Land Use Case Law Update

By Henry M. Hocherman and Noelle Crisalli Wolfson

Those of you who are regular readers of this column will perhaps recall that, since at least the beginning of last year, we have lamented the lack of genuinely precedent-setting cases in the land use area, and have attributed the ongoing drought to the weakness of the economy. This quarter presents us with similarly thin gruel; the cases upon which we report serve more as a reminder of what the rules are and how they will be applied than as a revelation of new law or even a significant gloss upon existing law.

All four of our cases come to us from the State's southern tier; three are Second Department cases and the fourth is, in a departure from our usual practice, a New York County Supreme Court case which we report both for its interest (the decisions, for the case is comprised of three, are exceptionally well reasoned and written) and in the expectation that it will ultimately make its way up the appellate ladder. If these four cases have anything in common, it is that all four of them appear to be correctly decided, and that all four stand upon fairly one-sided records which very much compel their ultimate outcomes.

SEQRA: When Substantial Change in Build Year Requires an SEIS

Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation ("Develop Don't Destroy (Brooklyn) III")[1] is yet another chapter in the ongoing saga of the Atlantic Yards Project (the "Project") currently being developed by Forest City Ratner Companies ("FCRC")[2] with funding assistance from ESDC[3] in the Borough of Brooklyn, in which a well-organized community opposition has mounted continuous challenges to the development of a mixed-use commercial and residential (including affordable housing) project on what is essentially fallow land.[4] Prior challenges were focused on the appropriateness and the procedural adequacy of property takings associated with development of the Project, and on the adequacy of ESDC's original SEQRA review. The instant case, again a SEQRA challenge, addresses the question of when emerging changes in the construction period ("build year") initially used in determining the impacts of a project under SEQRA are so significant as to mandate the preparation of a supplemental environmental impact statement ("SEIS") to address the potential adverse impacts of such changes. Central to that determination is the question of when and how *de facto* failure of the original schedule and the relative certainty of the new schedule are so well established as to render the assumptions underlying the original EIS patently incorrect.

In *Develop Don't Destroy (Brooklyn) III*,[5] the petitioners challenged a determination by ESDC, which is a partial funder of the Project and is the lead agency for purposes of SEQRA review, that a modification of the development plan for the Project which reflected an extension of the projected completion date for the Project by some 15 years (from 10 years to 25 years) would not have so material an effect on the environmental impacts of the Project as to require a supplemental environmental impact statement. The Court's decision in this case is actually the third in a sequence of three decisions, the first of which initially rejected petitioners' challenge,[6] the second of which granted, in part, petitioners' motion for leave to reargue and renew;[7] and the third of which, as reported here, ultimately granted the petition, remanded the matter to ESDC, and required the preparation of an SEIS to assess the potential environmental impacts of a delay in the construction of Phase II of the Project.[8]

The Atlantic Yards Project is a publicly-subsidized mixed-use commercial and residential Project for the development of 22 acres, consisting in large part of disused railroad switching yards, in the Borough of Brooklyn. As proposed, the Project is to be built in two phases, Phase I to include construction of a sports arena for use by a professional basketball team and construction of a new rail yard on the site of the rail yard currently owned by the Metropolitan Transportation Authority ("MTA"). The Project also includes 16 high-rise buildings which will contain commercial space and between approximately 5,000 and 6,000 residential units, of which approximately 2,250 units are proposed to be affordable to low-, moderate- and middle-income persons. Four to five of these buildings are to be built in Phase I, and the remainder are to be constructed in Phase II.[9]

The original General Project Plan ("GPP") for Atlantic Yards was approved by ESDC on July 18, 2006 and was modified on December 8, 2006, and the Project immediately became the subject of extensive challenges, including SEQRA challenges mounted by petitioners.[10] The EIS for the Project as originally adopted by the ESDC weighed in at some 3,500 pages and was itself (unsuccessfully) challenged by the petitioners on the basis, among others, that the "build years," or the time it would take for each phase of the Project to be completed (four years for the completion of Phase I and 10 years for the completion of Phase II), were optimistic and incorrect.[11]

