often be hard pressed to discern useful guidance from legal precedent – a conclusion which, if explained to the self-righteous client, could not but help have an incendiary effect.

B. What Constitutes a Sufficient Explanation for Deviating From a Prior Determination

Where a board's earlier decision involved an application that was based on virtually identical facts to those it is reviewing, that board still possesses significant leeway to deviate from the earlier determination if it provides the requisite explanation for so doing. Multiple different issues may serve as a legally cognizable explanation for its action. Again, even minor factual distinctions may be a basis for a zoning board to deviate from a prior decision, provided the board expresses a rational explanation of its reasons for reaching the different result.[35] This does not mean, however, that a board's rationale is immune from judicial invalidation if it fails to surpass the low bar of rationality. For example, in one matter a zoning board approved a canopy for one service station, while denying it to another, at least, in part, grounded on the fact that the former station was self-service and the latter had several (but not all) full-service pumps.[36] The court held that the distinction was irrational, finding that a canopy is intended to protect customers from inclement weather regardless of the specifics of pump operations and annulled the variance denial.[37]

In contrast, in *Waidler v. Young*,[38] the Second Department employed perhaps the most extreme application of the principle, which is that even where the facts are indistinguishable, a board has freedom to depart from a prior determination; once again, so long as its explanation for so doing is reasonable, a board *"may refuse to duplicate previous error* [*or*] *may change its views as to what is for the best interests of the [Town]* . . . It need only have a rational basis for doing so."[39]

C. A Sampling of Factors Relevant in Applying Precedent to Zoning Board Practice

Unfortunately, a majority of the reported cases which consider the *stare decisis* effect of prior land use decisions, particularly those relating to parcels different from the property undergoing review, include scant descriptions of the operative facts. Some of the factors which can be relevant are the distance between a property that is the subject of an application and the lands which received the prior determinations, whether the properties are in the same neighborhood and/or zoning district, the comparative magnitude of the variance(s) being sought and those for which the board previously issued determinations, changes in salient circumstances following the issuance of the prior decision(s), the number of properties that have received or been denied similar approvals and changes in the governing state enabling legislation.

1. Comparative Magnitude of the Variances

Perhaps by including this paragraph the author is demonstrating that he has a firm grasp of the obvious. The size of the variance(s) being sought in comparison to the magnitude of those which are claimed to be precedent is significant in determining whether or not the circumstances are substantially similar, or, alternatively, whether the differences are sufficient to serve as a reasonable explanation for a decision to deviate from the earlier dispositions.[40]

2. Distance Between Properties and Location in the Same Neighborhood

One Appellate Division decision upheld the denial of a variance which would have allowed a pool to encroach in the back-yard setback, notwithstanding that two previously-granted variances had authorized inground pools within such setbacks. A significant consideration on which the court said the board properly relied was that the prior determinations concerned properties not near to the subject parcel.[41] In a different opinion, that same court upheld a denial of area variances where the precedent that the applicant embraced related to properties situated in different neighborhoods and granted variances of lesser magnitude.[42]

In contrast, *L & M Graziose, LLP v. City of Glen Cove Zoning Board of Appeals,*[43] reversed the denial of variances. While recognizing both the broad deference accorded to zoning boards and that the board had properly held that the variances were substantial, the opinion relied, among other things, on its conclusion that "similar variance requests were granted for properties in very close proximity to the subject property, and the ZBA's past pronouncements confirm that the character of the neighborhood would not be negatively affected by the granting of the variances."[44]

3. Applicable Zoning District

Another factor that courts have accepted as a legitimate basis for distinguishing earlier determinations of a board is that purportedly precedential decisions were made with respect to properties located in a different zoning district than the site for which approval is being sought.[45] This follows, because presumably a variance or permit for a parcel in a different district may have different implications relating to or impacts in the context of a distinct set of permitted uses and dimensional requirements. The two districts may have been designed to accommodate and mitigate different potential impacts or foster types of land use with which certain varied externalities would inevitably be associated. On the other hand, as should be evident from the discussion so far, as with the other factors, the import of even a board's pattern of favorable treatment of multiple applications in the same zoning district as a subject property can be dismissed with an explanation that such decisions were prior mistaken interpretations that warrant correction.[46]

4. Change in Conditions, Neighborhood Character or Passage of Time

The Second Department has recognized that a change in conditions following an earlier administrative decision is a basis for a board to deviate therefrom. For example, the court held that a variance granted nine years earlier to allow a subdivision featuring "flag lots" that were similar to those for which variances were being sought, was insufficient to require invalidation of a denial of the latter, because the applicant failed to show that the outcome of his application was on essentially the same facts.[47]

Earlier this year the Second Department upheld the grant of an area variance to allow an addition of an accessory apartment in a two-family dwelling in direct contradiction of a condition imposed in the earlier 2016-vintage variance which authorized the original two-family use. While recognizing the import of precedent, the court found that the zoning board adequately explained its rationale for reaching a different result.[48] It held that the board properly relied not only on the applicant's desire to accommodate his mother-in-law, but on the reasoning "that the Town's housing needs had grown since 2016 due to population growth and that granting the application was one way to 'accomodat[e]' those needs."[49]

