WESTCHESTER MUNICIPAL PLANNING FEDERATION

2017 SEMINAR FOR ZONING BOARD MEMBERS

UNDERSTANDING VARIANCES, NONCONFORMING USES, INTERPRETATIONS AND SPECIAL USE PERMITS

SPECIAL USE PERMITS, INTERPRETATIONS AND NONCONFORMING USES

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INTRODUCTION

The jurisdiction of zoning boards of appeal to issue area and use variances is fairly well understood. However, zoning boards are also empowered to interpret the municipal zoning laws and, where required, correct an order, decision or determination of an administrative official to comport with their interpretation. *See* Town Law §267-b(1); Village Law §7-712-b(1); General City Law § 81-b(2). At times, this jurisdiction requires that a zoning board determine whether a particular use is a preexisting nonconforming use[1] or if changes that have occurred have caused the use's nonconforming status to be abandoned. Under some municipal codes, the zoning boards of appeal are also delegated the authority to grant special use permits.[2]

As the discussion below illustrates, cases decided in the past year have touched on a variety of topics relating to how zoning boards exercise their jurisdiction, including: (i) the extreme deference that continues to be accorded the decisions of zoning boards of appeal; (ii) what to make of a record that would support a contrary conclusion; (iii) whether an illegal condition imposed on a special use permit "poisons" the whole permit; (iv) the "tie-vote" dilemma; (v) the extent of the zoning board's discretion in the face of clear and unequivocal language in the municipal code; (vi) what to do about prior precedent; (vii) what the zoning board should consider when interpreting the municipal code; and (viii) whether the zoning board of appeals can be *forced* to decide every application made to it.

CASE LAW REVIEW

I. A Reminder: The Legal Standards of Review of Zoning Board Decisions. (*Mecox Bay Civic Association, Inc. v. Town of Southampton Zoning Board of Appeals*, 145 A.D.3d 725, 43 N.Y.S.3d 111 (2d Dep't 2016); *Quentin Road Development, LLC v. Collins*, 150 A.D.3d 859, 54 N.Y.S.3d 438 (2d Dep't 2017); *Carnelian Farms, LLC v. Leventhal*, 151 A.D.3d 844, 56 N.Y.S.3d 552 (2d Dep't 2017); *Sullivan v. Board of Zoning Appeals of City of Albany*, 144 A.D.3d 1480, 42 N.Y.S.3d 428 (3d Dep't 2106))

Judicial review of the decisions of zoning boards of appeal is extremely deferential except in very limited circumstances. The governing legal standards were recently summarized by the Appellate Division, Second Department, as follows:

> In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action taken is illegal, arbitrary and capricious, or an abuse

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[1] A nonconforming use is "'[a] use of property that existed before the enactment of a zoning restriction that prohibits the use.'" *Matter of Sand Land Corp. v. Zoning Board of Appeals of the Town of Southampton*, 137 A.D.3d 1289, 1291, 28 N.Y.S.3d 405, 408 (2d Dep't 2016) (*quoting Matter of McDonald v. Zoning Board of Appeals of Town of Islip*, 31 A.D.3d 642, 642-643, 819 N.Y.S.2d 533 (2d Dep't 2006)).

[2] A special use permit is an "authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." Town Law §274-b(1); Village Law §7-725-b(1); General City Law §27-b(1). It is a zoning tool created by statute (see Town Law §274-b; Village Law §7-725-b; General City Law §27-b) to give municipal governments more control over the siting of particular uses to protect the surrounding community from the potential negative effects of them. Because special permit uses are considered to be permitted uses, the standard to obtain a permit authorizing them is lighter than the standard for securing a variance; once the applicant has demonstrated compliance with the special use permit requirements, the permit must be granted.

> of discretion. When the question raised is one of purely legal interpretation of statutory terms, deference to the zoning board of appeals is not required.

Mecox Bay, 145 A.D.3d at 725-26, 43 N.Y.S.3d at 112 (citations omitted). *See also Quentin Road,* 150 A.D.3d at 859, 54 N.Y.S.3d at 439; *Carnelian Farms,* 151 A.D.3d at 845, 56 N.Y.S.3d at 554 (noting that a court should avoid substituting its judgment for that of the zoning board of appeals unless the board's action is illegal, arbitrary and capricious or an abuse of discretion). Where questions of pure legal interpretation are involved, the courts will review the zoning boards' decisions according to well-recognized principles of statutory construction, such as the ones recently discussed by the Third Department in *Sullivan v. Board of Zoning Appeals of the City of Albany,* 144 A.D.3d 1480, 42 N.Y.S.3d 428 (2d Dep't 2016):

> If the law or ordinance at issue does not define a particular term, courts will afford such term its plain or ordinary meaning, and 'any ambiguity in the language employed must be resolved in favor of the property owner.'

