

**NEW YORK STATE DEPARTMENT OF STATE**  
ONE COMMERCE PLAZA  
99 WASHINGTON AVENUE  
ALBANY, NY 12231-0001

**PLANNING AND ZONING**  
**CASELAW UPDATE: Spring 2010**

## **Legislation**

### **Open Meetings Law Notice Requirements**

Effective May 12, 2009, the Public Officers Law, § 104 was amended to add a new subdivision 5. Under this legislation, public bodies subject to the open meetings law, when they have the ability to do so, must conspicuously post notice of the time and place of a meeting on its (or its municipality's) internet website.

### **FOIL Requests via Electronic Mail**

Effective May 12, 2009, subdivision 1 of § 95 of the Public Officers Law was amended to add a new paragraph (d). This legislation requires each public body or agency to accept requests for records submitted by electronic mail, provided it has the reasonable means to do so, and to respond to such requests, to the extent practicable, by electronic mail.

### **Open Meetings Facilities**

Chapters 40 and 43 of the Laws of 2010 amended § 103 of the Public Officers Law to require that public bodies make all reasonable efforts to ensure that meetings are held in an appropriate facility that can adequately accommodate members of the public who wish to attend. In addition, public bodies must allow these meetings to be videotaped, photographed, or broadcast.

### **Open Meetings Violations**

Chapter 44 of the Laws of 2010 amends § 107 of the Public Officers Law such that if a court determines that a public body violated the OML, the court may declare any action taken void, without prejudice to a reconsideration in compliance with the OML, and it may require the members of the public body to attend training conducted by the Committee on Open Government.

## Cases

### Eminent Domain

In 2008, the Second Circuit rejected a challenge to the use of eminent domain in the controversial Atlantic Yards project in Brooklyn. (*Goldstein v. Pataki*, 516 F.3d 50 (2nd Cir. 2008), cert. denied, 128 S.Ct. 2964 (2008)). In November 2009, the Court of Appeals of New York came to the same conclusion with respect to claims based on New York state law in ***Goldstein v. New York State Urban Development Corporation***, 13 N.Y.3d 511 (2009). The proposed development includes a new sports arena to house the NBA's Nets franchise, various infrastructure improvements, and access upgrades to the subway located at the site. A future phase will include high rise buildings and eight acres of open, publicly-accessible landscaped space. The 16 towers will eventually include both commercial and residential uses.

A portion of the property for the proposed project is located in the Atlantic Terminal Urban Renewal Area (ATURA). Another portion of the proposed project area is in an area adjacent to the ATURA. The development of the Atlantic Yards project is a joint effort between a private company and the New York State Urban Development Corporation doing business as the Empire State Development Corporation (ESDC).

Before becoming involved in the project, ESDC conducted an extensive blight study of the 22-acre project site. The blight study showed, among other things, that a portion of the proposed project area that was not a part of ATURA was blighted. Based on this blight finding and the anticipated public benefits of the Atlantic Yards project, the ESDC concluded that it should exercise its power of eminent domain over certain of the non-ATURA properties in the project area in order to help implement the project. The petitioners in this case were business owners and residents of the non-ATURA properties within the Atlantic Yards project area slated to be taken by eminent domain in connection with the project.

The challengers argued, among other things, that the taking was not for a public use but would primarily benefit the private developer, in violation of article I, § 7(a) of the New York Constitution and the state's Eminent Domain Procedure Law § 207(C)(1). Petitioners also argued that the blocks to be condemned were not blighted, and that the mild dilapidation and inutility of the property did not support a finding of substandard and insanitary conditions within the meaning of article XVIII, § 1 of the New York Constitution.

The Court explained that it must uphold a decision of a public body to take property by eminent domain unless the challenger can show that the "condemnor's findings that a proposed acquisition will further a public use . . . does not rationally relate to any conceivable public purpose." The Court further recognized that a taking that produces

a benefit to the public will not be declared invalid simply because it also furthers a private interest. The court noted that blighting conditions today did not have to replicate the conditions that existed in the Great Depression when that constitutional provision was adopted. Furthermore, “any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.” Weighing the public interests versus the private benefits from the project was an appropriate task for the policy-making branches of government, not the court.