Of course, one of the most important changes that can justify divergent outcomes is the evolution of the character of the neighborhood in which the salient property or properties are located. In one case, a board's explanation that its history of granting successive variances to other parties had changed the character of the neighborhood was held to be a rational one justifying denial of an application for similar relief.[50] A board was also found to have provided a rational explanation for disparate treatment of an application in contrast to earlier dispositions, where it stated that in subsequent years the town had "come to realize that the proliferation of nonconforming lots is 'disruptive of the goals of sound planning and land use, injurious to the health safety and welfare of the community and against public policy.'"[51] In *Cowan*, the Court of Appeals upheld a variance denial, notwithstanding the relatively recent grant of two others to adjoining landowners based on the board's stated perception that recent development had negatively impacted the community. In pertinent part, the decision explained its reasoning as follows:

> the zoning board was certainly free to conclude that, after three years from the last residential construction, the area had become too congested to permit further substandard development . . . the board was powerless to change. That the board had granted two variances in the past did not strap it to grant variances to all comers in the future automatically and without due regard for changed conditions that might require a different result. Having granted two variances in the past, the board could properly decide that additional variances would impose too great a burden and strain on the existing community.[52]

Conversely, so long as it is rational, a board's adherence to earlier decisions based on its finding that there had been no salient change in circumstances that would justify a different result will not be disturbed.[53] However, where there had been substantial changes in circumstances following a prior denial, a board's refusal to consider a new application for similar relief can be arbitrary and capricious.[54] Thus, a board's authority to decide whether or not a change in circumstances is substantial enough to require it even to consider an application is not unlimited.

The mere passage of time after a board's earlier decision is an insufficient basis, in and of itself, to reach a result which deviates from that precedent. For example, in *Lucas v. Board of Appeals of Village of Mamaroneck*, the Second Department annulled a variance where it found that the zoning board's reasons for distinguishing a 15-year-old denial did not reflect that there had been "a material change in circumstances sufficient to justify the different result."[55] In fact, even after a variance has expired, a zoning board is not free to deny a renewal absent changed circumstances.[56] One case applied this principle to a board's refusal to renew a 24-year-old frontage variance.[57] Nevertheless, that a prior decision is chronologically very close to an application for a similar variance

is likely to be a factor that a board can properly consider in determining the precedential respect it should be accorded.[58]

5. Different Plans

An application concerning the same parcel of property for which an adverse decision has been issued does not foreclose a subsequent application that is premised on materially different plans.[59] However, where the change in plans does not materially affect the impacts of a proposed land use that were cited as a basis for the earlier denial the board is not free to revisit and reevaluate those impacts.[60] *Moore v. Town of Islip Zoning Board of Appeals*, relied, in part, on a change in the plans as establishing that a zoning board erred in refusing to entertain a new application, stating:

> A zoning board may refuse to rehear an application in the absence of new facts or a change of circumstances . . . even when the second application is brought by a difference applicant . . . a zoning board may not refuse to consider an application with respect to which there has been a substantial change of circumstances since the prior denial. . . . Here, in light of the factors that must be considered under the balancing test set forth in Town Law § 267–b(3)(b) . . . particularly the character of and conditions in the neighborhood (*see* Town Law § 267–b[3][b][1], [4]), it was arbitrary and capricious for the Zoning Board to refuse to hear the petitioner's application on the basis of the denial of a variance application with respect to the same property nearly 20 years before. The present application, although similar to the prior application in that it requested variances permitting the construction of a single-family residence on a substandard lot, differed substantially from the prior application in that the present application did not seek permission to construct a two-car garage or to vary the minimum sideyard requirements of the zoning law.[61]

Not inconsistent with the passage quoted from *Moore* is that in the first instance, the question of whether an application has changed sufficiently to be materially different from one which a board has already considered is committed to the board's discretion.[62]

6. Different Types of Structures

Where a board has granted previous area variances that are similar to those which are the subject of a current application, but which involved different types of structures, a denial does not constitute a different result on essentially the same facts.[63]

7. Change in Controlling Legal Standards

As to legal changes, binding precedent dictates that determinations made under a legal standard which has subsequently substantively been modified are afforded little or no weight with respect to applications made under the current statutory criteria. In particular, New York's highest court held that a zoning board's earlier denial of an area variance under the old common law "practical difficulty" standard[64] does not mandate the same outcome on a subsequent application seeking variances for the same property under the now-effective statutory standard.[65]

8. Pattern of Previous Decisions

Not surprisingly, where a board has rendered a number of decisions reaching a consistent outcome, the courts may be more likely to conclude that the precedent embodying that pattern binds the board. In *Nicholai v. McLaughlin*, the court held that denial of a wetland permit required an explanation, where the board had on numerous prior occasions allowed greater encroachments into wetlands and wetlands buffers.[66] Similarly, the First Department rejected a zoning board's interpretation that a convenience store was not permitted as an accessory use to a gas station, where the board in a significant number of other cases granted permission, including to direct competitors of the applicant, to allow precisely such a combination, and, accordingly, dismissed the board's attempt to explain why its permitting pattern was irrelevant.[67]