Sullivan, 144 A.D.3d at 1482, 42 N.Y.S.3d at 430 (citations omitted).[3]

In each of the following cases, the zoning boards' decisions were ultimately upheld by the courts applying these principles. For example, in *Mecox Bay,* the Supreme Court and Appellate Division both rejected challenges to the Zoning Board's decision upholding a certificate of occupancy issued to the Town for a storage shed in a local park, which the Town used to store equipment in connection with a sailing program it sponsored in the park. A group of residents, some of whom lived near the park, appealed to the Zoning Board to rescind the certificate of occupancy. The Board refused on the grounds that a storage shed is a permitted accessory use in the residential district in which the park was located as well as an integral part of the park use which was also a permitted use in the residential zone. The neighbors challenged the decision. The Supreme Court denied the petition and the Appellate Division, Second Department affirmed, principally on the ground that the Zoning Board's interpretation of whether the shed was a permitted accessory use was largely fact-based and, in the absence of illegality, arbitrariness and capriciousness or an abuse of discretion, entitled to deference. *Mecox Bay,* 145 A.D.3d at 725-26, 43 N.Y.S.3d at 112.

Carnelian Farms involved a conditional building permit issued to an owner of a commercial horse boarding and training center for the construction of an indoor riding arena and other site improvements on the owner's land. The condition required that all material excavated in connection with the construction be removed from the site and properly disposed of off-site. Preferring to stockpile the material to use for fill and to regrade other areas on the property, the petitioner-owner appealed the imposition of the condition to the Zoning Board and simultaneously requested a fill permit. The Zoning Board upheld the condition and denied the fill permit, and the petitioner commenced an Article 78 proceeding. The Supreme Court granted the petition, struck the condition from the building permit and directed the issuance of the fill permit. On appeal, the Appellate Division, Second Department reversed because the record supported the Zoning Board's decision and, therefore, the decision was entitled to deference. The Second Department emphasized that:

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[3] Other controlling rules and methods of construction that should be followed by a zoning board when called upon to interpret municipal zoning ordinances are: (i) avoid a construction that renders any of the relevant provisions or words superfluous; (ii) construe the zoning law "as a whole," reading all of its parts together in a harmonious manner; and (iii) do not "read into" the statutory language conditions or criteria that are not there.

> The ZBA properly considered the scope of the construction at the premises and the amount of fill that would be generated as a result. After considering the proposed use of the fill and the environmental effects of those proposals, the ZBA concluded that removal of the fill, rather than any of the alternatives proposed by the petitioners, was the most appropriate course of action. The ZBA's determination was rational and supported by the record, and the Supreme Court should have accorded deference to the ZBA's discretion instead of substituting its own judgment.

Carnelian Farms, 151 A.D.3d at 845, 56 N.Y.S.3d at 554 (citation omitted).

Deference was similarly given to the decision of the Board of Standards and Appeals of the City of New York ("BSA") in *Quentin Road Development,* in which the BSA upheld the Department of Building's determination that a certain Zoning Resolution of the City of New York setting maximum floor area ratios applied to the petitioner's building. Finding no illegality, arbitrariness or abuse of discretion in how the Department of Buildings or BSA interpreted the applicable Zoning Resolution, the Supreme Court and Appellate Division, Second Department found the BSA's decision rational and upheld it. *Quentin Road Development,* 150 A.D.3d at 859, 54 N.Y.S.3d at 439.

In *Sullivan,* the Zoning Board of Appeals was called upon to determine whether a church's plan to house 14 homeless people in its parsonage qualified as part of the "house of worship" use permitted in the R-1B zoning district in which the church's and petitioner's properties were located. The Division of Buildings and Codes advised the church's counsel that the proposed use did not qualify as part of the permitted religious use of the property and the church sought an interpretation from the Zoning Board. Following hearings on the matter, the Zoning Board agreed with the church and rendered an interpretation that housing the homeless is consistent with the mission and actions of a house of worship and, therefore, permitted as a part of the worship use. The petitioner-neighbor, opposed to the use, appealed the Zoning Board's decision in an Article 78 proceeding. *Sullivan,* 144 A.D.3d at 1480-81, 42 N.Y.S.3d at 429.

The Supreme Court granted the petition and annulled the Zoning Board's decision, finding that the use did not fall within the definition of "house of worship" contained in the City's zoning ordinance. *Sullivan,* 144 A.D.3d at 1481, 42 N.Y.S.3d at 429. The City and church appealed. On appeal, the Appellate Division, Third Department reversed, finding that the proposed homeless shelter activity was a form of "worship" and, therefore, allowed as part of the permitted religious use of the church property. *Sullivan,* 144 A.D.3d at 1482, 42 N.Y.S.3d at 429-30. The Third Department noted that while "house of worship" was a defined term in the zoning ordinance, the definition relied upon the meaning of "worship" which was not defined. The Court turned to the legal dictionary definition of the term – "'[a]ny form of religious devotion, ritual or service showing reverence . . . to a divine being" -- and considered the broad interpretation accorded religious uses in New York cases, some of which recognized that services to the homeless constitute religious conduct. The Third Department ultimately held that the church's proposed homeless shelter in its parsonage was permitted as part of the house of worship use allowed in the R-1B residential zoning district. *Sullivan,* 144 A.D.3d at 1483-83, 42 N.Y.S.3d at 431.

