ZONING LITIGATION

Alan J. Knauf, Esq.
KNAUF SHAW LLP
1400 Crossroads Building
2 State Street
Rochester, New York 14614
(585) 546-8430
Fax: (585) 546-4324
aknauf@nyenvlaw.com
www.knaufshaw.com

A. ARTICLE 78 PROCEEDINGS

I. Preliminary Issues for Petitioners.

A. Citizen Groups. It is advisable for citizen groups to adopt a formal organization so they present a united front to the outside world, including the press, and their lawyer has a single contact, and does not have to deal with internal organizational conflicts. In order to limit liability, the best strategy is to incorporate a group under the Not-for-Profit Corporation Law prior to participation in DEC or court proceedings. Other advantages are the possibility that the group will qualify for tax-exempt status under Internal Revenue Code §501(c)(3) (so that donations may be tax deductible), the formalization of the organization, and insulation from liability for costs. Furthermore, while some members may have to be identified to demonstrate standing and comply with filing requirements with the New York State Attorney General, other members and supporters may invoke the First Amendment to remain anonymous behind the corporate veil. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163 (1958).

B. Constitutional Protection. The First Amendment guarantees "the right of the people... to petition the Government for a redress of grievances" and "freedom of speech," and New York Constitution Article 1, §§8 and 9(1) provide similar guarantees. Thus, statements made in the course of participation in administrative and legal proceedings may be constitutionally protected. *Allan & Allan Arts, Ltd. v. Rosenblum*, 201 A.D.2d 136, 615

N.Y.S.2d 410 (2d Dep't 1994), *mot. den'd* 85 N.Y.S.2d 921, 627 N.Y.S.2d 319 (1995). Furthermore, under the *Noerr-Pennington* doctrine, *see Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S.127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), participation of citizens in administrative and legal challenges against a project are constitutionally protected, even if funded by a competitor, unless they are a "sham," meaning that their arguments are objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Inv. v. Columbia Pictures Ind.*, 508 U.S. 49, 60-61 (1993). *See, e.g., Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578 (W.D.N.Y. 1999), *aff'd* 229 F.3d 1135 (2d Cir. 2000).

C. **Anti-SLAPP Statutes.** Citizens generally fear reprisal by legal action, and in fact a strategic lawsuit against public participation ("SLAPP") is not uncommon. SLAPP suits are "civil lawsuits... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." *Long Island Association for AIDS v. Greene*, N.Y.L.J. 10/7/97 28:4 (N.Y. Sup. Ct. Suffolk Co. 1997), *citing* Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Problems 506 (1988). Civil Rights Law §§70-a and 76-a and CPLR §§3211(g) and 3212(h) provide a defense and counterclaim (with remedies including punitive damages and attorneys' fees) for a SLAPP suit. In such an action involving "public petition and participation," the law provides the following defense:

> damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

Civil Rights Law § 76-a(2). Further, CPLR §3211(g) requires dismissal of a SLAPP unless the plaintiff demonstrates that its case has a "substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."

D. **Freedom of Information Law.** Before filing suit, it may be prudent to file a freedom information request in order to gain as much information as possible before going to court. Public Officers Law Article 6.

E. **Strategy.** Citizens should keep in mind that denial of a single permit may be sufficient to derail a project. Thus, an objector may only have to win a single

battle to win the entire war. Nonetheless, a "shotgun" approach may result in a loss of credibility. Further, while ongoing proceedings may hamper an applicant's ability to finance its project, it is not appropriate to undertake proceedings merely for the purpose of delay. It is often advisable to cooperate with the press and send out press releases on developments, since the press will often be sympathetic to project opponents.

II. Nature of Article 78 Proceeding. Includes former "writs of *certiorari* to review, *mandamus* or *prohibition*." CPLR §7801.

A. Special Proceeding. The proceeding is a special proceeding also governed by CPLR Article 4. CPLR §7804(a).

B. Respondent. Respondent must be a "body or officer." CPLR §7802(a).

C. Questions Presented. Under CPLR §7803, the questions presented are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

III. Mechanics

A. Commencement.

1. **Filing.** "A special proceeding is commenced by filing a petition." CPLR §304 (amended by Laws of 2001, c. 473).

a. Index Number. An index number is mandatory. CPLR §306-a; *Gershel v. Porr*, 89 N.Y.2d 327, 653 N.Y.S.2d 82 (1996).

b. Process. Filing is accomplished by "delivery of the" required papers "together with any fee required" to the County Clerk

or "any other person designated by the clerk of the court." CPLR §304. *Mendon Ponds Neighborhood Association v. Dehm*, 98 N.Y.2d 745, 751 N.Y.S.2d 819 (2002); *Krenzer v. Town of Caledonia Zoning Board of Appeals*, 233 A.D.2d 882, 649 N.Y.S.2d 863 (4th Dep't 1996).