In contrast, where a board's results on similar questions have been inconsistent, a decision is unlikely to be viewed as an arbitrary departure from precedent no matter which way the board decides the current matter (so long as it has a rational basis).[68] Inconsistency of prior determinations came into play in *Mobil Oil Corporation v. Village of Mamaroneck Board of Appeals*.[69] Therein, after denying a variance to allow a gas station to erect a canopy over its pumps on two occasions, the zoning board subsequently granted one to another gas station in the same zoning district in a similar location; yet it then denied a third application for a canopy on the subject property.[70] The court held that the zoning board's finding that the two prior denials rendered the landowner's hardship self-created, was irrational, as the board had "evinced a willingness to grant such an application" and that, consequently, the prior denials of the petitioner's predecessor's applications were irrelevant to the pending application.[71]

V. A Land Use Board Can Consider the Potential Precedential Impact Its Determination May Have on Future Applications

Based on the significant role of precedent in the land use process, in making a decision a board is empowered to consider the consequences its action might have on future land use applications involving similar facts.[72] For example, the Court of Appeals relied on the impact of precedent on zoning boards as a basis to hold that the decision denying a variance grounded on a board's stated desire to avoid creating potentially adverse precedent was not arbitrary and capricious. The relevant passage in the decision reads as follows:

> The Board was . . . entitled to consider that granting a variance for an illegally substandard parcel with 40 feet of frontage width could set a precedent within the neighborhood such that landowners of oversized parcels could illegally subdivide their land and seek an area variance to improve the substandard plot with the idea that two parcels with two houses are worth more than one parcel with one house. As the Board is entrusted with safeguarding the character of the neighborhood in accordance with the zoning laws (see Town Law § 267–b[3][c]), it was well within its discretion to deny a variance that would have allowed an owner to take advantage of an illegally nonconforming parcel by erecting a dwelling upon it.[73]

On a similar rationale, the Second Department explained that a board was within its rights to discount the pattern of development in close proximity to the property for which the variance was sought based on this precept. Its analysis stated:

> [a]lthough the petitioner introduced evidence that the variances he sought were consistent with conditions existing on neighboring properties, the petitioner introduced no evidence as to whether those comparators existed prior to the enactment of the ordinance, and the Board was permitted to consider that granting the requested variances could set a negative precedent and thereby undermine the existing ordinance.[74]

The author submits that employment by a board of the purported concern about setting precedent as a basis for its decision may be more susceptible to unwarranted speculation and abuse than most other aspects of the law relating to administrative *stare decisis*, as the vast majority of variances can, rightfully or wrongfully, be portrayed as posing a danger of establishing precedent. At least one arguing in favor of an application in the face of a board's avowed fear of making precedent can point to the principles discussed above. At the risk of repetition, a board's putative fear of the precedential impact of a decision on future dispositions is blunted by the authority holding that minor factual distinctions can be a basis for a zoning board to deviate from a prior decision, and even if the facts are virtually indistinguishable, the board merely has to give a rational explanation of its reasons for reaching a different result.[75]

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Endnotes

1. Hopefully, the rest of the article will be more useful.
2. *Cowan v. Kern*, 41 N.Y.2d 591, 595, 394 N.Y.S.2d 579, 581 (1977); *Matejko v. Board of Zoning Appeals of Town of Brookhaven*, 77 A.D.3d 949, 950, 910 N.Y.S.2d 123, 126 (2d Dep't 2010); *Crilly v. Karl*, 67 A.D.3d 793, 795, 888 N.Y.S.2d 189, 191 (2d Dep't 2009), *lv. denied*, 14 N.Y.3d 709, 903 N.Y.S.2d 768 (2010).
3. Collateral estoppel and *res judicata* are related, but distinct doctrines, that may apply to give prior administrative determinations binding effect. *Staatsburg Water Company v. Staatsburg Fire District*, 72 N.Y.2d 147, 153, 531 N.Y.S.2d 876, 878 (1988). Collateral estoppel or issue preclusion requires there to be "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and [there was] a full and fair opportunity to contest the decision now said to be controlling" *Id*. It is theoretically a flexible doctrine which requires consideration of conservation of the resources of the board and parties, the stakes in the prior proceeding, the interest in clear and accurate results. *Id. Res Judicata* applies to prevent a party from relitigating a claim that was decided between the same parties and brought to a final conclusion from pursuing the same claim even if under a new legal theory. *See Simmons v. Trans Express Inc.*, 37 N.Y.3d 107, 111, 148 N.Y.S.3d 178, 181 (2021). Where a current applicant is not the same party who obtained the prior decision regarding the subject property, *res judicata*, may not bar his or her ability to make that application (*see Gonzalez v. Zoning Board of Appeals of Town of Putnam Valley*, 3 A.D.3d 498, 497, 771 N.Y.S.2d 142, 145 (2d Dep't 2004); *Peccoraro v. Humenik*, 258 A.D.2d 465, 466, 684 N.Y.S.2d 588, 589 (2d Dep't 1999)), but the earlier decision, subject to the factors discussed in this article, has a strong chance of being dispositive.