II. <u>That the Record Would Support a Contrary Conclusion Does Not Justify Overturning the Zoning Board's Decision</u>. (*Mamaroneck Coastal Environment Coalition, Inc. v. Board of Appeals of the Village of Mamaroneck,* 152 A.D.3d 771, 59 N.Y.S.3d 118 (2d Dep't 2017))

In this case, the petitioners sought to annul a special use permit issued to the Hampshire Club, Inc., a not-for-profit corporation ("the Club"), which authorized the Club to hold a certain number of non-

member events at the Hampshire Country Club in the Village of Mamaroneck (the "Village"), arguing that the business relationship between the Club and Hampshire Recreation, LLC ("Hampshire"), the property owner, violated the Zoning Ordinance. Under the Village's Ordinance, a membership club must be operated as a not-for-profit corporation. Hampshire incorporated the Club as a not-for-profit organization and leased the property to the Club to operate the facilities. The Club then applied for permission to hold some non-member events on the Property, which was permitted under the Ordinance provided a special permit was obtained. Following a hearing, the Zoning Board of Appeals ("ZBA") issued the special use permit. *Mamaroneck Coastal Environment Coalition,* 152 A.D.3d at 771, 59 N.Y.S.3d at 118. The lower court rejected the petitioners' challenge and the Appellate Division, Second Department affirmed on appeal, holding that "there was substantial evidence that Hampshire Club, Inc.'s contemplated use comported with the requirements of Village of Mamaroneck Zoning Code §§342-3 and 342-35(B)(9)(a), and there were no reasonable grounds for denying the special use permit. Therefore, the special use permit to host nonmember events at the Country Club should have been granted." *Mamaroneck Coastal Environment Coalition*, 152 A.D.3d at 771, 59 N.Y.S.3d at 118 (citations omitted).

The Appellate Division recognized that even if the evidence in the record supported two contrary conclusions, "the court may not substitute its own judgment for that of the board. The fact that the contrary determination is also supported by the Record does not change the result." *Mamaroneck Coastal Environment Coalition, supra.*

III. An Illegal Condition Does Not "Poison" the Whole Special Permit. (*Citrin v. Board of Zoning Appeals of the Town of North Hempstead,* 143 A.D.3d 893, 39 N.Y.S.3d 229 (2d Dep't 2016))

Citrin addresses whether a five-year durational limitation imposed on a special use permit is legal. The Supreme Court upheld the condition but, on appeal, the Appellate Division, Second Department reversed, holding that the applicable Town Code provision did "not explicitly provide the Board [referring to the Zoning Board of Appeals] with the authority to impose durational limits upon permits granted pursuant" to the applicable section and, therefore, it was improper for the Board to impose it at all. *Citrin*, 143 A.D.3d at 895, 39 N.Y.S.3d at 230.

In reaching its decision, the Court noted that: (i) while the Zoning Board has authority to impose conditions on a special permits, the conditions must be explicitly authorized by the Zoning Ordinance; (ii) where any condition is not unauthorized, such condition (and only such unauthorized condition) must be annulled; and (iii) once the illegal condition is eliminated, the remaining provisions of the special permit should and will be upheld. *Citrin, supra.*

IV. "Scientific" Trumps Non-Scientific Evidence. (*Blanchfield v. Town of Hoosick*, 149 A.D.3d 1380, 53 N.Y.S.3d 226 (3d Dep't 2017))

In this case, the petitioner challenged the Zoning Board of Appeals' denial of a special use permit for a dog training and handling business, which her neighbors opposed principally on the basis of noise concerns. At the time of the case, the petitioner had already been operating the dog training and handling business on the property for a while. The respondent neighbor filed a noise complaint and the Town Code Enforcement Officer concluded that the dog training and handling business was not permitted "as-of-right" under the Town's Land Use Law and that petitioner was required to obtain a special use permit and site plan approval for the dog use. At the Code Enforcement Officer's direction, the petitioner filed an application for the approvals (special use permit and site plan). Following hearings, the Zoning Board of Appeals denied the applications "[c]iting the current and foreseeable impact of dog noise on the neighbors." *Blanchfield,* 149 A.D.3d at 1381, 53 N.Y.S.3d at 228. The petitioner-owner commenced an Article 78 proceeding to review the denial of the special use permit.