On June 23, 2009 ESDC adopted a Modified General Project Plan ("MGPP") which it affirmed by resolution on September 17, 2009. Petitioners commenced this

proceeding challenging the ESDC's September 17, 2009 resolution on the grounds, *inter alia*, that ESDC had run afoul of SEQRA by not preparing an SEIS.[12] Petitioners' initial challenge rested primarily upon the renegotiation in June of 2009 of the agreement between FCRC and the MTA for the purchase of air rights necessary to construct six of the 11 buildings that were to be constructed in Phase II of the Project. Under the original FCRC/MTA Agreement, a $100,000,000 purchase price for the air rights was to be paid at the inception of the Project, whereas under the modified agreement only $20,000,000 of the purchase price was to be paid up front, with the balance to be paid in installments over a period extending until the year 2030, permitting the building sites for each of the buildings in Phase II to be taken down as needed over that period.[13]

Upon its motion for leave to reargue and renew (their petition having been denied), Petitioners' argument was extended to include a modification to the original Development Agreement between FCRC and ESDC, entered into by FCRC and ESDC after the proceeding was commenced.[14] As modified, the Development Agreement provides for commencement and construction of the sports arena and the commencement of the Phase I buildings within three to ten years of the Project start date (or between 2013 and 2020) and the substantial completion of the Phase I buildings by 2022. Notably, the modification includes substantial and meaningful sanctions, including liquidated damages in the amount of as much as $341,000,000, upon the developer's failure to meet the Phase I dates. In stark contrast to the Phase I sanctions, however, the Phase II timetable does not require commencement of Phase II buildings until the fifteenth anniversary of the Project's start, or 2025, and permits a substantial completion date that could be as distant as the year 2035. Most significantly from the court's point of view, with respect to Phase II, the modification did not include meaningful sanctions or liquidated damages of any kind, but merely gave ESDC the option to terminate the applicable lease for any portion of the Project site on which construction of improvements had not commenced in accordance with the terms of the modified Development Agreement.[15]

Thus, at the time of its initial decision to dismiss the petition, the Court had had before it only the MTA Agreement, which, petitioners argued, essentially removed any incentive on the part of the developer to complete Phase II of the Project. In denying the petition the Court noted that ESDC had its consultants prepare a Technical Memorandum, dated June 2009, which was used, among other things, to determine whether or not an SEIS was necessary. Among the stated purposes of the Technical Memorandum was to assess whether "the potential for delay due to prolonged adverse economic conditions would result in 'any new or substantially different significant adverse impacts than those addressed in the FEIS' that was prepared in connection with the ESDC's approval of the 2006 plan."[16] The ultimate determination of the Technical Memorandum was that the changes it examined "'would not, considered either individually or together, result in any significant adverse environmental impacts not previously addressed in the FEIS.'"[17] Further, the Court looked to an ESDC staff memorandum prepared in September of 2009 which concluded that the Project remained viable and that the Project schedule was "'achievable based on existing and projected economic conditions'" and on the report of a real estate consulting firm retained by ESDC.[18]

Deferring to what it correctly perceived to be its limited prerogatives in assessing a determination by a lead agency whether or not to prepare an SEIS, and noting that ESDC's determinations were based upon, among other things, the Technical Memorandum, the Court found that ESDC's actions in not requiring an SEIS were not irrational based on the record before it, and denied the petition.[19] The Court noted that although the MTA Agreement permitted the developer to acquire the necessary air rights for Phase II buildings on a parcel-by-parcel basis, the existence of the MTA Agreement did not necessarily vitiate the lead agency's determination that the Project could still be completed within a period reasonably close to that originally contemplated.[20]

On the motion to reargue, the Court was presented for the first time with the modified Development Agreement between FCRC and ESDC which, although it had been in the works at the time of the original petition, had not yet been executed. A broad outline, but not the proposed language, of the modified Development Agreement had been brought to the Court's attention during the initial proceeding.[21]