4. 66 N.Y.2d 516, 518, 498 N.Y.S.2d 111, 114 (1985); *Nicholai v. McLaughlin*, 163 A.D.3d 572, 81 N.Y.S.3d 89 (2d Dep't 2018); *Amdurer v. Village of New Hempstead Zoning Board of Appeals*, 146 A.D.3d 878, 45 N.Y.S.3d 186 (2d Dep't 2017) (holding that where a zoning board failed to set forth a factual basis for failing to adhere to its prior determination on substantially similar facts, its determination had to be invalidated as arbitrary and capricious).

5. *Nicholai*, 163 A.D.3d at 574, 81 N.Y.S.2d at 91 ("the planning board's belated effort to provide such distinctions is not properly before us."); *See Matter of Lafayette Storage*, 77 N.Y.2d 823, 826, 566 N.Y.S.2d 198, 199 (1991).

6. *Charles A. Field*, 66 N.Y.2d at 520, 498 N.Y.S.2d at 1227; *Collins v. Governor's Office of Employee Relations*, 211 A.D.2d 1001, 621 N.Y.S.2d 748 (3d Dep't 1995).

7. *Charles A. Field*, 66 N.Y.2d at 519-520, 498 N.Y.S.2d at 1226-1227 (citations omitted). Interestingly, in an observation that does not seem to play an explicit role in subsequent cases the Court stated that "it is often suggested that such an agency 'has somewhat greater freedom than a common law court' . . . " *Id*. at en 2.

8. 66 N.Y.2d at 520, 498 N.Y.S.2d at 115.

9. *Id*.

10. *Voutsinas v. Schenone*, 166 A.D.3d 634, 636, 88 N.Y.S.3d 57, 60 (2d Dep't 2018)("[T]he principles of *res judicata* and collateral estoppel apply to quasi-judicial determinations of administrative agencies, such as zoning boards, and preclude the relitigation of issues previously litigated on the merits"); *Grasso Public Carting v. Trade Waste Commission of City of New York*, 250 A.D.2d 454, 673 N.Y.S.2d 391 (1st Dep't 1998) (finding that where a commission was acting in a quasi-legislative, rather than quasi-judicial, capacity it did not have to explain deviation from a past policy).

11. *Voutsinas*, 166 A.D.3d at 636, 88 N.Y.S.3d at 61.

12. *O'Connor and Sons Home Improvement, LLC*, *v. Acevedo*, 197 A.D.3d 1112, 1114, 153 N.Y.S.3d 492, 494 (2d Dep't 2021), *quoting*, *Nicholai*, *supra*. *See Amdurer,* 146 A.D.3d at 878-879, 45 N.Y.S.3d at 187 (annulling as arbitrary and capricious a zoning board's determination which was contrary to an earlier decision on substantially similar facts without explanation for the divergence); *Margulies v. Town of Ramapo*, 2024 WL 1545457 (2d Dept 2024).

13. *See Nicolai*, *supra*; *Lyublinskiy v. Srinivasan*, 65 A.D.3d 1237, 1239-1240, 887 N.Y.S.2d 119, 121 (2d Dep't 2009) (holding that New York City's Board of Standards and Appeals' determination that it lacked authority to grant a special permit to legalize the enlargement of a residence to surpass the zoning bulk limitations was arbitrary and capricious where on a prior application for another property it had granted precisely such relief).

14. *Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 747, 834 N.Y.S.2d 295, 296 (2d Dep't 2007); *Aliperti v. Trotta,* 35 A.D.3d 854, 854-855, 827 N.Y.S.2d 274, 275-276 (2d Dep't 2006) (invalidating denial of a variance where the board had granted a previous application for the same property and articulated no rational basis for reaching a different result on essentially the same facts); *Civic Association of Setaukets v. Trotta*, 8 A.D.3d 482, 778 N.Y.S.2d 524 (2d Dep't 2004)(annuling an area variance allowing a property to be used in the same way in the same configuration as one denied one year earlier).

15. *Nicholai*, 163 A.D.3d at 572, 81 N.Y.S.2d at 91 ("'An agency's failure to provide a valid and rational explanation for its departure from its prior precedent 'mandates reversal' regardless of whether the record otherwise supports the determination' . . . (citations omitted))" *Lyublinskiy,* 65 A.D.3d at 1239-1240, 887 N.Y.S.2d at 12; *Hamptons, LLC v. Village of East Hampton*, 98 A.D.3d 738, 950 N.Y.S.2d 386 (2d Dep't 2012) (holding that where a zoning board failed to provide a factual basis for imposing conditions in a special use permit where it had not done so on a substantially similar application, those conditions were arbitrary and capricious); *Lucas v. Board of Appeals v. Village of Mamaroneck*, 57 A.D.3d 784, 785-786, 870 N.Y.S.2d 78, 79 (2d Dep't 2008); *Campo Grandchildren Trust*, 39 A.D.3d at 747, 834 N.Y.S.2d at 296.