The Supreme Court dismissed the application and the petitioner appealed. The Appellate Division, Second Department reversed the Supreme Court, annulled the denial of the special use permit and site plan approval, and remitted the application back to the Zoning Board "to grant a special use permit and site plan approval to petitioner upon consideration of appropriate conditions and safeguards consistent with the requirements of the local laws of respondent Town." *Blanchfield*, 149 A.D.3d at 1385, 53 N.Y.S.3d at 231. Central to the Zoning Board's decision and the parties' dispute was noise from the dog use, and its purported impact on the enjoyment and value of surrounding properties, which was hotly debated by petitioner and her neighbors during the Zoning Board proceedings. One neighbor maintained that noise emanating from petitioner's property dissuaded a prospective buyer from purchasing his residence; another neighbor argued that customers of her horse training and boarding business had expressed concerns about the impact of the noise on their horses.

Among the general standards applicable to special uses under the Town of Hoosick's Land Use Law was a decibel limitation of 80 decibels at the property line. The petitioner, a nurse who purportedly had been trained to take sound readings, measured noise levels at her property lines over the course of a month at various times of the day. The results, which were submitted to the Zoning Board, showed that the levels never exceeded 70 decibels. Petitioner also offered noise attenuation mitigation, specifically the erection of a solid stockade fence and relocation of outside dog pens behind a building to help block noise. To substantiate their objections based upon noise, one neighbor submitted a recording of the noise from the petitioner's property and the horse training and boarding operator submitted emails from customers purportedly expressing concern about the noise.

The Appellate Division annulled the Zoning Board's decision on the grounds that the petitioner had met her burden of showing that she complied with the conditions applicable to her special use and, therefore, was entitled to the permit. In rejecting the weight given the neighbors' and petitioner's noise "evidence" by the Zoning Board, the Appellate Division explained that petitioner's measurements amounted to scientific measurements which were not rebutted by the neighbor's recording, reliance on which would be unreasonable because it was subject to manipulation and, therefore, unreliable, or any other evidence in the record. The Appellate Division also rejected the Zoning Board's summary dismissal of the petitioner's mitigation measures as insufficient to mitigate dog noise, noting that the Zoning Board failed to identify any specific deficiencies in such measures. The Court concluded that the Zoning Board rested its decision on generalized objections from the neighbors which is insufficient to support a Board's decision. *Blanchfield*, 143 A.D.3d at 1384-85, 53 N.Y.S.3d at 231.

The petitioner in *Blanchfield* asserted a variety of arguments to support her claim that the Zoning Board's determination should have been annulled. While most of them were rejected, the Appellate Division's assessment of the arguments provides helpful lessons to zoning boards, applicants and practitioners alike on issues they may face in other zoning board proceedings. For example, the petitioner argued that the Zoning Board failed to follow proper procedures because it did not refer the application to the Planning Board. The Appellate Division rejected the argument because the petitioner failed to raise the contention before the Zoning Board and, therefore, waived the right to raise it in the judicial proceeding. *Blanchfield*, 149 A.D.3d at 1381, 53 N.Y.S.3d at 228. The Appellate Division also rejected the petitioner's argument that her dog use qualified as a "boarding kennel" or "breeding kennel," citing her own contrary characterization of the use in her application and supporting materials and the Zoning Board's finding that the dog use was not permitted, which was entitled to deference. *Blanchfield,* 149 A.D.3d at 1381-82, 53 N.Y.S.3d at 229. Finally, the Court rejected the petitioner's claim that she did not require site plan approval because her dog operation was in existence prior to enactment of the Town's Land Use Law and, therefore, qualified as a preexisting, non-conforming use, exempt from the requirements of the subsequently adopted Land Use Law. In rejecting the argument, the Court found that a local law in effect at the time the dog use was established required site plan approval when any change of use occurred and petitioner failed to obtain such approval when she changed the use of her land to

establish the dog use. Under settled law, nonconforming use status can be obtained only if the use was lawfully in existence (i.e. had all required permits and approvals) at the time it became nonconforming. Since petitioner failed to obtain site plan approval when she first established the dog use, the operation could not have acquired nonconforming use status. In any event, the Court noted that petitioner was proposing changes to her operations that had the effect of expanding them and, therefore, any nonconforming use status would be abandoned. *Blanchfield,* 149 A.D.3d at 1382, 53 N.Y.S.3d at 228-29.