In granting the reargument motion the Court noted that ESDC had, in arguing that the MTA Agreement did not necessarily extend the build-out until the year 2030, emphasized that that agreement would be subject to a modified Development Agreement to be entered into between ESDC and the developer, in which the developer would be bound to complete the Project within ten years, or by 2019. ESDC supported this claim by providing a summary of the modified Development Agreement, but the actual text thereof was never introduced during the initial proceeding.[22]

In deciding the reargument motion in petitioners' favor, the Court noted that ESDC for the first time acknowledged the fact that the revised Development Agreement provided a 25-year outside date for the development of Phase II of the Project. The Court's indignation at ESDC's admission that it was aware of the 25-year outside date even during the initial pro-

ceeding is obvious in its grant of petitioners' motion to reargue and renew,[23] and ultimately carries through to its final decision in this case, reversing its prior determination.[24]

In ultimately reversing its earlier determination, the Court relied heavily on the terms of the revised Development Agreement which, when read together with the MTA Agreement, made it appear substantially more likely that Phase II would be delayed beyond the initial build-out period used in the underlying EIS.[25] The Court accorded great weight to the fact that whereas the developer's failure to complete Phase I (the arena, the rail yards, and some of the buildings) in a timely manner would subject the developer to substantial monetary sanctions, the developer's delay, and possible ultimate default, in the completion of Phase II would not give rise to similar sanctions but would result only in the forfeiture of development rights. The Court noted that although the Development Agreement requires the completion of Phase II construction within a 25-year period, or by 2035, failure to substantially complete Phase II construction, while defined as an "event of default" under the Development Agreement, is not the basis for the payment of liquidated damages but merely grants ESDC the option to terminate the applicable Project lease for any portion of the Project site on which construction of the improvements had not been commenced.[26] In short, the Court in essence determined that the revised agreements essentially constituted recognition by all parties (FCRC, ESDC and MTA) that the original build year assumptions were no longer realistic or achievable.

Ultimately, while citing and purporting to defer to strict limitations on the Court's prerogatives in reviewing the lead agency's decision, the Court held that ESDC's determination not to require an SEIS was arbitrary and capricious. In so doing, the Court stated that:

> In so holding, the court recognizes, as the Appellate Division held in a prior litigation involving the Atlantic Yards Project, that a mere inaccuracy in the build date will not invalidate the basis data used in the agency's environmental assessment.... However, as the Court also held, ESDC's choice of the build year is not immune to judicial review but, rather, is subject to review under the rational basis or arbitrary and capricious standard that is applicable to judicial scrutiny of any agency action in an Article 78 proceeding.... In the instant case, ESDC's continuing use of the 10 year build date was not merely inaccurate; it lacked a rational basis, given the major change in deadlines reflected in the MTA and Development Agreements. (citations omitted)[27]

In a sense, petitioners' contentions in attacking the original EIS were partially vindicated.

The thrust of the Court's holding is that when intervening events (in this case the revisions to the key agreements governing the Project) so clearly cast doubt upon the continued likelihood that the original build year assumption can or will be met, and expressly point to new, more likely build years, the failure to address the more likely build year in an SEIS will be deemed irrational or arbitrary.[28]

The inclusion of a "build year" in an EIS is, by its nature, always speculative, the more so in the case of a large and complex project, in that it assumes market conditions, the availability of money, absorption rates, and the availability of labor and materials, none of which can be guaranteed by a project sponsor. The inherent vagaries of any build year assumption have been recognized by the courts.[29] As noted by the Appellate Division in petitioners' first SEQRA challenge,[30] the acceptance by a lead agency of a build year assumption as proffered by a project sponsor is subject to the same test as any other SEQRA determination by a lead agency, that is, whether, based upon the record, the agency's determination can be deemed by a court to be "irrational or arbitrary and capricious." As oft cited in SEQRA cases, including this one, the court may not substitute its judgment for that of the lead agency unless that judgment fails that fundamental test.

