INTERPRETATIONS BY THE ZONING BOARD OF APPEALS

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1. ZBA Jurisdiction

Town Law §267-a(4) specifically vests a town zoning board of appeals ("ZBA") with the following jurisdiction:

> Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town.

This appellate jurisdiction includes both the power to grant variances, and the power to review the enforcement official's determination. Town Law §267-b. "The board's jurisdiction to review the zoning decisions of enforcement officers is exclusive." 2 Salkin, *New York Zoning Law and Practice* (4th ed.) §27:24. For example, "[i]t is within the power of a zoning board of appeals to determine whether an applicant for a building permit is entitled to a nonconforming use." *Id.*

Only decisions of the zoning enforcement official can be reviewed, whether that person is

labeled the code enforcement officer, zoning officer or building inspector. The ZBA has no power to hear appeals of those officials from interpretations of the state building code, since those are not zoning determinations. *Portion Properties, Inc. v. De Luca*, 126 A.D.2d 650, 510 N.Y.S.2d 905 (2d Dep't 1987). However, in *RSM West Lake Road LLC v. Town of Canandaigua Zoning Bd. of Appeals*, 12 N.Y.3d 843, 881 N.Y.S.2d 390 (2009), an appeal could be taken from a determination made under a local dock law enacted pursuant to authority of the Navigation Law, since the dock law "was adopted pursuant to article 16 of the Town Law." Further, the ZBA has no power to determine the validity of the zoning ordinance itself. *Smith v. Town of Plattekill*, 13 A.D.3d 695, 787 N.Y.S.2d 406 (3d Dep't 2004).

The ZBA jurisdiction is appellate only, so it cannot make an interpretation without the administrative official first making a determination. *Barron v. Getnick*, 107 A.D.2d 1017, 486 N.Y.S.2d 528 (4th Dep't 1985). It should only consider the "narrow issue" before it. *BBJ Associates, LLC v Zoning Board of Appeals of Town of Kent*, 65 A.D.3d 154; 881 N.Y.S.2d 496 (2d Dep't 2009). It may consider requests in the alternative, so that an applicant can apply for a variance, and at the same time seek a determination that the variance is unnecessary and the applicant should have been granted a building permit or has a legal nonconforming use. *See P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals*, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002). The ZBA can dispose of an appeal as follows:

> The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

Town Law §267-b(1). Thus, the ZBA can make the decision that the administrative official should have made.

2. Time to Appeal

Town Law §267-a(5)(a) requires that the local zoning official file their decision in their office within five business days. Then, an appeal from that determination "shall be taken within sixty days after the filing" of the decision by filing a notice of appeal with the ZBA and the administrative official. Town Law §267-a(5)(b). While the notice of appeal should specify "the grounds thereof and the relief sought," state law does not specify any particular form, although a local zoning code may.

Town Law §267-a(5) measures the 60-day period from "filing." However, case law has long made it clear that the time to appeal to the ZBA does not begin to run for a neighbor until he or she receives actual notice of the decision. *Pansa v. Damiano*, 14 N.Y.2d 356, 251 N.Y.S.2d 665 (1964). This is consistent with the analogous rule that when bringing an Article 78 proceeding, "the limitations 'period... does not begin to run until the aggrieved party is aware of the determination and the fact that he or she is aggrieved by it.'" *Alterra Healthcare Corp. v. Novello*, 306 A.D.2d 787, 788, 761 N.Y.S.2d 707 (3d Dep't 2003); *Farina v. Zoning Board of Appeals of the City of New Rochelle*, 294 A.D.2d 499, 742 N.Y.S.2d 359 (2d Dep't 2002). Rather, "fundamental fairness would seem to compel the conclusion that a petitioner should not be held to have been dilatory in challenging a determination of which he was not aware." *Biondo v. New York State Board of Parole*, 60 N.Y.2d 832, 834, 470 N.Y.S.2d 130 (1983). *See also* New York Department of State, James Coon Local Government Technical Series, *Zoning Board of Appeal*s (Nov. 2005) at 25-26.