The Court went on to say that the clearing and rehabilitation of underdeveloped and blighted land is an objective recognized in the New York State Constitution separate and distinct from the provisions of the Constitution pertaining to housing, and that courts have repeatedly upheld the use of eminent domain to enable the use of the underlying property for a variety of purposes. Since the Court had found a valid public purpose for the Atlantic Yards project beyond the development of low-income housing, the taking of property for such purposes and the use of state funds to pay for certain infrastructure improvements associated with the development of the Atlantic Yards project do not violate the New York State Constitution.

## **SEQRA**

In ***Centerville’s Concerned Citizens v. Town Board of Town of Centerville***, 56 AD 3d (4<sup>th</sup> Dep’t 2008) the Town passed a local law affecting its zoning. The Plaintiffs brought a declaratory judgment action against the town, seeking to annul the local law based upon, among other things, its failure to comply with SEQRA. The Supreme Court dismissed the complaint, but the appellate division reversed the lower court. The Town had declared itself lead agency and concluded that this was an unlisted action. It prepared a short form environmental assessment form (EAF) and issued a negative declaration before passing the local law.

The Court held that where a lead agency fails to comply with SEQRA mandates, the negative declaration must be nullified. The use of short form EAF is allowed in unlisted actions, however, a long form EAF must be prepared for a Type I action or where a negative declaration with conditions is issued for an unlisted action. Under SEQRA, “the adoption of changes in the allowable uses within any zoning district affection 25 or more acres of the district” is a Type I action. The Town’s local law affected the allowable uses in the entire town and thus should have been declared a Type I action. Since a full long form EAF is required for such an action, the negative declaration is nullified, and accordingly, the local law is an invalid legislative enactment.

## Standing

***Save the Pine Bush v. Common Council of the City of Albany***, 13 N.Y.3d 297 (2009) was a victory for those who have long believed the courthouse door should be open wider for advocates seeking standing in environmental disputes. The court began its decision, “We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource. Applying that rule to this case, we hold that the individual petitioners who are members of Save the Pine Bush, Inc., and the organization itself, have standing to challenge an action alleged to threaten endangered species in the Pine Bush area.”

Following the required environmental review and subsequent rezoning of a 3.6 acre parcel adjoining the Pine Bush Preserve to accommodate a parking lot for a proposed hotel, nine members of Save the Pine Bush commenced challenging the City’s action under the State Environmental Quality Review Act, alleging that they “live near the site of the hotel project” and they “use the Pine Bush for recreation and to study and enjoy the unique habitat found there.” The trial court denied a motion to dismiss the proceeding for lack of standing, vacated the City’s SEQRA determination, and annulled the rezoning. The trial court determined that the environmental impact statement was flawed because while it gave “considerable attention” to the Karner Blue Butterfly, it did not contain “a hard look” at the potential impact on other rare plant and animals.

The Appellate Division affirmed, finding, with respect to standing, that the plaintiffs could show evidence that “they regularly use the Preserve” and that “at least one of the petitioners resides in sufficient proximity to the Preserve to facilitate that use.” Applying *Society of Plastics Industry v. Suffolk County* (77 N.Y.2d 761), the Court said that “In land use matters... the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large,” and that standing of an organization could be “established by proof that the agency action will directly harm the association members in their use and enjoyment of the affected natural resources.”

The Court of Appeals agreed, finding it was likely that members of the Save the Pine Bush organization would frequent and enjoy the Pine Bush. They referred to the finding by the United States Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972), agreeing that a “generalized interest in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff “aesthetics and environmental well being” would be enough.” Here, the City did not challenge the injuries the petitioners asserted and the court found that the petitioners were able to prove the direct harm to the organization members.

The court, while holding that the petitioners had standing, nonetheless found for the City on the merits. The Court noted that the fact that not all possible potential impacts

were studied was not fatal to the City approval of the zoning change. They stated “while it is essential that public agencies comply with their duties under SEQRA, some common sense in determining the extent of those duties is essential too.”

## **Area Variance**

In *Caspian Realty, Inc. v. Zoning Board of Appeals of the Town of Greenburgh*, 68 AD 3d 62 (2d Dep’t 2009), the Second Department held that a zoning board of appeals may take into account an applicant’s deceitful representations when evaluating an area variance application provided that such actions are analyzed in the context of Town Law § 267-b(3)’s area variance standard.