V. The Tie-Vote Dilemma – A "Non-Vote" When Exercising Original Jurisdiction, a "No Vote" When Exercising Appellate Jurisdiction. (*Alper Restaurant Inc. v. Town of Copake Zoning Board of Appeals,* 149 A.D.3d 1337, 51 N.Y.S.3d 705 (3d Dep't 2017))

In *Alper Restaurant*, the Third Department was called upon to determine whether a tie vote by the Town of Copake Zoning Board of Appeals in connection with a special use permit application constituted a "no-vote" or a non-action. The issue arose in connection with an application by the respondent-developer for a special use permit for the construction of a resort hotel located in the Town. During the pendency of the application, a vacancy occurred on the five-member Board; thereafter, the Board voted 2-2 on the application. There being no majority on either side, the vote was deemed a non-action by the Board. Following the appointment of a fifth member, the Zoning Board voted to approve the special use permit by a vote of 3-2. *Alper Restaurant,* 149 A.D.3d at 1337-38, 41 N.YS.3d at 706.

The petitioners, owners of an inn and restaurant on adjacent property, challenged the special use permit, arguing that the 2-2 vote was effectively a default denial of the application, which could not be overcome by a new vote. The Supreme Court dismissed the petition and the petitioners appealed. *Alper Restaurant,* 149 A.D.3d at 1338, 51 N.Y.S.3d at 706.

On appeal, the Appellate Division, Third Department affirmed, holding as follows:

> We can find no reason to disturb Supreme Court's determination that the September 2014 tie vote constituted non-action on the application, thus permitting the ZBA to vote on the application for a second time in November 2014. Supreme Court accurately set forth the 2002 legislative amendments to Town Law § 267–a, aptly observed the impact of those amendments in relation to *Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 735 N.Y.S.2d 873, 761 N.E.2d 565 (2001) and correctly determined that a tie vote of a zoning board of appeals only results in a default denial when, among other things, it is exercising its appellate jurisdiction (see Town Law § 267–a [13][b]; L. 2002, ch. 662, § 7; Terry Rice, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 61, Town Law § 267–a at 31–33). Inasmuch as it is undisputed that the ZBA was exercising its original jurisdiction here (see Code of the Town of Copake § 232[C]), we agree with Supreme Court that the September 2014 tie vote did not result in a default denial. Petitioners' additional argument that the ZBA's bylaws, rather than the Town Law, control here is patently without merit.

Alper Restaurant, 149 A.D.3d at 1338, 51 N.Y.S.3d at 706-07.

The Third Department also considered the issue of whether the new Zoning Board member was permitted to act on the decision even though he was not on the Board during the hearings. The Court found there was no error in the new member's participation in the second vote because he "was informed about the application when he rendered his vote." *Alper Restaurant,* 149 A.D.3d at 1338, 51 N.Y.S.3d at

707. Further finding that the Zoning Board's interpretation of the special permit criteria applicable to the proposed resort project was rational, the Court upheld the Supreme Court's dismissal of the challenge. *Alper Restaurant, supra.*

VI. Don't Overlook the Clear and Unequivocal Language of the Code; The Rule of "Estoppel;" and the "Ripeness Doctrine" As It Relates to Taking Claims. (*Warner v. Town of Kent Zoning Board of Appeals,* 144 A.D.3d 814, 40 N.Y.S.3d 517 (2d Dep't 2016))

This case involved an unfortunate situation where an applicant and her father, Robert Sprague ("Sprague"), whose non-conforming residence was destroyed by fire, were precluded from rebuilding Sprague's home because they failed to complete the reconstruction within one-year of the fire, as required under the Town's Zoning Ordinance. The delay was due, in part, to a dispute the applicant and Sprague had with the insurance company regarding the payment of benefits, which took nine months to resolve. Once the dispute was resolved, Sprague applied for and obtained a demolition permit and demolished the residence. A month later, and two weeks before the one-year completion deadline was set to expire, the Putnam County Health Department approved that aspect of Sprague's plan for an addition to the house. Sprague applied for the building permit that same day but the Building Inspector rejected the application because it was missing essential application documents, including a site plan and survey. Sprague hired a surveyor but another nine months passed before Sprague refiled for a building permit to reconstruct the house, missing the reconstruction deadline by as many months. The Building Inspector denied the building permit because the one-year reconstruction period had expired. *Warner,* 144 A.D.3d at 815-16, 40 N.Y.S.3d at 519.[4]

Sprague, representing himself and acting on the applicant's behalf, then filed a one-page form with the Zoning Board by which he apparently intended to seek to extend the one-year period to complete reconstruction. However, the form he filed, denominated a "Request for Hearing/Application for Variance," did not articulate the variances necessary for this purpose. The Zoning Board conducted hearings over six months, during which there was a lot of discussion among concerned neighbors, Zoning Board members and Sprague about the Building Inspector's denial of the building permit application, the events that caused the delay and, generally, a "variance." *Warner,* 144 A.D.3d at 816-17, 40 N.Y.S.3d at 520.