3. Standing

Town Law §267-a(4) allows an appeal to be taken by "any person aggrieved, or by an officer, department, board or bureau of the town." A "person aggrieved" would include the applicant for a permit that was denied, or the owner of property that is the subject of an interpretation. Further, like with an Article 78 proceeding (discussed below), neighbors who are impacted by a development have standing to bring an appeal to the ZBA, either individually or through an association. For example, in *RSM West Lake Road LLC v. Town of Canandaigua Zoning Bd. of Appeals*, 12 N.Y.3d 843, 881 N.Y.S.2d 390 (2009), two associations of lakefront owners had standing to appeal a zoning officer's interpretation regarding a dock project.

4. Stay

An appeal "shall stay all proceedings in furtherance of the action appealed from." Town Law §267-a(4). However, there is no stay when the administrative official certifies to the ZBA that a stay would "cause imminent peril to life or property," but in that case the ZBA or a court may still grant a stay. Town Law §267-a(4). Where the certificate of "imminent peril" is baseless, the stay will be reinstated by a court. *Town of Groton v. Langer*, 175 Misc.2d 47, 667 N.Y.S.2d 1014 (Sup. Ct. Tompkins Co. 1997). Some courts have held that the stay does not apply to appeals by third parties. *Historic Hornell, Inc. v. City of Hornell Planning Board*, 9 Misc. 3d 1108A, 859 N.Y.S.2d 903 (Sup. Ct. Steuben Co. 2008).

5. Hearing

Upon filing the notice of appeal, the administrative official must supply the ZBA with "all the papers constituting the record upon which the action appealed from was taken." Town Law §267-a(5)(b). Then a hearing is held, like any other ZBA hearing, on five days' notice. The appellant must pay the cost of the notices." Town Law §267-a(7). At the hearing, any person may appear in person or by an agent or attorney. Town Law §267-a(7).

At the hearing, the applicant or their attorney will normally present background facts and legal arguments. While normally the facts are not in dispute, in many cases the ZBA must resolve conflicting facts based on the evidence presented. For example, in *Toys R Us v. Silva*, 89 N.Y.2d 411, 424, 654 N.Y.S.2d 100, 107 (1996), the ZBA properly determined whether a nonconforming use was continued during a disputed time frame. *See also P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals*, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002).

6. Decision

The ZBA must make a decision within 62 days, although that time limit may be extended by consent of the applicant and the board. Town Law §267-a(8). The decision should be filed with the town clerk within five business days, and a copy mailed to the applicant. Town Law §267-a(9).

Generally, a board must render findings to support its decision. *Dean Tarry Corp. v. Friedlander*, 78 A.D.2d 546, 432 N.Y.S.2d 35 (2d Dep't 1980); *see also Open Space Council v. Planning Board of Town of Brookhaven*, 152 A.D.2d 698, 543 N.Y.S.2d 754 (2d Dep't 1989); *Sherman v. Frazier*, 84 A.D.2d 401, 446 N.Y.S.2d 372 (2d Dep't 1982); *Asthma v. Curcione*, 31 A.D.2d 883, 298 N.Y.S.2d 286 (4th Dep't 1969). Conclusory findings are insufficient. *Leibring v. Planning Board of the Town of Newfane*, 144 A.D.2d 903, 544 N.Y.S.2d 236 (4th Dep't 1988). Therefore, the ZBA decision on an administrative appeal should be supported by findings.

7. Collateral Estoppel and *Res Judicata*

The doctrines of collateral estoppel and *res judicata* apply so that the interpretation of the ZBA is binding in later proceedings involving the same party. *Lee v. Jones*, 230 A.D.2d 549, 659 N.Y.S.2d 549 (3rd Dep't 1997); *Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 532 N.Y.S.2d 230 (1988); *Freddolino v. Zoning Board of Appeals of the Village of Warwick*, 192 A.D.2d 839, 596 N.Y.S.2d 490 (3rd Dep't 1993).