In assessing the import and ultimate precedential value of this case, it should be noted that the facts in this case differ from the typical build year delay in significant ways. In general, the fact that a build year will be delayed emerges slowly as a project progresses and is rarely so starkly articulated as it was here. Further, a build year delay does not generally, in and of itself, become the subject of an action by the SEQRA lead agency, as it did here when the lead agency adopted a revised project plan to which it was itself a party and in which the potential for delay was memorialized. Finally, to the extent that there are build year delays, they rarely approach the magnitude of the delays in this case, nor is that magnitude so readily apparent so early on in the history of a project. That said, however, the decision (albeit a lower court decision) is important in that it presents a compact statement of the applicable law and reaches what appears to be, under the facts of this case, the correct determination, although one cannot help but wonder whether the decision was influenced to some extent by the court's indignation at ESDC's lack of candor in disclosing the contents of the revised Development Agreement during the first hearing of the case.

The Smell Test; Justice Triumphs

Cacsire v. City of White Plains Zoning Board of Appeals[31] and *Gentile v. Village of Tuckahoe Zoning Board of Appeals*[32] are two cases involving challenges to determinations by zoning boards of appeal, in one case denying variances, in the other granting the variance subject to a condition so burdensome as to constitute a *de facto* denial. The cases break no new ground at all, but are interesting in that, looking only to the very brief description of the facts that appear in the Appellate Division decisions, the Appellate Division appears to have been moved by, among other things, the sheer inequity of the ZBA's and lower court's determinations. In both cases, the circumstances under which the denied variances were originally sought were extraordinarily compelling in favor of the petitioners.

Cacsire involved a house purchased by petitioners in 1993 that had been built in or about 1904, which predated White Plains' certificate of occupancy regulations.[33] The house was located in a residential neighborhood zoned for one- and two-family houses. At the time petitioners acquired the house it was being used as a two-family residence, was referred to in the real estate listings as a two-family dwelling, and was so described in petitioners' contract of sale. Petitioners' mortgage was conditioned upon use of the building as a legal two-family residence. Petitioners' title search disclosed, among other things, that the property was classified by the City of White Plains as a two-family dwelling for tax purposes. Thus, all involved (petitioners, their counsel, their mortgagee and, presumably, the city) believed, and had a good faith basis for believing, that the building was a legal two-family dwelling.[34]

In 2002, having rented the property as a two-family dwelling for some nine years, and having paid taxes on it as a two-family dwelling for that entire period, petitioners applied to the White Plains Department of Buildings for a permit to renovate the upstairs kitchen.[35] They received the permit, spent $10,000 on the renovations, and upon completion thereof the Department of Buildings refused to issue certificates of completion for the work, informing petitioners, for the first time, that there was a "'non-consistency [sic] with [its] records in regards to the classification of the property"[36] and that petitioners would need to obtain a variance permitting the use of the building as a two-family dwelling before a certificate of completion would be issued.[37] In fact, six variances were required to render the building conforming. The ZBA denied the variances finding, among other things, that petitioners' hardship was self-created. Petitioners commenced an Article 78 proceeding; Supreme Court upheld the denial of the variances and petitioners appealed.[38]

Although the ZBA paid lip service to application of the applicable balancing test as set forth in General City Law Section 81-b, the Appellate Division, after reiterating all five prongs of the test, found that the ZBA was arbitrary and capricious in all of its findings but for the finding that the requested variances were substantial, and that the ZBA's determinations were wholly lacking in any evidentiary support.[39] The Court stated that "a determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual base."[40]

At bottom, however, the Appellate Division's motivation for reversing the lower court appears in the antepenultimate paragraph of the decision in which the Appellate Division stated that "[t]o the contrary, the record indicates that the property owned by the petitioners had been used by its residents and taxed by the City as a two-family dwelling for over 50 years."[41] In essence, the Appellate Division applied the smell test rather than (or perhaps in addition to) the balancing test and found that the ZBA and the lower court had failed both.