At the conclusion of the hearings, the Zoning Board voted to affirm the Building Inspector's denial of the building permit, one member stating that the only question before the Board was whether that denial was required under the Code. Sprague asked if he could apply for a variance and after being told he could, he asked the Zoning Board to defer a decision. The Board declined to do so and rendered its decision affirming the Building Inspector's denial of the building permit. *Warner,* 144 A.D.3d at 817-18, 40 N.Y.S.3d at 520-21.

The petitioner appealed the denial, arguing that the Zoning Board's decision was arbitrary and capricious, irrational and exhibited an abuse of discretion. The Supreme Court granted the petition and directed the Building Inspector to issue the building permit, finding that the Zoning Board's determination that the petitioner's hardship was self-created lacked a rational basis given the petitioner's diligent efforts to comply with the Building Inspector's directives. *Warner,* 144 A.D.3d at 818, 40 N.Y.S.3d at 521.

The Appellate Division, Second Department reversed, finding fault with the focus of the Supreme Court's analysis. Specifically, the Second Department stated that the only issues to have been considered

[4] Subsequent to the Sprague appeal, the one-year reconstruction period was changed to two years but, regrettably for Sprague, the amendment did not have retroactive effect. *Warner,* 144 A.D.3d at 818, 40 N.Y.S.3d at 521.

were whether the Zoning Board had correctly interpreted the Town Code or if it was estopped from enforcing it. On the interpretation issue, the Appellate Division held that the Zoning Board "correctly interpreted the then-current version of Town Code §77-84(A)," which "enunciated a strict one-year limit for *completion* of the rebuilding of a destroyed nonconforming residence. Thus, the ZBA's affirmance of the denial of the October 2011 permit application was a correct interpretation of the law. The ZBA correctly concluded that it was not authorized to disregard that clear language." *Warner,* 144 A.D.3d at 820, 40 N.Y.S.3d at 522 (emphasis in original). The Second Department rejected the Supreme Court's and dissenting judge's interpretation of Section 77-48(A) as containing authority to grant a "good-cause" extension of the reconstruction period, finding such interpretation:

> inconsistent with the clear and unequivocal language of the provision itself. Unlike ordinances that provide for discretionary extensions of time to restore a destroyed nonconforming building, the Town Code's mandatory provision – which stated that a nonconforming building 'shall not be reestablished . . . unless such restoration is completed within one year from the date of such destruction' – neither said nor implied that the ZBA was vested with discretionary authority to extend the time limit. Indeed, the Town Code states that '[t]he word "shall" is always mandatory and not merely directory.'

Warner, 144 A.D.3d at 820, 40 N.Y.S.3d at 522-23 (alterations in original, citations omitted).

The Appellate Division also rejected the petitioner's contention that the Zoning Board was estopped from enforcing the one-year limitation on reconstruction, explaining that something more than harsh results must exist for estoppel to lie. The Court explained the rule of estoppel as follows:

> Generally, the doctrine of estoppel is not available against a governmental agency to prevent it from discharging its statutory duties, even when the results are harsh. Exceptions to the general rule may be warranted in 'unusual factual situations to prevent injustice,' but only in the 'rarest cases.'
>
> This is not one of those rare cases. Nothing that the Building Inspector may have done or said misled the petitioner into failing to comply with Town Code § 77–48(A). Indeed, in submitting only an incomplete application just two weeks before the one-year restoration period expired, the petitioner could not reasonably have thought that a site survey was unnecessary. The requirement of a survey is clearly stated in the Town Code (*see* Town Code § 27–8[D]), as well as on the first page of the building permit application form.
>
> The Supreme Court's decision and the dissent accept the truth of the petitioner's averments, and overlook evidence in the record that raises questions as to the accuracy of those averments. Nonetheless, even assuming the truth of the petitioner's averments, we conclude that the ZBA was not estopped from enforcing the one-year time limit then existing under Town Code § 77–48(A).

Warner, 144 A.D.3d at 820-21, 40 N.Y.S.3d at 523 (citations omitted).

Finally, the Second Department rejected the petitioner's assertion that the application of the one-year reconstruction deadline to her property effected an unconstitutional taking of her property without just compensation, finding that the claim was not ripe because the petitioner had not exhausted her administrative remedies, i.e. applied for a variance. *Warner,* 144 A.D.3d at 821, 40 N.Y.S.3d at 524. At the close of its opinion, the Court, in what may have been an attempt to ease petitioner's plight, noted "that the petitioner is not precluded from applying for the area variance that would be necessary to allow her to rebuild her house." *Warner,* 144 A.D.3d at 821-22, 40 N.Y.S.3d at 524 (citations omitted).[5]

VII. Prior Precedent. (*Bartolacci v. Village of Tarrytown Zoning Board of Appeals*, 144 A.D.3d 903, 41 N.Y.S.3d 903 (2d Dep't 2016))

This case involved an appeal to the Zoning Board of Appeals of the Village of Tarrytown from a determination by the Building Inspector that the petitioner's application for a building permit for a retaining wall required Planning Board review because it involved the disturbance of steep slopes. The Zoning Board affirmed the determination and the petitioner appealed to the Supreme Court. The Supreme Court dismissed the petition and the property owner appealed. The Appellate Division, Second Department affirmed the Supreme Court and denied the appeal. *Bartolacci,* 144 A.D.3d at 904, 41 N.Y.S.3d at 117.