8. Exhaustion of Administrative Remedies

"[O]ne who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 412 N.Y.S.2d 821 (1978). Thus, before the determination of a zoning official is challenged in court, a litigant must exhaust his administrative remedies by appeal to a zoning board of appeals. *Matter of Turner v. Town of Grand Island Building Department*, 97 A.D.2d 980, 468 N.Y.S.2d 783, 784 (4th Dep't 1983); *Matter of the Association for the Development of a Healthy Oneonta Community, Inc. v. Kirkpatrick*, 87 A.D.2d 934, 450 N.Y.S.2d 78 (3d Dep't 1982); *Rosenbush v. Keller*, 271 N.Y. 282 (1936).

The failure to file a timely appeal "constitutes a failure to exhaust administrative remedies," and requires dismissal of further applications for the same relief. *Dowling v. Holland*, 245 A.D.2d 167, 666 N.Y.S.2d 585 (1st Dep't 1997); *see also Watergate II Apartments v. Buffalo Sewer*

Authority, 46 N.Y.2d 52, 412 N.Y.S.2d 821 (1978); *Clowry v. Town of Pawling*, 202 A.D.2d 663, 609 N.Y.S.2d 663 (2d Dep't 1994). Thus, in *Hays v. Walrath*, 271 A.D.2d 744, 705 N.Y.S.2d 441 (3d Dep't 2000), *Engert v. Phillips*, 150 A.D.2d 752, 542 N.Y.S.2d 202 (2d Dep't 1989), and *Matter of Jonas v. Town of Colonie*, 110 A.D.2d 945, 488 N.Y.S.2d 263 (3d Dep't 1985), the failure of neighbors to appeal issuance of a building permit to the ZBA was fatal. Likewise, in *We're Associates Co. v. Commissioner of Department of Planning and Development*, 185 A.D.2d 820, 586 N.Y.S.2d 315 (2d Dep't 1992), it was necessary to appeal the denial of a building permit to the ZBA. However, exhaustion of administrative remedies by an appeal will not be required if it is futile. *Historic Hornell, Inc. v. City of Hornell Planning Board*, 9 Misc. 3d 1108A, 859 N.Y.S.2d 903 (Sup. Ct. Steuben Co. 2008).

The requirement to appeal will apply to stop-work or other enforcement orders. *Aliano v. Oliva*, 72 A.D.3d 944, 899 N.Y.S.2d 330 (2d Dep't 2010). For example, in *Miller v. Price*, 267 A.D.2d 363, 700 N.Y.S.2d 209 (2d Dep't 1999), the building inspector issued a "stop-work order," and instead of appealing to the local ZBA, the plaintiff commenced an action in state Supreme Court. The court dismissed the action, holding that "plaintiffs' failure to pursue their administrative remedies by a timely administrative appeal of the determination of the building inspector bars judicial intervention."

9. Rules of Interpretation.

"Where the language of a statute is clear and unambiguous," the interpreting authority "must give effect to its plain meaning; words are not to be rejected as superfluous." *Tall Trees Constr. Corp. v. Zoning Bd. of Appeals*, 97 N.Y.2d 86, 91 (2001), *citing Rosner v. Metropolitan Prop. & Liab. Ins. Co., Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998); McKinney's Cons Laws of NY, Book 1, Statutes §§ 94, 231. "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." *Majewski, supra, citing Tompkins v. Hunter*, 149 N.Y. 117, 122-123 (1896); *Raritan, supra*.

Where terms are not defined by the law, "dictionary definitions [are] 'useful guideposts' in determining the meaning of a word or phrase," *Rosner v. Metropolitan Property and Liability Ins. Co.*, 96 N.Y.2d 475, 479-80, 729 N.Y.S.2d 658, 660 (2001); *see also Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation*, 14 N.Y.3d 161, 897 N.Y.S.2d 693 (2010). Further, in interpreting undefined statutory terms, a court may look to the relevant legislative history. *Sutka v. Conners*, 73 N.Y.2d 395, 404, 541 N.Y.S.2d 191, 194-95 (1989), *citing Ferres v. City of New Rochelle*, 68 N.Y.2d 446, 451, 510 N.Y.S.2d 57 (1986).