In *Caspian Realty, Inc.*, the petitioner-respondent applied to the Town of Greenburgh Planning Board for site plan approval to establish a furniture store on a parcel of property in the Town. The plans for the store showed a 6,208-square-foot main-floor showroom, and a cellar. Caspian represented to the Planning Board that the cellar would be used for storage and mechanicals. Based on this plan and all subsequent plans submitted to the Planning Board, the proposed floor area ratio (“FAR”) and number of parking spaces for the proposed use complied with the dimensional requirements of the Town’s Code. In 2003, before a certificate of occupancy was issued for the store, the Building Inspector observed finishing work in the cellar and instructed Caspian to submit updated plans. Caspian submitted plans to the Building Department showing the cellar as storage. Caspian also barricaded the stairway leading from the cellar to the showroom. Temporary and final certificates of occupancy were issued for the store and thereafter the store opened for business.

In 2004 the Building Department issued a zoning violation to Caspian on the grounds that it was using the cellar as a showroom in violation of its certificate of occupancy. Caspian subsequently applied to the Town of Greenburgh Zoning Board of Appeals for area variances from the FAR requirements and parking requirements of the Town Code to permit it to continue using both the main level and the cellar of the building as a furniture showroom. Caspian required an approximately 100 percent variance from the Town’s FAR requirements and an approximately 50 percent variance from the parking requirements in order to use the cellar as a showroom.

The Zoning Board of Appeals held a public hearing on the application which lasted for six sessions. At the public hearing, Caspian argued that it was not aware that it was not permitted to use the cellar as a showroom and that if it were allowed to use the main floor and the cellar as a showroom, its showroom would be of a comparable size to its competitors in the area. Neighboring property owners appeared at the public hearing in opposition to Caspian’s application and complained that conditions of the approved site plan pertaining to, among other things, landscaping, noise, and overnight parking, had not been satisfied. They also complained that the size and configuration of the site made delivery truck movements entering the site difficult and that such truck traffic

negatively impacted traffic in the surrounding area.

In 2006 the Zoning Board of Appeals denied Caspian's application on the grounds, among others, that the benefit to the applicant was outweighed by the detriment to the Town because granting the variances would, in light of Caspian's prior deceptive practices, diminish respect for the Town's planning, building, and tax laws. The Board further found that the retail use of the cellar negatively impacted the community in terms of noise, truck movements, and traffic, that the variances requested were substantial, and that Caspian's need for the variance was self-created and due to its deceptive conduct. Caspian brought an Article 78 proceeding asking the Court to annul the Board's denial and grant the variances on the grounds that the application of the statutory area variance standard balanced in its favor.

The Supreme Court determined that Caspian deceived the Town regarding its intended use and purpose of the cellar. However, the Supreme Court held that deception is not one of the enumerated factors of the statutory area variance standard and that the Board's focus on this aspect of Caspian's application prevented it from properly applying the statutory area variance standard. Thus, the Supreme Court annulled the denial and remanded the matter to the Zoning Board of Appeals. The Zoning Board of Appeals appealed and the Second Department reversed.

With regard to the consideration of the applicant's deceitful conduct, the Second Department found that Caspian had, in fact, acted in a deceitful manner regarding its use of the cellar based on the evidence in the record.<sup>18</sup> Thus, the issue became what role, if any, that finding was permitted to play in the overall determination of Caspian's application for area variances.

The Court held that Town Law § 267-b(3)'s standard for area variance review must be used; however, the Court held that an applicant's deceptive conduct can play a role in the application of the statutory area variance standard, stating that while an applicant's deceit toward municipal boards with respect to prior or current applications may not, standing alone, warrant the denial of an area variance under Town Law § 267-b(3), that factor can be considered significant and compelling to the extent it inextricably relates to certain of the enumerated statutory factors, such as whether the benefit of a requested variance is outweighed by the adverse impact which may inure to the Town and its ability to enforce the law in future cases if it were to grant an area variance to an applicant who had misled municipal authorities throughout the application process.

The lesson from this case is that even though an area variance cannot be turned down for the sole reason that the applicant engaged in deceptive conduct, deceptive conduct will carry considerable weight in the application of the statutory area variance standard and, in the context of the application of that standard, could cause an application that may have otherwise been granted to be denied, even if no physical harm will result from the grant of the variance.

## Variance Conditions

In 2008, the Second Department handed down a decision which continues to support courts annulling ZBA actions that impose conditions on area variances that are improper and unreasonable. In ***Voetsch v. Craven***, 48 AD 3d 585 (2<sup>nd</sup> Dep't 2008) the Town of Harrison ZBA granted the petitioner's area variance for, among other things, a parking lot. This approval was conditioned on the petitioner prohibiting overnight parking and the installation of a chain across the parking lot entrance to prevent overnight parking.