Gentile is a case in which the equities, although perhaps less compelling than those in *Cacsire*, also tip in favor of the petitioner. In *Gentile*, Tuckahoe's Zoning Board of Appeals was slightly cagier than White Plains', but the Second Department was not to be deterred in its insistence upon justice.

Petitioners owned a single-family home in the Village of Tuckahoe. In 2001 they applied for a permit for, among other things, reconstruction of existing retaining walls in their back yard.[42] During the process of reconstructing the retaining walls, petitioners also reconstructed an existing exterior stairway in the back yard. Five years later "it was discovered" that the stairway was in violation of Tuckahoe's four-foot side yard requirement.[43] Petitioners filed an application to the ZBA for an area variance to permit continuing use of the stairs. The ZBA granted the application, but imposed a condition that the stairway be set back at least two feet from the property boundary which, it would appear from the Appellate Division's decision, was essentially physically impossible.[44]

The lower court upheld the validity of the condition and Petitioner appealed. The Appellate Division found that the condition was arbitrary and capricious, and upheld the grant of the variance while annulling the condition.[45] The Appellate Division quoted *St. Onge v. Donovan*,[46] to the effect that a zoning board does have the jurisdiction to impose reasonable conditions directly related to and incidental to the proposed use of the property, but held that the imposition of unreasonable or improper conditions may be annulled and the variance otherwise upheld.[47] Interestingly enough, the Appellate Division held that the stairway setback condition was unreasonable "as there was no evidence adduced at the hearing that compliance of such condition would be feasible,"[48] but having said that, it does

not appear that there was direct evidence to the effect that it was not feasible. In effect, the Court refused to permit what it saw as the indirect denial of a variance which, based upon the equities of the case, should have been granted. The decision does reaffirm the rule that a conditional variance may be stripped of an invalid condition and remain valid as modified by the court, without the necessity for a remand to the ZBA.

As noted above, neither *Cacsire* nor *Gentile* make new law, but they do stand as examples of what the courts (and in particular the Second Department) will do to right a wrong when the equities are screamingly obvious.

Since we are on the topic of conditional approvals, brief reference to the case of *Greencove Associates, LLC v. Town Board of the Town of North Hempstead*[49] is appropriate in that it illustrates a set of facts in which a condition of site plan approval limiting the size of buildings in a shopping center to approximately 6,800 square feet where the dimensional limitations in the zoning ordinance would permit 10,000 square feet was upheld.

Petitioner, the owner of a shopping center in the Town of North Hempstead, sought site plan approval from the town board for expansion of an existing shopping center by the addition of a 10,000-square-foot retail building. The town board approved the site plan but, giving effect to a recommendation by the Nassau County Planning Commission, imposed a condition on site plan approval limiting the size of the new building to approximately 6,800 square feet.[50]

The basis of the town board's condition was the existence of a restriction, imposed at the time that the shopping center was originally approved in 1959, requiring the maintenance of a landscaped buffer along a portion of the property adjacent to a residential neighborhood. In 1999, the town board had approved a site plan application to expand the shopping center subject, among other things, to a condition requiring improvements to the landscaped buffer. Following that site plan approval, the buffer measured, on average, 22 feet in width.[51]

As proposed by the petitioner, the new building would have reduced the buffer, in an area directly behind the building, to a width of just four or five feet.[52]

The petitioner having challenged the condition in an Article 78 proceeding, the lower court made no determination, but transferred the proceeding to the Appellate Division pursuant to CPLR 7804(g).[53] The Appellate Division held that the transfer was improper since the determination to be reviewed was not made following an evidentiary hearing, but insofar as the whole record was before it, made a determination to decide the proceeding on the merits.[54]

The Appellate Division held that the determination was not arbitrary and capricious, an abuse of discretion, or irrational in that it was intended to maintain the integrity of the landscaped buffer and gave effect to a condition that had long been in place.[55] Inherent (although unspoken) in the Appellate Division's determination was an acknowledgment that the petitioner had long been aware of the condition requiring the existing buffer, had acceded to it in 1999, and that the Code of the Town of North Hempstead, in retaining site plan authority in the town board, explicitly gave the town board power to consider, among other things, "compatibility of design considerations and adequacy of screening from residential properties."[56] The Court held that "[A] condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property."[57] As noted above, the case breaks no new ground, but it does make it clear that notwithstanding that a proposed building complies with the dimensional limitations in the zoning ordinance, a condition reducing its size below those limitations will not be invalid if there are other factors (including, presumably, SEQRA factors) justifying the reduction in size.