"In addition, "[i]t is a general rule in interpretation of statutes that the legislative intent is primarily to be determined from the language used in an act, considering the language in its most natural and obvious sense." McKinney's Cons. Laws of New York, Book 1, Statutes §232. The ZBA is not authorized to read new requirements into the applicable laws because a "zoning code must be construed according to the words used in their ordinary meaning and may not be extended by

implication." *Matter of Baker v Town of Islip Zoning Bd. of Appeals*, 20 A.D.3d 522, 523-4, 799 N.Y.S.2d 541, 20 A.D.3d at 523-524. The rule of strict construction even bars the granting of a request to interpret a zoning code so as to "supply language which was conceivably omitted by the framers of the ordinance through inadvertence." *Kurlander v. Hempstead*, 31 Misc. 2d 121, 124 (Sup. Ct. Nassau Co. 1961).

"As a general rule, zoning ordinances are in derogation of the common law and must be strictly construed against the municipality." *Sanantonio v. Lustenberger*, 73 A.D.3d 934, 935, 901 N.Y.S.2d 109, 110 (2d Dep't 2010); *see also Matter of Baker v Town of Islip Zoning Bd. of Appeals*, 20 AD3d 522, 523, 799 N.Y.S.2d 541). "However, this rule is subject to the limitation that where... it would be difficult or impractical for a legislative body to promulgate an ordinance which is both definitive and all-encompassing, a reasonable amount of discretion in the interpretation of the ordinance may be delegated to an administrative body or official." *Sanantonio v. Lustenberger*, 73 A.D.3d 934, 935, 901 N.Y.S.2d 109, 110 (2d Dep't 2010).

Thus in *Sanantonio*, the ZBA properly determined that a beauty salon was not a "home occupation," even though that term was apparently not defined, since beauty salons were included in the list of "personal service stores." In *BBJ Associates, LLC v Zoning Board of Appeals of Town of Kent*, 65 A.D.3d 154; 881 N.Y.S.2d 496 (2d Dep't 2009), the ZBA properly determined that a proposed road to serve a multi-family development was not a permitted use in a zone that only allowed single-family and commercial uses.

10. Precedent.

"A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." *Knight v. Amelkin*, 68 N.Y.2d 975, 977, 510 N.Y.S.2d 550 (1986); *see also Heller v. New York State Tax Commission*, 116 A.D.2d 901, 905, 498 N.Y.S.2d 211, 213-214 (3d Dep't 1986) [*citing Matter of Charles A. Field Delivery Serv. v. Roberts*, 66 N.Y.2d 516, 498 N.Y.S.2d 111 (1985)]. This is only logical, since the determination of what is arbitrary and capricious should not be made in a vacuum, but rather requires comparison to other decisions. *See Callahan Industries Inc. v. Rourke*, 187 A.D.2d 781, 785, 589 N.Y.S.2d 663, 666 (3d Dep't 1992); *Matter of Frisenda v. Zoning Board of Appeals of Town of Islip*, 626 N.Y.S.2d 263 (2d Dep't 1995). Failure to do so renders the later decision arbitrary and capricious, and without a rational basis. *Callahan Industries Inc. v. Rourke*, 187 A.D.2d 781, 589 N.Y.S.2d 663 (3d Dep't 1992); *Group for the South Fork v. Wines*, 190 A.D.2d 794, 593 N.Y.S.2d 557 (2d Dep't 1993).

Nonetheless, officials can reopen past mistakes to correct errors. *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176 (1988).

11. Changes in the Law

Where the law is changed prior to a final decision, the new law will apply unless the landowner has acquired "vested rights." 2 Salkin, *New York Zoning Law and Practice* (4th ed.)