On appeal, the Court affirmed the prohibition on overnight parking, but found that the condition of installing a chain across the entrance was unreasonable as the overnight parking was already prohibited by the initial condition.

## Use Variance

In ***O'Connell Machinery v. City of Buffalo Zoning Board of Appeals***, 60 AD 3d 1353 (4<sup>th</sup> Dep't 2009) the petitioner sought to annul a use variance that allowed a mixed-use residential and commercial development on property located in a zone classified as "light industrial". The City ZBA granted the use variance on the basis of the statutory factors in General City Law § 81-b(3). The court upheld the ZBA's determination stating that the conclusion that the developer satisfied all of the statutory factors for approval of use variances had a rational basis and is supported by substantial evidence in the record. Particularly, the court stated that developer provided "proof, in dollars and cents form," that it cannot realize a reasonable return on its investment because the property had been substantially vacant for 30 years, and only 10% to 15% of the space was occupied at the time of application, and the prospects for expanding occupancy and generating sufficient revenue to recover necessary maintenance, repairs and improvements were marginal.

In ***Vomero v. City of New York***, 13 NY3d 840 (2009) the Court of Appeals held that the subject property's location in close proximity to commercial uses on a main thoroughfare was not sufficient to support a finding of uniqueness under the use variance standard because nearby properties shared similar conditions and thus such conditions were common to the neighborhood rather than unique to the subject property.

In *Vomero*, GAC Catering, Inc. ("GAC") purchased a residentially zoned corner parcel on Staten Island directly across from a catering facility also owned by GAC. At the time GAC purchased the residentially zoned property, it was improved with a single-family residence. Shortly after it purchased the residentially zoned property, GAC demolished

the house located on the property and applied to the City's Department of Buildings for a building permit to construct a two-story building that it intended to use as a photography studio in connection with its nearby catering business. The Department of Buildings denied the building permit on the grounds that the proposed photography studio use was not a permitted use of the property.

GAC applied to the New York City Board of Standards and Appeals (the "BSA") for a use variance to permit the proposed photography studio use of the property. In support of its application, GAC submitted evidence showing that many of the corner properties in the surrounding neighborhood have become commercial and therefore its proposed use was not out of character with the surrounding neighborhood, and that the property was unique because of its purported irregular shape and its location at the corner of an intersection, which area, GAC explained, was predominately developed for commercial use. GAC also submitted a financial analysis in support of its contention that it could not realize a reasonable return if it were to use the property for a use permitted under the City's Zoning Resolution.

The BSA found that GAC satisfied the applicable use variance standard and granted the variance. GAC's next door neighbor commenced an Article 78 proceeding challenging the approval.

The Supreme Court, Richmond County, granted the petition and annulled the grant of the variance. It held that the evidence in the record demonstrated that (1) GAC could realize a reasonable return on the property if it were to use or sell the property for a permitted use; (2) GAC's hardship was self-created since it admitted that it purchased the property with knowledge of the residential zoning in place (which, in the City of New York, apparently is relevant but not outcome determinative on an application for a use variance); (3) granting the variance would have a negative impact on the character of the community notwithstanding the predominately commercial character of the surrounding neighborhood since the granting of the variance would further weaken the continuing viability of residential properties in the immediate area surrounding the property; and (4) that hardship was not unique to the property since GAC's property was similarly situated with respect to lot size and proximity to commercial uses to the surrounding residentially zoned and developed lots. The court noted that the only difference between GAC's property and the other residentially zoned properties on the block was that GAC's property was on the corner (apparently not enough of a distinction in and of itself to make the property unique).

The Second Department, with two justices dissenting, reversed the Supreme Court's annulment of the variance and dismissed the petition, holding that the BSA's decision granting the requested use variance had a rational basis in the record and was not arbitrary and capricious. With regard to whether a "unique physical condition" rendered the property unusable for a permitted use, the majority focused on the fact that "other properties in the area, which have similar characteristics to and are in locations similar to the property at issue here, had 'unique physical conditions' such that 'practical

difficulties or unnecessary hardships' would arise with conforming uses" and that there was no evidence in the record to distinguish GAC's property from such other properties. On the issue of uniqueness, the dissent agreed with the lower court that the property was not materially different from surrounding residential properties and thus any hardship the zoning classification of the property imposed was not unique to the property.