16. *See*, *e.g.*, *Nicholai*, 163 A.D.3d at 574, 81 N.Y.S.3d at 91; *Amdurer*, 146 A.D.3d at 879, 45 N.Y.S.3d at 878; *Lyublinskiy,* 65 A.D.3d at 1239-1240, 887 N.Y.S.2d at 121; *Lucas*, 57 A.D.3d at 785-786, 870 N.Y.S.2d at 79; *Campo Grandchildren Trust*, 39 A.D.3d at 747, 834 N.Y.S.2d at 296; *Aliperti v. Trotta,* 35 A.D.3d at 854-855, 827 N.Y.S.2d at 275-276; *Mobil Oil Corporation v. Village of Mamaroneck Board of Appeals*, 293 A.D.2d 679, 681, 740 N.Y.S.2d 456, 459 (2d Dep't 2002); *Waylonis v. Baum*, 281 A.D.2d 636, 638, 723 N.Y.S.2d 55, 57 (2d Dep't 2001); *Frisenda v. Zoning Board of Appeals v. Town of Islip,* 215 A.D.2d 479, 480, 626 N.Y.S.2d 263, 263-264 (2d Dep't 1995).

17. *Cowan*, 41 N.Y.2d at 596, 394 N.Y.S.2d at 581-582; *Monroe Beach, Inc., v Zoning Board of Appeals of City of Long Beach*, 71 A.D.3d 1150, 1151, 898 N.Y.S.2d 194, 196 (2d Dep't 2010).

18. *Palm Management Corporation v. Goldstein*, 29 A.D.3d 801, 804, 815 N.Y.S.2d 670, 674 (2d Dep't 2006), *aff'd on other grounds*, 8 N.Y.3d 337, 833 N.Y.S.2d 423 (2007)("the principles of res judicata and collateral estoppel apply to quasi-judicial determinations of administrative agencies, such as zoning boards, and preclude the relitigation of issues previously litigated on the merits"); *see Voutsinas*, 166 A.D.3d at 636, 88 N.Y.S.3d at 60; *Calapai v. Zoning Board of Appeals of Village of Babylon*, 57 A.D.3d 987, 989, 871 N.Y.S.2d 288, 290 (2d Dep't 2008). Please note, however, that in the context of determining whether a challenge to the merits of an administrative board's determination in an Article 78 proceeding should be heard by the Appellate Division or the Supreme Court under the substantial evidence or arbitrary and capricious standards, it is settled law that "[m]unicipal land use agencies like the Zoning Board are quasi-legislative, quasi administrative bodies . . . " as their hearings are informational rather than ones at which sworn testimony or the formal taking of evidence occurs. *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98, 103-104 (2d Dep't 2005), *dismissed*, 6 N.Y.3d 890, 817 N.Y.S.2d 624 (2006), and, *lv. denied*, 7 N.Y.3d 708, 822, N.Y.S.2d 482 (2006); *see Francello v. Mendoza*, 165 A.D.3d 1555, 1556-1557, 87 N.Y.S.3d 361, 363-364 (3d Dep't 2018). Therefore, whether a board is "quasi-judicial" may vary with context.

19. *Nicholai*, *supra* (annulling a Planning Board's denial wetland control permit for failing to adhere to prior precedent); *Callanan Industries, Inc. v. Rourke*, 187 A.D.2d 781, 589 N.Y.S.2d 663 (3d Dep't 1992).

20. *Nozzleman 60, LLC v. Village of Cold Spring Zoning Board of Appeals*, 34 A.D.3d 682, 825 N.Y.S.2d 107 (2d Dep't 2006), *lv. denied*, 9 N.Y.3d 803, 840 N.Y.S. 2d 763 (2007).

21. *Voutsinas, supra*.

22. *Christian Airmen, Inc. v Town of Newstead Zoning Board of Appeals*, 115 A.D.3d 1319, 983 N.Y.S.2d 173 (4th Dep't 2014).

23. *Hamptons, LLC*, *supra*; *Lyublinskiy, supra.*

24. *Nicholai*, *supra.*

25. *Take Two Outdoor Media LLC v. Board of Standards and Appeals of City of New York*, 146 A.D.3d 715, 48 N.Y.S.3d 653 (1st Dep't 2017).

26. *Restuccio v. City of Oswego,* 114 A.D.3d 1191, 979 N.Y.S.2d 749 (4th Dep't 2014).