§33:23; *Theirbault v. Town of Farmington Planning* Board, 199 A.D.2d 1059, 608 N.Y.S.2d 910 (4th Dep't 1993); *Lawrence School Corp. v. Morris*, 167 A.D.2d 467, 562 N.Y.S.2d 707 (2d Dep't 1990); *Pokoik v. Silsdorf*, 40 N.Y.2d 769, 390 N.Y.S.2d 49 (1976). Vested rights are normally only acquired by commencement of actual construction of a substantial improvement. *Jaffee v. RCI Corp.*, 119 A.D.2d 854, 500 N.Y.S.2d 427 (3d Dep't 1986); *Paliotto v. Dickerson*, 22 A.D.2d 929, 256 N.Y.S.2d 55 (2d Dep't 1964). However, a landowner has the right to expand a mine on the same parcel. In *Jones v Town of Carroll*, 15 N.Y.3d 139, 905 N.Y.S.2d 551 (2010), a landfill owner had vested rights in a landfill expansion on the when it purchased equipment, hired employees and developed and pursued its plans.

In some situations, where a municipality illegally denies a permit, and then changes the law to make the use illegal, a landowner's proposed use may be grandfathered. 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:19. However, in *Lawrence School Corp. v. Morris*, 167 A.D.2d 467, 562 N.Y.S.2d 707 (2d Dep't 1990), even though a permit was arbitrarily revoked, the landowner had to comply with a new law. In addition, under its police powers, a municipality can regulate preexisting uses. *Concerned Citizens of Perinton, Inc. v. Town of Perinton*, 261 A.D.2d 880, 689 N.Y.S.2d 812 (4th Dep't 1999), *mot. den'd* 94 N.Y.2d 756, 703 N.Y.S.2d 73 (1999), *cert. den'd* 529 U.S. 1111, 120 S. Ct.1965 (2000).

The "special facts" doctrine applies to bar a municipality from passing a new law directed at preventing a particular landowner's use.

> This doctrine has been invoked where arbitrary and dilatory tactics of an administrative body delayed a property owner's application pursuant to which that owner was entitled to a permit as a matter of right, in order to thereafter change a zoning ordinance and defeat the property owner's rights and nullify the application.

Preble Aggregate, Inc. v. Town of Preble, 263 A.D.2d 849, 850, 694 N.Y.S.2d 788, 792 (3d Dep't 1999), *lv. den'd* 94 N.Y.2d 760, 706 N.Y.S.2d 81 (2000); *see also BBJ Associates, LLC v Zoning Board of Appeals of Town of Kent*, 65 A.D.3d 154; 881 N.Y.S.2d 496 (2d Dep't 2009); *Lawrence School Corp. v. Morris*, 167 A.D.2d 467, 562 N.Y.S.2d 707 (2d Dep't 1990); *Theirbault v. Town of Farmington Planning Board*, 199 A.D.2d 1059, 608 N.Y.S.2d 910 (4th Dep't 1993).

12. Screening Appeal

No provision in the Town Law vests the ZBA clerk or attorney with jurisdiction to screen appeals for the ZBA, but rather the ZBA should determine if it has jurisdiction to hear the appeal. The jurisdiction of the ZBA to review "zoning decisions of enforcement officers... cannot be exercised by other administrative officers." 2 Salkin, *New York Zoning Law and Practice* (4th ed.) §27:24. Thus, in *Mendon Ponds Neighborhood Association v. Town of Mendon Zoning Board of Appeals*, Index No. 2003/6215 (Sup. Ct. Monroe Co. 2003), the court held that a town attorney improperly refused to let a zoning board of appeals hear an appeal that he considered time–barred. Nonetheless, town staff can probably refuse to forward to the ZBA an appeal that is patently

improper.