The Court of Appeals reversed the decision of the Second Department and reinstated the Supreme Court, Richmond County, decision, reasoning that:

The physical conditions of the parcel relied on by the board did not establish that the property's characteristics were "unique" as defined by New York City Zoning Resolution § 72-21(a). Proof of uniqueness must be "peculiar to and inherent in the particular zoning lot" (N.Y. City Zoning Resolution § 72-21[a]), rather than "common to the whole neighborhood."...The fact that this residentially zoned corner property is situated on a major thoroughfare in a predominantly commercial area does not suffice to support a finding of uniqueness since other nearby residential parcels share similar conditions.

The holding in *Vomero* is not new law; it simply reinforces decades of case law which has consistently held that where a condition in a neighborhood affects several similarly situated properties in a substantially similar manner, that characteristic may not be relied on by any one of those property owners to support a finding that his or her property is unique in the context of the statutory use variance analysis. *Vomero* should not be read as a wholesale preclusion of the consideration of the nature of the use of properties surrounding a property that is the subject of an application for a use variance when determining whether the subject property is unique. In fact, the Court of Appeals expressly states that GAC's proximity to commercial uses was not unique "since other nearby residential parcels share similar conditions." This qualifying language demonstrates that the Court did not hold that the nature of the surrounding area was itself insufficient or irrelevant to support a finding of uniqueness under the use variance standard; rather, the Court simply held that based on the facts in the record before it GAC's property was not unique.

## **Non-Conforming Use**

This case stems from attempted extinguishment of a long standing prior non-conforming use in the Village of Westhampton Beach. The property in question had been used as an asphalt plant since 1945. The use was rendered non-conforming in 1985 and was acquired by the current owner in 1994. In 2000, the Village adopted a local law that provided that the right to maintain a non-conforming asphalt plant terminated within one year unless the owner applied to the ZBA for an extension of the termination date not to exceed five years. The petitioner applied and was granted this

extension and then commenced this action for summary judgment, alleging that the local law was invalid since, among other things, the amortization period was too short. In denying summary judgment the court held the petitioner failed to demonstrate the law is invalid on its face. In ***Suffolk Asphalt Supply, Inc. v. Board of Trustees of Village of Westhampton Beach***, 59 AD 3d 429 (2<sup>nd</sup> Dep't 2009) the court noted that "there remains a question of fact regarding whether the amortization period provided in the local law was reasonable and thus constitutional as applied to the plaintiff."

The court stated the general rule in determining the reasonableness of an amortization period is "a question which must be answered in light of the facts of each particular case". "Reasonableness is determined by examining all the facts, including the length of the amortization period in relation to the investment and the nature of the use. The period of amortization will normally increase as the amount invested increases or if the amortization applies to a structure rather than a use". Factors to be considered in determining reasonableness include "the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner".

Noting that determining the reasonableness of the amortization period relates to whether a property owner has an opportunity to recoup its investment, the court went on to say that the amortization period does not have to be long enough to recoup the entire investment, only sufficiently long, so that the property owner does not suffer a "substantial loss" of investment. Here the court found that the property owner had failed to submit evidence of the amount of its investment in the property and therefore there is a question of fact which precluded summary judgment.

## **Enforcement**

The Appellate Division recently held that liability may not be imposed on a Village for negligence or breach of contract for the failure to enforce its building and zoning laws. In ***Bell v. Village of Stamford***, 51 AD 3d 1263 (3<sup>rd</sup> Dep't 2008) the petitioner owned property in the Village across the street from three properties upon which were constructed a building and parking area. The plaintiff alleged that this construction was done without obtaining the necessary building permits, variances and other approvals and that the plaintiff repeatedly informed the Village of these activities. The Village did not take action to stop the construction or to remedy the situation, and as a result, the plaintiff brought the action claiming negligence and breach of contract against the Village.

The lower court denied the Village's motion to dismiss the complaint based on the grounds that the plaintiff failed to state a cause of action, but the Appellate Court reversed, granting the Village's motion. The Appellate Court found that the plaintiff had failed to establish a "special relationship" which is necessary to establish liability on the part of a municipality. A special relationship can be established in one of three ways:

(1) When the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) When the municipality voluntarily assumes a duty that generates justifiable reliance from the person who benefits from that duty; or (3) When the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation.

In its decision the court found that no liability could be imposed against the Village under any the three categories. The court specifically addressed the first category finding that the adoption of zoning ordinances and building codes by a municipality does not create a special relationship with the residents of the municipality. The Court also found that the plaintiff alleged no affirmative conduct on the part of the Village that could have induced the plaintiff's reliance creating a special relationship under the second category. As to the third possibility, the plaintiff offered no more than a passing reference to the Mayor's interest in the project leading the court to also disregard this claim.