As the reader will readily discern, none of the four cases reported this quarter will have anyone scurrying to buy the movie rights, but they retain a level of interest nonetheless, particularly the three decisions constituting *Develop Don't Destroy (Brooklyn)*, which gives some insight into when a clearly documented and obviously material change in circumstances will require the preparation of an SEIS, notwithstanding that original SEQRA review was extremely comprehensive and that its original build year assumptions had once survived a judicial review.

Endnotes

1. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation*, 33 Misc.3d 330 (Sup. Ct. NY Co. 2011) (*"Develop Don't Destroy (Brooklyn) III"*).
2. The authors and the law firm with which they are affiliated have represented Forest City Ratner Companies in various matters, none of them related, however, to the subject of this litigation.
3. Referring to the New York Urban Development Corporation doing business as Empire State Development Corporation ("ESDC").
4. *See, e.g., Goldstein v. New York State Urban Development Corporation*, 13 N.Y.3d 511 (2009), as reported in Henry M. Hocherman and Noelle V. Crisalli *Land Use Case Law Update*, 24.1 Municipal Lawyer 5-12 (Winter 2010).
5. *Develop Don't Destroy (Brooklyn) III*, 33 Misc.3d 330.
6. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation*, 26 Misc.3d 1236(A), 2010 WL 936220 (Sup. Ct. NY Co. 2010) (unreported decision) *("Develop Don't Destroy (Brooklyn) I")*.
7. *Develop Don't Destroy (Brooklyn), Inc. v. Empire State Development Corporation*, 30 Misc.3d 616 (Sup. Ct. NY Co. 2010) (*"Develop Don't Destroy (Brooklyn) II"*).