13. SEQRA

If an action is determined to be classified as a "Type II action," no further SEQRA review is required. 6 N.Y.C.R.R. §§617.3(a), 617.6(a)(1)(i). The list of Type II actions includes "interpreting an existing code, rule or regulation," 6 N.Y.C.R.R. §617.5(c)(31), so a ZBA interpretation is exempt from SEQRA.

14. Rehearing.

Town Law §267-a(12) allows a rehearing on a unanimous vote of the board. Note that the unanimous vote refers to the decision to hold the rehearing – not the ultimate decision on the application at the end of the rehearing. Thus, in *Ireland v. Zoning Bd. of Appeals of Town of Queensbury*, 195 A.D.2d 155, 606 N.Y.S.2d 843 (3d Dep't 19894), the ZBA was free to rehear a case and reverse itself. *Res judicata* did not tie the board's hands.

15. Article 78 Proceeding - Procedures

a. Venue. An Article 78 proceeding may be brought to challenge the decision of the ZBA in State Supreme Court in the county where the town is located. CPLR §506.

b. Statute of Limitations. A proceeding to challenge a ZBA decision is time-barred if it is not commenced within 30 days of filing with the town clerk. Town Law §267-c.

c. Standing.

i. Zone of Interest. A "petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute." *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6, 9, 377 N.Y.S.2d 451, 454 (1975); *Matter of District Attorneys of Suffolk County*, 58 N.Y.2d 436, 442, 461 N.Y.S.2d 773 (1983). If a petitioner's only interest in a case is purely economic and not environmental, there may not be standing to bring a challenge. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778, 785 (1991). There is no standing if the petitioner is not in the zone of interest. *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778, 785 (1991).

ii. Liberal Rule. In *Douglaston Civic Association, Inc. v. Galvin*, 36 N.Y.2d 1, 6, 367 N.Y.S.2d 830, 834 (1974), the Court of Appeals rejected "the apparent readiness of our courts in zoning litigation to dispose of disputes over land use on questions of standing without reaching the merits," and

substituted "a broader rule of standing." Adjoining residents are automatically presumed to have standing. *Crady v. Newcomb*, 142 A.D.2d 940, 530 N.Y.S.2d 365 (4th Dep't 1988); *Bonded Concrete Inc. v. Zoning Bd. of Appeals of Town of Saugerties*, 268 A.D.2d 771, 702 N.Y.S.2d 184 (3d Dep't 2000). "Status of neighbor, however, does not automatically provide the 'admission ticket' to judicial review." *Brighton Residents Against Violence to Children v. MW Properties, LLC*, 306 A.D.2d 960, 760 N.Y.S.2d 69 (4th Dep't 2003), *mot. den'd* 100 N.Y.2d 514, 769 N.Y.S.2d 200 (2003).

iii. **Organizational Standing.** In *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 773, 570 N.Y.S.2d 778, 785 (1991), the Court of Appeals stated:

> First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members.

An unincorporated association has the capacity to sue in the name of its president or treasurer. General Associations Law §12.

iv. **Burden of Proof.** The burden of proving standing lies with the petitioner. *Society of the Plastic Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778 (1991). When standing is challenged, the petitioner has the "burden to come forward with probative evidence sufficient to" prove standing, which will not be satisfied by conclusory allegations in the petition. *Piela v. Van Voris*, 229 A.D.2d 94, 96, 655 N.Y.S.2d 105, 107 (3d Dep't 1997). Thus, "petitioner's failure to submit the proof necessary to meet the well-established requirements for standing in land use matters" will result in dismissal. *Otsego 2000, Inc. v. Planning Bd. of Otsego*, 171 A.D.2d 258, 259, 575 N.Y.S.2d 584, 585 (3d Dep't 1991), *lv. den'd* 79 N.Y.2d 753, 581 N.Y.S.2d 281 (1992).