The plaintiff failed to seek relief under CPLR Article 78 in the nature of mandamus to compel municipal enforcement of the Village's zoning and building laws so the Appellate Court did not address the issue of whether an Article 78 proceeding was available to village residents looking to compel the enforcement of building and zoning laws against another resident.

## **Preemption**

In *Blum & Bellino v. Town of Greenburgh*, 58 AD 3d 835 (2<sup>nd</sup> Dep't 2009) the petitioners operated a real estate business out of their single family residence in the Town of Greenburgh. After applying and being approved for a sign permit issued by the Town's building inspector, the petitioners posted an oversized sign on their lawn in an effort to advertise their real estate business as well as satisfy certain statutory requirements related to the business as set forth in Real Property Law Section 441-a. Soon thereafter the sign permit was revoked by the building inspector on the grounds that its size violated the Town's sign law.

An appeal of the revocation of the sign permit was taken to the Town's ZBA and alternatively an area variance was requested to maintain the oversized sign. The revocation was upheld and the variance application was denied. The petitioners appealed the ZBA decision to the Supreme Court and it upheld the determination of the ZBA. The Appellate Division, Second Department further held that Real Property Law § 441-a, which mandates that a real estate business operating out of a residence have a sign readable from the sidewalk, does not preempt the Town's sign law.

## Prior Precedent

In ***Foti v. Town of East Hampton ZBA***, 60 AD 3d 1057 (2<sup>nd</sup> Dep't 2009) the petitioner appealed a determination made by the Town of East Hampton ZBA arguing that the determination was arbitrary and capricious and that the ZBA failed to adhere to prior precedent. The Supreme Court upheld the ZBA's denial with the Appellate Division affirming.

The petitioner owned property containing fresh water wetlands. In 1992, the prior owners of the property had been granted a special use permit and certain variances in order to construct a home. The petitioner sought approval from the ZBA for a natural resources special use permit and three area variances in order to, similarly, construct a single family residence. The ZBA denied the application "finding that the project exceeded the constraints of the lot and had the potential to increase flooding in the area".

The courts upheld the ZBA's determination, because the record compiled by the ZBA demonstrated that all relevant facts were considered in making the determination. The public offered comments at hearings on the application that there would be flooding and that there had been flooding on an adjoining parcel recently granted a permit-causing a stoppage to construction work. The Town of East Hampton Planning Department confirmed that there was chronic flooding in the area of the property, with testimony and photographs. There was also evidence that the water table was very high and the septic system, which would be located 23 feet from the wetlands, would not provide adequate separation (adverse impact to the neighborhood). The variance would be substantial. Further, the Planning Department had specifically advised Petitioner regarding the wetlands constraints on the property (self created hardship).

In explaining why it departed from its 1992 permit grant - its prior precedent - the ZBA noted that substantial changes had occurred including that: (1) since 1992 it had become more keenly aware of the severity of flooding problems in the area, this was evidenced by testimony and photographs made a part of the record documenting the flooding problems in the neighborhood, including the construction on the adjoining parcel; and (2) prior approval was granted, in part, based upon a "Relief Provision" of the Town Code that had since been deleted.

## Ethics

This Appellate Division case, ***Matter of Hedman v. Town Board of Town of Howard, et al.***, 56 A.D.3d 1287 (4th Dept. 2008) began when some of the residents of the Town of Howard, commenced an Article 78 proceeding that sought the removal of a Town Board member pursuant to N.Y. Public Officers Law § 36. Under this section of the Public Officers Law, an officer may be removed for misconduct, maladministration,

malfeasance or malversation of office. The threshold for removal under the Public Officers Law is a high burden to meet as "allegations of minor neglect of duties, administrative oversights or violations of law... do not, in general, warrant removal."

The proceeding was transferred from the supreme court to the Appellate Division. The Board member was accused of trying to conceal his relationship with a company that proposed to build a wind energy facility in the Town including a turbine on the member's property. It was also alleged that the Board member ignored a conflict of interest when he voted to approve the wind energy facility. The Court dismissed both allegations finding that concealing of the relationship was purely speculative. The member also was able to show that he had not entered into a contract with the wind company prior to the time he cast his vote as a Board member and that the impropriety in failing to make a public disclosure of the potential conflict did not warrant removal from the Board.