Among the petitioner's arguments why the Zoning Board's determination should be overturned was that similar applications had not been referred to the Planning Board for review. The Second Department concluded that "the ZBA either reasonably determined that the circumstances of the prior applications for building permits were distinguishable from those of the instant application, or otherwise provided a valid and rational explanation for its departure from its prior precedent," and rejected the contention. *Bartolacci, supra.*

VIII. Abandonment of a Nonconforming Use. (*Lumberjack Pass Amusements, LLC v. Town of Queensbury Zoning Board of Appeals,* 145 A.D.3d 1144, 42 N.Y.S.3d 473 (3d Dep't 2017))

In this case, a property owner of a commercial property in an intensive commercial district sought a variance to permit the continued use of a residence on its property for residential purposes in a manner consistent with the building's historic use. The Town Zoning Administrator determined that no variance was required because the owner had been able to demonstrate that the single-family residence had been occupied as a residence without cessation for a continuous period of more than eighteen months and, therefore, the preexisting nonconforming residential use had not lapsed. *Lumberjack Pass*, 145 A.D.3d at 1144, 42 N.Y.S.3d at 474.

An abutting owner of commercial property appealed the Zoning Administrator's determination to the Zoning Board of Appeals, arguing that the evidence did not demonstrate continuity of the nonconforming use. The Zoning Board disagreed and affirmed the Zoning Administrator's determination. An appeal to the Supreme Court ensued. *Lumberjack Pass,* 145 A.D.3d at 1145, 42 N.Y.S.3d at 474-75.

The Supreme Court granted the petition on the ground that the Zoning Board had applied the incorrect legal standard by considering whether the owner intended to abandon or relinquish the single-family use, when the correct standard required the Zoning Board to determine only whether the use had been discontinued. The Supreme Court further declared that the preexisting nonconforming use had been

[5] In an unusual move, one of the Justices of the Appellate Division, Second Department wrote a strong, 5-page dissent on the basis of which he would have affirmed the Supreme Court, granted the petition and given Sprague time to complete the reconstruction work.

discontinued.[6] *Lumberjack Pass, supra.* The Appellate Division, Third Department disagreed that an incorrect standard had been used by the Zoning Board, and reversed. In doing so, the Third Department noted that the Zoning Board clearly understood the application of the discontinuation provision, analyzed first whether the use had been discontinued, and examined whether an intent to abandon had been exhibited only after determining that complete cessation of the use had not occurred. *Lumberjack Pass,* 145 A.D.3d at 1146, 42 N.Y.S.3d at 475-76.

The Third Department acknowledged there was conflicting evidence in the record on the issue of discontinuance and abandonment of the use but cautioned that "'courts will not weigh the evidence or reject the choice made by the [ZBA] where the evidence is [merely] conflicting and room for choice exists.'" *Lumberjack Pass,* 145 A.D.3d at 1146, 42 N.Y.S.3d at 476 (alterations in original; citations omitted). Given the fact-intensive nature of the evidence, the Third Department held "we cannot say that the ZBA's determination was irrational or unreasonable." *Lumberjack Pass, supra.*

IX. What's a One-Family Dwelling? Look For Functional Equivalence. (*Cole v. Town of Esopus*, 55 Misc. 3d 382, 47 N.Y.S.3d 634 (Sup. Ct. Albany County 2016))

The issue before the Zoning Board in this case was whether a group residence facility for recovering addicts transitioning from treatment facilities was permitted as a one-family dwelling under the Town's zoning ordinance. Initially, the Town's Code Enforcement Officer determined that it was and advised the owner that a special use permit and site plan approval would not be required; however, he subsequently rescinded his opinion after receiving guidance from the Town's counsel that further review of a site plan was required. Thereafter, the petitioner renewed its request for a determination that its use constituted a one-family dwelling. This time, the Code Enforcement Officer affirmatively determined that it did not and concluded, instead, that it was a "convalescent home" expressly excluded from the definition of a dwelling unit under the Town zoning ordinance. The petitioner appealed the determination to the Town's Zoning Board of Appeals. *Cole,* 55 Misc. 3d at 385, 47 N.Y.S.3d at 637.