d. **Necessary Parties.** An Article 78 proceeding must include all necessary parties, *e.g.* landowner or permittee, although courts may allow inclusion after the statute has run. *Baker v. Town of Roxbury*, 220 A.D.2d 961, 632 N.Y.S.2d 854 (3d Dep't 1995), *mot. den'd* 87 N.Y.2d 807, 641 N.Y.S.2d 829 (1996); *cf. Town of Preble v. Zagata*, 250 A.D.2d 912, 672 N.Y.S.2d 510 (3d Dep't 1998).

e. **Mootness.** Where a facility is constructed, or a new facility occupied, and a petitioner fails "to safeguard their interests by promptly seeking an injunction," a challenge under CPLR Article 78 may be barred by laches or deemed moot. *Stankavich v. Town of Duanesburg Planning Bd.*, 246 A.D.2d 891, 667 N.Y.S.2d 997 (3d Dep't 1998); *Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 746 N.Y.S.2d 429 (2002); *Harford Taxpayers for Honest Gov't v. Town Bd.*, 252 A.D.2d 784, 675 N.Y.S.2d 683 (3d Dep't 1998). Likewise, an unreasonable delay in complaining about an alleged zoning violation will result in a bar by laches. *Thomas ex rel. Hamlin Park Community & Taxpayers' Ass'n v. City of Buffalo*, 275 A.D.2d 1004, 713 N.Y.S.2d 795 (4th Dep't 2000).

However, if an opponent unsuccessfully seeks an injunction, they may still proceed in court. *Silvera v. Town of Amenia Zoning Bd. of Appeals*, 33 A.D.3d 706, 823 N.Y.S.2d 430 (2d Dep't 2006). Further, in *Abrams v. City of Buffalo Zoning Board of Appeals*, 61 A.D.3d 1387, 877 N.Y.S.2d 550 (4th Dep't 2009), the Appellate Division refused to determine that an appeal was moot when the petitioner did not seek an injunction to stop construction of a parking lot.

f. **Remedies.** The court may annul, confirm, modify or remand. CPLR §7806. Or, it may remit for findings. *See Dean Tarry Corp. v. Friedlander*, 78 A.D.2d 546, 432 N.Y.S.2d 35 (2d Dep't 1980); *Van Wormer v. Planning Board of the Town of Richland*, 158 A.D.2d 995, 551 N.Y.S.2d 145 (4th Dep't 1990).

16. Review of Decision By Article 78

a. **Question Presented.** Under CPLR §7803(3), in an Article 78 proceeding, the question for the court is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."

b. **Arbitrary and Capricious.** The "arbitrary and capricious" standard applies to review of factual findings of the ZBA. A ZBA will be given substantial deference in its factual findings, which will only be annulled under CPLR Article 78 if arbitrary, capricious or illegal. *P.M.S. Assets, Ltd. v. Zoning Board of Appeals of Village of Pleasantville*, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v. Board of Education of Union Free School District No. 1*, 34 N.Y.2d 222, 230, 356 N.Y.S.2d 833, 839 (1974). "[R]ationality is the appropriate standard of review." *Sasso v. Osgood*, 86 N.Y.2d 374, 385, 633 N.Y.S.2d 259, 264. n.2 (1995). "'If a decision is rational and is supported by substantial evidence, a reviewing court may not substitute its judgment for that of a [board] even if an opposite conclusion might logically be drawn.'" *Village of Honeoye Falls v. Town of* Mendon, 237 A.D.2d 929, 930, 654 N.Y.S.2d 534 (4th Dep't 1997); *see also Doyle v. Amster*, 79 N.Y.2d 592,

595-6, 584 N.Y.S.2d 417, 419 (1992). "When reviewing the determinations of a Zoning Board, courts consider 'substantial evidence' only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination." *Sasso v. Osgood*, 86 N.Y.2d 374, 385, 633 N.Y.S.2d 259, 264. n.2 (1995). In *Toys R Us v. Silva*, 89 N.Y.2d 411, 424, 654 N.Y.S.2d 100, 107 (1996), the Court of Appeals held:

> That conflicting inferences may have been drawn from this evidence is of no moment. "[T]he duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists."

c. **Legal Interpretations.** In cases of interpretation, "the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld." *Matter of Ansonia Residents Assn. v. New York State Div. of Housing and Community Renewal*, 75 N.Y.2d 206, 213, 551 N.Y.S.2d 871, 873 (1989); *see also Toys R Us v. Silva*, 89 N.Y.2d 411, 418, 654 N.Y.S.2d 100, 104 (1996); *Beekman Hill Ass'n v. Chin*, 274 A.D.2d 161, 712 N.Y.S.2d 471 (1st Dep't 2000).