27. *Grosso v. Dechance,* 205 A.D.3d 1026, 1028, 166 N.Y.S.3d 888, 889 (2d Dept 2022)(which in upholding a zoning board's denial of area variances reasoned: "[c]ontrary to the petitioner's contention, the Zoning Board's granting of two prior applications for area variances did not constitute a precedent from which the Zoning Board was required to explain a departure, as the petitioner failed to establish that the prior applications bore sufficient factual similarity to the subject application"); *Todd Kramer v. Zoning Board of Appeals of Southampton,* 131 A.D.3d 1170, 16 N.Y.S.3d 832 (2d Dep't 2015)(rejecting a challenge to denial of area variances where the applicants failed to demonstrate that three prior variances bore sufficient similarity to its application to require the zoning board to explain its departure from precedent); *Graviano v. Young*, 75 A.D.3d 601, 904 N.Y.S.2d 667 (2d Dep't 2010); *Gallo v. Rosell*, 52 A.D.3d 514, 859 N.Y.S.2d 675 (2d Dep't 2008).

28. *Expressway Development, Inc. v. Town of Gates Zoning Board of Appeals*, 147 A.D.3d 1427, 46 N.Y.S.2d 725 (4th Dep't 2017) (confirming denial of a use variance where the applicant failed to establish the existence of favorable earlier determinations on essentially the same facts); *Blandeburgo v Zoning Board of Appeals of Town of Islip*, 110 A.D.3d 876, 972 N.Y.S.2d 693 (2d Dep't 2013) (holding that the petitioner failed to show sufficient similarity between prior variances for in-ground pools within the rear-yard setback and the current application to have required the zoning board to explain its departure); *Kaiser v. Town of Islip Zoning Board of Appeals*, 74 A.D.3d 1203, 904 N.Y.S.2d 166 (2d Dep't 2010); *London v. Zoning Board of Appeals of Town of Huntington*, 49 A.D.3d 739, 855 N.Y.S.2d 561 (2d Dep't 2008), *lv. denied*, 10 N.Y.3d 713, 861 N.Y.S.2d 273 (2008); *Conversions for Real Estate, LLC, v. Zoning Board of Appeals of Incorporated Village of Roslyn*, 31 A.D.3d 635, 818 N.Y.S.2d 298 (2d Dep't 2006).

29. *Latuga v. Giannadeo*, 140 A.D.3d 771, 772, 31 N.Y.S.3d 206, 207 (2d Dep't 2016), *lv. denied*, 28 N.Y.3d 914, 52 N.Y.3d 291 (2017); ("petitioners failed to establish that the case bore sufficient factual similarity to the subject application so as to require an explanation from the Board'); *Todd Kramer*, 131 A.D.3d at 1172, 16 N.Y.S.3d at 834 (confirming the denial of setback and area variances, finding that no explanation by the board for departure from prior precedent was necessary, where the petitioner failed to show that three earlier decisions bore sufficient factual similarity); *Conversions Real Estate, LLC*, 31 A.D.3d at 636, 818 N.Y.S.2d at, 299.

30. S*ee Gallo*, 52 A.D.3d at 516, 859 N.Y.S.2d at 677 (2d Dep't 2008); *Monte Carlo 1, LLC v. Weiss*, 142 A.D.3d 1173, 1175, 38 N.Y.S.3d 228 (2d Dep't 2016); *see generally Kaufman v. Incorporated Village of Kings Point*, 52 A.D.3d 604, 609, 860 N.Y.S.2d 573, 577 (2d Dep't 2008)(finding that conclusory statements made by the village attorney at a public hearing were insufficient to establish that similar applications had been granted in the past).

31. *Falco v. Town of Islip Zoning Board of Appeals*, 283 A.D.2d. 576, 576, 725 N.Y.S.2d 221, 221-222 (2d Dep't 2001)("petitioner did not put forth sufficient evidence of a change of circumstances or new facts that were not available at the time of her 1984 application for a zoning variance. Therefore, her 1999 application for a new hearing on the proposed variance for the subject property was properly denied . . . (citations omitted)."

32. *Gonzalez*, 3 A.D.3d at 498, 771 N.Y.S.2d at 144-145.

33. *Olson v. Scheyer*, 67 A.D.3d 914, 889 N.Y.S.2d 245 (2d Dep't 2009); *Dejoy v. Zoning Board of Appeals of Town of Babylon*, 249 A.D.2d 389, 390, 670 N.Y.S.2d 793, 793 (2d Dep't 1998); *Montalbano v. Silva*, 204 A.D.2d 457, 458, 611 N.Y.S.2d 630, 631 (2d Dep't 1994).

34. *Waidler v. Young*, 63 A.D.3d 953, 954, 882 N.Y.S.2d 153, 154 (2d Dep't 2009).

35. *Monte Carlo 1, LLC*, 142 A.D.3d at 1176, 38 N.Y.S.3d at 231; *see Gallo*, 52 A.D.3d at 516, 859 N.Y.S.2d at 677.

36. *Mobil Oil Corporation*, 293 A.D.2d at 681, 740 N.Y.S.2d at 459.

37. *Mobil Oil Corporation*, 293 A.D.2d at 681, 740 N.Y.S.2d at 459. When it granted the variance to the other party, the board was likely unwise to have expressly disclaimed any expertise as to the appropriate minimum size and location of a canopy and defer that determination to other village land use boards.