8. *Develop Don't Destroy (Brooklyn) III*, 33 Misc.3d at 349.
9. *Id.* at 333.
10. *See Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *1; *see also Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev Corp.*, 59 A.D.3d 312 (1st Dep't 2009); *Goldstein*,13 N.Y.3d 511.
11. *Develop Don't Destroy (Brooklyn), Inc.*, 59 A.D.3d at 317-318. Interestingly, that challenge also included an allegation that the EIS failed to take a hard look at the project because, among other things, it failed to evaluate the project's potential for inciting terrorism.
12. *Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *1. The SEQRA Regulations provide that the lead agency may require an applicant to prepare an SEIS to review specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS which arise from a change in the project, newly discovered information or a change in the circumstances related to the project. 6 NYCRR 617.9(a)(7).
13. *Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *2.
14. *Develop Don't Destroy (Brooklyn) II*, 30 Misc.3d at 619-621.
15. *Id.* at 622-625.
16. *Develop Don't Destroy (Brooklyn) I*, 2010 WL 936220, *4.
17. *Id.*
18. *Id.* at *5.
19. *Id.* at *6-*9.
20. *Id.* at *7.
21. *Develop Don't Destroy (Brooklyn) II*, 30 Misc.3d at 619-621.
22. *Id.*
23. *See id.* at 627-628.
24. *See Develop Don't Destroy (Brooklyn) III*, 33 Misc.3d at 335-338.
25. *Id.* at 340.
26. *Id.* at 335-338.
27. *Id.* at 340-341.
28. *Id.* at 346-348.
29. *See, e.g., Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev Corp*, 59 A.D.3d 312, 318 (1st Dep't 2009). "Turning now to the 'build year' issue, it is petitioners' contention that the build years, i.e., the time periods by which the phases of the project were predicted to be substantially operational, were intentionally underestimated in the project EIS and that the EIS's disclosure of the project's environmental impacts was consequently fatally skewed. The record, however, discloses that in selecting the build years to be used in the EIS, the lead agency did not arbitrarily select a build year it found favorable but relied upon the detailed construction schedules of the project's highly experienced general contractor and upon the opinions of its own consultants and an independent contractor. It is, of course, possible that the lengths of the projected build-out periods (four years for the first phase of the project, including the arena, and 10 years for the remaining elements) were underestimated, but the ultimate accuracy of the estimates is neither within our competence to judge nor dispositive of the issue properly before us, which is simply whether the lead agency's selection of build dates based on its independent review of the extensive construction scheduling data obtained from the project contractor may be deemed irrational or arbitrary and capricious . . . , and it may not. The build dates having been rationally selected, there can be no viable legal claim that the EIS was vitiated simply by their use. Indeed, we have, in rejecting a similar challenge to an EIS, held that reliance on a particular build date, even if inaccurate, will not affect the validity of the basic data utilized in an EIS (*Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Council of City of N.Y.*, 214 A.D.2d 335, 337 [1995], *lv denied* 87 N.Y.2d 802 [1995])."
30. *Develop Don't Destroy (Brooklyn), Inc. v. Urban Dev Corp.*, 59 A.D.3d 312 (1st Dep't 2009).
31. *Cacsire v. City of White Plains Zoning Board of Appeals*, 930 N.Y.S.2d 54 (2d Dep't 2011).
32. *Gentile v. Village of Tuckahoe Zoning Board of Appeals*, 87 A.D.3d 695 (2d Dep't 2011).
33. *Cacsire*, 930 N.Y.S.2d at 56.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 56-57.
39. *Id.* at 57-58.
40. *Id.* at 57 (citing *Halperin v. City of New Rochelle*, 24 A.D.3d 768 (2d Dep't 2005)).
41. *Cacsire*, 930 N.Y.S.2d at 58.
42. *Gentile*, 87 A.D.3d at 695.
43. *Id.* The decision does not offer any more detail as to how the "discovery" came about; one suspects the neighbors.
44. *Id.*
45. *Id.* at 696.
46. *St. Onge v. Donovan*, 71 N.Y.2d 507, 515-516 (1988).
47. *Gentile*, 87 A.D.3d at 696.
48. *Id.* (citing *Martin v. Brookhaven Zoning Board of Appeals*, 34 A.D.3d 812, 813 (2d Dep't 2006)).
49. *Greencove Associates, LLC v. Town Board of the Town of North Hempstead*, 929 N.Y.S.2d 325 (2d Dep't 2011).
50. *Greencove Associates, LLC*, 929 N.Y.S.2d at 326-327.
51. *Id.*
52. *Id.* at 326.
53. *Id.* at 327.
54. *Id.*
55. *Id.* at 327-328.
56. *Id.* at 327 (citing the Code of the Town of North Hempstead §§70-219[E](1), 219[B]).
57. *Greencove Associates, LLC*, 929 N.Y.S.2d at 327 (quoting *International Innovative Tech Group Corp. v. Planning Board of the Town of Woodbury*, 20 A.D.3d 531, 533 (2d Dep't 2005)).

Henry M. Hocherman recently became of counsel to the law firm Hocherman Tortorella & Wekstein, LLP of White Plains, New York, having been one of the firm's founding partners. Mr. Hocherman is a 1968 graduate of The Johns Hopkins University and a 1971 graduate of Columbia Law School, where he was a Forsythe Wickes Fellow and a Harlan Fiske Stone Scholar.

Noelle Crisalli Wolfson is a member of the Land Use and Environmental Committee of the Municipal Law Section of the New York State Bar Association and is an associate in the law firm Hocherman Tortorella & Wekstein, LLP. She is a 2001 graduate of Siena College and a 2006 graduate of Pace University School of Law, where she was a Research and Writing Editor of the Pace *Environmental Law Review* and an Honors Fellow with the Land Use Law Center.