Nonetheless, if the question is "pure legal interpretation of statutory terms," deference by the court to the ZBA is not required. *Toys R Us v. Silva*, 89 N.Y.2d 411, 419, 654 N.Y.S.2d 100, 104 (1996); *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 102-103, 667 N.Y.S.2d 327, 328 (1997). Deference associated with an agency "applying its special expertise in a particular field" only applies to "rational interpretation of statutory terms" and "a determination by the agency that runs counter to the clear wording of a statutory provision is given little weight." *Raritan supra.* Where the issue is code interpretation, the ZBA is not entitled to unquestioned deference. Rice, *McKinney's Practice Commentary* to Town Law §267-c (Supp. 2002) at 264, *citing Tallini v. Rose*, 208 A.D.2d 546, 617 N.Y.S.2d 34 (2d Dep't 1994), *lv. den'd* 85 N.Y.2d 801, 624 N.Y.S.2d 371 (1995); *Exxon Corp. v. Bd. of Standards and Appeals of the City of New York*, 128 A.D.2d 289, 515 N.Y.S.2d 768 (1st Dep't 1987), *lv. den'd* 70 N.Y.2d 614, 524 N.Y.S.2d 676 (1988). Rather, "the ultimate responsibility of interpreting the law is that of the court." *KMO-361 Associates v. Davies*, 204 A.D.2d 547, 611 N.Y.S.2d 660 (2d Dep't 1994), *lv. den'd* 84 N.Y.2d 811, 622 N.Y.S.2d 913 (1994).

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Alan Knauf concentrates his law practice in environmental, municipal, land use and real estate law, and civil litigation and appeals. He represents municipalities, citizens, landowners and businesses on issues including hazardous waste and petroleum spill cleanup, brownfield development, environmental impact review, water pollution and wetlands, zoning and planning, project siting, alternative energy, municipal law, and commercial real estate. Mr. Knauf is attorney for the Town of Huron in Wayne County, New York. He is listed in Best Lawyers in America "Lawyer of the Year" in Rochester for Environmental Litigation, and Land Use and Zoning Law, and is also listed for Land Use and Zoning Litigation. He is also listed with Superlawyer in the areas of Environmental Law, Environmental Litigation and Real Estate Law.

Mr. Knauf has been counsel on over 100 reported decisions. Some of the notable precedents he helped establish include:

Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dep't 2013), aff'd 23 N.Y.3d 728, 992 N.Y.S.2d 710 (2010) where he represented Dryden Resources Awareness Coalition, and the Third Department upheld local zoning legislation banning hydrofracking.

Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation, 14 N.Y.3d 161, 897 N.Y.S.2d 693 (2010), where the Court of Appeals overruled DEC's interpretation of the definition of "brownfield site," allowing the Lighthouse sites to enter the Brownfield Cleanup Program, and opening up the program to voluntary remediation of sites across the state.

Concerned Area Residents of the Environment v. Southview Farm, 34 F.3d 114 (d Cir. 1994), cert den'd 514 U.S. 1082, 115 S.Ct. 1793 (1995), establishing that concentrated animal feeding operations required permits for manure discharges under the Clean Water Act, resulting in widespread implementation of comprehensive nutrient management plans at farms across America, and reduced water pollution.

Snyder v. Newcomb, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993), which established a private right of action to bring a direct action against the insurer of a petroleum discharger under the New York Oil Spill Act.

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