38. 63 A.D.3d at 954, 882 N.Y.S.2d at 154**.** *See Nozzleman 60, LLC*, 34 A.D.3d at 683, 825 N.Y.S.2d at 109.

39. *Waidler, supra*; *Take Two Outdoor Media LLC, supra*; *Nozzleman 60, LLC,* 34 A.D.3d at 683, 825 N.Y.S.2d at 109.

40. *See Pesek*, 156 A.D.2d 690, 691, 549 N.Y.S.2d 164, 165 (2d Dep't 1989); *cf. Obermeier v. Amelkin*, 65 A.D.2d 574, 409 N.Y.S.2d 28 (2d Dep't 1978), *aff'd*, 49 N.Y.2d 807, 426 N.Y.S.2d 980 (1980.)

41. *Blandeburgo,* 110 A.D.3d at 878, 972 N.Y.S.2d at 694; *see North Shore, F.C.P., Inc. v Mammina*, 22 A.D.3d 759, 804 N.Y.S.2d 383 (2d Dep't 2005) (finding that where the location of the premises and the impacts of the proposals were different, the proposals "were not based on essentially the same facts"); *see Brady v. Town of Islip Zoning Board of Appeals*, 65 A.D.3d 1337, 1337, 886 N.Y.S.2d 465, 468 (2d Dep't 2009), *lv. denied*, 14 N.Y.3d 703, 898 N.Y.S.2d 99 (2010)(upholding the denial of a variance to allow swimming pool on a substandard lot, where there were no pools on deficient lots within 600 feet of the subject property and where only seven pools on substandard lots were within the 300-home neighborhood in which that property was located).

42. 156 A.D.2d at 690-691, 549 N.Y.S.2d at 165.

43. 127 A.D.3d 863, 7 N.Y.S.3d 344 (2d Dep't 2015).

44. 127 A.D.3d at 865, 7 N.Y.S.3d at 346.

45. See *Blandeburgo,* 110 A.D.3d at 878, 972 N.Y.S.2d at 694; *see generally Hamptons, LLC*, *supra.*

46. *Nozzleman 60, LLC,* 34 A.D.3d at 682, 825 N.Y.S.2d at 109.

47. *Matejko*, 77 A.D.3d at 950, 910 N.Y.S.2d at 125.

48. *Margulies*, *supra*.

49. *Id.*

50. *Spandorf v. Board of Appeals of East Hills*, 167 A.D.2d 546, 547, 562 N.Y.S.2d 215, 216 (2d Dep't 1990).

51. *Pesek*, 156 A.D.2d at 691, 549 N.Y.S.2d at 165.

52. 41 N.Y.2d at 595-596, 394 N.Y.S.2d at 581.

53. *Pettit v. Board of Appeals of Town of Islip*, 160 A.D.2d 1006, 1007, 554 N.Y.S.2d 723, 724 (3d Dep't 1990) (the Board's finding that there were "no material differences" between a proposed application and a prior one which had been denied less than a year before . . . "was clearly not arbitrary" or an abuse of discretion, as "there was ample evidentiary support therefor in the record" . . . and "[s]ince there was no change of facts or circumstances, the Board properly denied a rehearing . . . (citations omitted)").

54. *Moore v. Town of Islip Zoning Board of Appeals,* 28 A.D.3d 772, 772, 813 N.Y.S.2d 542, 543 (2d Dep't 2006)

55. 57 A.D.3d at 785-786, 870 N.Y.S.2d at 79.

56. *American Red Cross, Tompkins County Chapter v. Board of Zoning Appeals of City of Ithaca*, 161 A.D.2d 878, 879, 555 N.Y.S.2d 923, 924-925 (3d Dep't 1990) ("In our view, the record contains insufficient evidence evincing a change in circumstances sufficient to support respondent's reversal of its previous position").

57. *Cohen v. Village of Irvington*, 29 Misc.3d 1231, 920 N.Y.S.2d 240 (Sup. Ct. Westchester Co. 2010).

58. *See*, *e.g, Pettit*, 160 A.D.2d at 1007, 554 N.Y.S.2d at 724.

59. *Hurley v. Zoning Board of Appeals of Village of Amityville*, 69 A.D.3d 940, 941, 893 N.Y.S.2d 277, 278-279 (2d Dep't 2010) (stating that there was no merit to a claim that a zoning board was barred from granting variances where it had previously denied them to the same applicant, as revised plans materially changed aspects of the matter); *Hunt v. Board of Zoning Appeals of Incorporated Village of Malverne*, 27 A.D.3d 464, 812 N.Y.S.2d 581 (2d Dep't 2006).

60. *Voutsinas*, 166 A.D.3d at 636, 88 N.Y.S.3d at 60-61.

61. 28 A.D.3d at 773, 813 N.Y.S.2d at 543 (citations omitted).