The Zoning Board affirmed the Code Enforcement Officer's determination that the facility did not qualify as a single-family residence, relying for its decision on the size and physical layout of the facility and its operational characteristics when compared to a traditional residence. Of particular significance to the Zoning Board was the large number of bedrooms and residents to be accommodated in the facility, the dormitory style of the restrooms, the dedication of rooms in the building for offices, counseling and treatment activities and the dispensation of medications, the provision of 12 parking spaces on the site, the duration and transiency of residents' stays, the provision of 24-hour professional supervision and the emphasis on therapeutic counseling and services in the transitioning process. The Zoning Board found that such physical facilities and operations were not consistent with the layout and function of a traditional residence and did not foster the formation among the residents of "stable, interdependent relationships such that they will live as the functional equivalent of a family." *Cole,* 55 Misc. 3d at 389-90, 47 N.Y.S.3d at 640. The Zoning Board deferred to the Code Enforcement Officer's determination that the use amounted to a convalescent home.

The property owner and the operator of the facility challenged both aspects of the Zoning Board's decision. The Supreme Court, Albany County upheld the Zoning Board's determination that the community residence was not a one-family dwelling because such a determination is "fact-bound, and the ZBA's determination is entitled to deference." *Cole,* 55 Misc. 3d at 388, 47 N.Y.S.3d at 640. The Court noted that considering the facts relied upon by the Zoning Board in their totality, "the ZBA could

[6] The neighbor-petitioner commenced a combined Article 78-declaratory judgment action to challenge the Zoning Board's determination as arbitrary and capricious and obtain a declaration from the Supreme Court that the nonconforming use had been abandoned.

reasonably determine that the proposed community residence is not a one-family dwelling within the meaning of its Zoning Code." *Cole,* 55 Misc. 3d at 389, 47 N.Y.S.3d at 640.[7]

X. Mandamus Does Not Lie From a Discretionary Action. (*Willows Condominium Association v. Town of Greenburgh*, 153 A.D.3d 535, ____ N.Y.S.3d ___, Slip Op. 05961 (2d Dep't 2017))

This case involved a creative, but unsuccessful, attempt by a condominium association (the "Association") to compel the Town Building Inspector to render a formal determination as to whether a nearby commercial business was violating the zoning ordinance by illegally manufacturing mulch and topsoil on its premises. The Association sent a letter to the Building Inspector complaining about the activities. In response, the Building Inspector sent the nursery business a notice of violation letter demanding that it comply with the applicable laws but he did not issue a formal "determination" of the Association's complaint. Finding the Building Inspector's letter unsatisfactory, the Association filed an application with the Zoning Board to review the Building Inspector's failure to issue a formal determination. The Zoning Board apparently declined to make a determination on the application. *Willows Condominium,* 153 A.D.3d at ___, ___ N.Y.S.3d at ___, Slip Op. at 1.

The Association then commenced an action in the nature of "mandamus" against the Town, Building Inspector and Zoning Board (collectively "the Town Parties") to compel a formal determination of the allegations in their letter. The Town Parties moved to dismiss the mandamus claim on the grounds the claim did not state a cause of action. The Supreme Court agreed and the Appellate Division, Second Department affirmed, holding that the Association had no right to be awarded mandamus. The Court explained that "'the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion.'" *Willows Condominium,* 153 A.D.3d at ___, ___ N.Y.S.3d at ____, Slip Op. at 2 (citation omitted). Because the Building Inspector had no duty to issue a formal determination of every complaint he received or decide the merits of every allegation presented to him, he was vested with discretion to decide the best manner in which to handle such matters and, therefore, mandamus did not lie to compel him to act in any particular manner. For these reasons, the Court explained, the complaint against the Building Inspector was properly dismissed. *Willows Condominium, supra.*

With respect to the mandamus claim asserted against the Zoning Board, the Second Department explained that the Zoning Board's only non-discretionary appellate jurisdiction was to review an order, requirement, decision, interpretation or determination of the Building Inspector and since the Building Inspector took no such formal action, the Zoning Board did not fail to take a non-discretionary action. That is, the Association had no "'clear legal right'" to a determination by the Zoning Board and so there was nothing the Zoning Board could be compelled to review by way of mandamus. Therefore, the proceeding was properly dismissed. *Willows Condominium, supra.*

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[7] In reaching its determination, the Supreme Court rejected the petitioners' contention that the Zoning Board's decision discriminated against the residents of the facility on the basis of disability. However, the Court did agree with petitioners that the Zoning Board's conclusion that the community facility was a convalescent home was in error and reversed that aspect of the Board's determination. *Cole,* 55 Misc. 3d at 391-93, 47 N.Y.S.3d at 641-43.

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ABOUT HOCHERMAN TORTORELLA & WEKSTEIN: With more than 70 years of combined experience in Westchester, the Hudson Valley and Long Island, the lawyers at Hocherman Tortorella & Wekstein, LLP ("HTW") offer high-quality personalized counsel and pragmatic solutions to corporate, not-for-profit and private clients in all aspects of zoning, land use and entitlement matters, real property transactions and litigation.