62. *See Pettit*, 160 A.D.2d at 1007, 554 N.Y.S.2d at 724 (finding to be controlling the denial of a variance less than a year earlier).

63. *Spandorf*, 167 A.D.2d at 547, 562 N.Y.S.2d at 216.

64. *See generally Sasso v. Osgood*, 86 N.Y.2d 374, 384, 633 N.Y.S.2d 259, 264 (1995)("[w]e conclude Town Law § 267–b(3)(b) requires the Zoning Board to engage in a balancing test, weighing 'the benefit to the applicant' against 'the detriment to the health, safety and welfare of the neighborhood or community' if the area variance is granted, and that an applicant need not show 'practical difficulties' as that test was formerly applied."); *Cohen v. Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003)("the history of these amendments does not suggest that they were intended merely to codify the disparate attempts in the courts to define 'practical difficulty' . . . the earlier standards embodied in the Village and Town Laws. Rather, the statutory history supports petitioners' position that the Legislature intended to replace the confusing 'practical difficulty' standard with a consistent test that weighed benefit to the applicant against detriment to the community . . .").

65. *Pecoraro v. Board of Appeals of the Town of Hempstead*, 2 N.Y.3d 608, 614, 781 N.Y.S.2d 234, 237 (2005) ("while the Board relied on its 1969 denial of a similar variance, it did not give estoppel effect to that decision. *Nor could it do so since Town Law § 267–b was enacted after that determination.*" (emphasis added)); *see Josato, Inc., v. Wright*, 288 A.D.2d 384, 733 N.Y.S.2d 214 (2d Dep't 2001).

66. 163 A.D.3d at 574; 81 N.Y.S.3d at 91.

67. *Exxon Corporation v. Board of Standards and Appeals of City of New York*, 128 A.D.2d 289, 296-299, 515 N.Y.S.2d 768, 773-774 (1st Dep't 1987), *lv. denied*, 70 N.Y.2d 614, 524 N.Y.S.2d 676 (1988).

68. *See Cipriano v. Board of Zoning Appeals of City of Glen Cove*, 203 A.D.2d 362, 363, 610 N.Y.S.2d 305, 306 (2d Dep't 1994) ("the record reveals that although some property owners, similarly situated, had been granted variances, others had not. Accordingly, it cannot be said that the petitioner in this case was unfairly singled out or that the Board completely abandoned its own precedent."); *see generally Terrace Court, LLC v. New York State Division of Housing and Community Renewal*, 18 N.Y.3d 446, 940 N.Y.S.2d 549 (2013); *Cowan*, 41 N.Y.2d at 596, 394 N.Y.S.2d at 582 ("there is no history of a consistently liberal board policy that was suddenly and dramatically changed to the disadvantage of [the applicant]").

69. *Mobil Oil Corporation, supra.*

70. *Mobil Oil Corporation*, 293 A.D.2d at 680, 740 N.Y.S.2d at 457.

71. The board's putative effort to dismiss the precedential value of the intervening grant of a variance for the other gas station was rendered less effective by the finding in the resolution granting its earlier approval that the variance would be precedent "for the 10 other gas stations, including [the station of the applicant which was denied] located within the municipality." *Mobil Oil Corporation*, 293 A.D.2d at 459, 740 N.Y.S.2d at 681.

72. *Pecoraro*, 2 N.Y.3d at 615, 781 N.Y.S.2d at 238; *Bonadonna v. Board of Zoning Appeals of Incorporated Village of Upper Brookville*, 230 A.D.3d 855, 858, 198 N.Y.S.3d 368, 371 (2d Dep't 2023); *C. Foster v. Dechance*, 210 A.D.3d 1085, 1087, 178 N.Y.S.3d 786, 788 (2d Dep't 2022); *Parsome, LLC, v. Zoning Board of Appeals of Village of East Hampton*, 191 A.D.3d 785, 788, 142 N.Y.S.3d 552, 555-556 (2d Dep't 2021); *Dutt v. Bowers*, 207 A.D.3d 540, 542, 172 N.Y.S.3d 64, 66 (2d Dep't 2022); *Sacher v. Upper Brookville*, 124 N.Y.S.3d 902, 904, 3 N.Y.S.3d 69, 70 (2d Dep't 2015).

73. *Pecoraro,* 2 N.Y.3d at 614, 781 N.Y.S.2d at 237.

74. *Bonadonna*, 230 A.D.3d at 858, 198 N.Y.S.3d at 371. *See Genser v. Board of Zoning Appeals of Town of North Hempstead*, 65 A.D.3d 1144, 1147, 885 N.Y.S.2d 327, 330 (2d Dep't 2009)("granting the variance would not only set a negative precedent; it would also reduce the average lot width in the area, impairing the effectiveness of the zoning ordinance"). *C. Foster*, 210 A.D.3d at 1087, 178 N.Y.S.3d at 788 ("since the Board determined that no similar variances had been granted, it was permitted to consider the possibility that granting these variances could set a negative precedent within the area").

75. *See Monte Carlo 1, LLC*, *supra.*