2. **Notice of Petition/Order to Show Cause.** Required under CPLR § 403.

   a. Return Date. Return date no longer necessary to commence action. CPLR §304, as amended by Laws of 2001, c. 473, omitted notice of petition or order to show cause as jurisdictional requirement for filing. *Cf. Vetrone v. Mackin*, 216 A.D.2d 839, 628 N.Y.S.2d 866 (3d Dep't 1995); *Travis v. New York State Dept. of Environmental Conservation*, 185 A.D.2d 714, 585 N.Y.S.2d 929 (4th Dep't 1992); *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205 (1997). However, it wouldn't hurt to file notice of petition with a fictitious return date, and serve as altered by the Court.

   vi. **Service.** Notice of Petition or Order to Show Cause must be "with" the petition when served. CPLR §306-b. *See Lebow Village of Lansing Planning Board*, 151 A.D.2d 865, 542 N.Y.S.2d 840 (3d Dep't 1989). This apparently still requires a return date.

   b. Order to Show Cause. Must be signed and filed. *Krenzer v. Town of Caledonia Zoning Board of Appeals*, 233 A.D.2d 882, 649 N.Y.S.2d 863 (4th Dep't 1996).

3. **Verification.** Petition must be verified. CPLR §7804(d); *but see* CPLR §3022.

4. **Defects.** Defects may be waived. *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205 (1997).

B. Service.

1. **Notice.** Must serve at least 20 days before return date unless specified by order to show cause. CPLR §7804(c).

2. **Time Limit.** Must serve "not later than fifteen days after the date on which the applicable statute of limitations expires," also within 120 days of filing. CPLR §306-b. Upon "good cause shown or in the interest of justice" the court can extend time limit. CPLR §306-b.

3. **Notice of Petition/Order to Show Cause.** Must serve petition with

notice of petition or order to show cause. CPLR §306-b.

4. **Method of Service.** *See* CPLR §311 (for city serve mayor, treasurer, counsel or clerk, for town serve supervisor or clerk, for village serve mayor, clerk or trustee); CPLR §312 (for board or commission serve presiding officer or clerk, or town or village clerk but not city clerk); CPLR §307 (state); if sue state officer or agency must always also serve Attorney General. CPLR §7804(c).

C. Venue/Court.

1. **County.** As specified in CPLR §506—generally in county where body or officer made determination, certain state agencies must be sued in Albany County. Failure to comply with this requirement may be fatal. *Nolan v. Lungen*, 61 N.Y.2d 788, 473 N.Y.S.2d 388 (1984).

2. **RJI.** The petitioner needs to purchase an RJI and get papers to the Supreme Court Assignment Clerk. The practice varies by county. Service may have to be completed before purchasing an RJI unless an Order to Show Cause is requested. Court Rules §202.6(a). It may be prudent to have a duplicate red–rule original of the petition time–stamped by the County Clerk, and delivered to Supreme Court with a copy of the RJI.

3. **Appellate Division.** If question (4) under CPLR §7803 ("substantial evidence " review of true administrative hearing), if Special Term cannot dispose of case due to "objections that could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata," it should transfer to Appellate Division to determine "substantial evidence issue." CPLR §7804(g).

D. Verified Answer. Served at least five days before return date. CPLR §7804(e).

E. Objections in Point of Law. Objections may be raised by answer or motion to dismiss on five days' notice. CPLR §7804(f). If the motion is denied, the answer should be served within five days of service of order with notice of entry, and the petition may be re-noticed by petitioner (two days' notice) or respondent (seven days' notice).

F. Record. CPLR §7804(e). "The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court." If there is no record ("return"), the Court should remit the matter back to the body or officer. *Dupree v. Scully*, 100 A.D.2d 966, 967, 475 N.Y.S.2d 79, 80 (2d Dep't 1984); *Petty v. Sullivan*, 131 A.D.2d 762, 517 N.Y.S.2d 60 (2d Dep't 1987). Court can order correction or supplementation of the record.

CPLR §7804(e).

G. **Reply.** Required for "counterclaim demonimated as such," "new matter," or "where accuracy of proceedings annexed to the answer is disputed." CPLR §7804(d).

H. **Supporting Affidavits.** Allowed with pleadings. CPLR §7804(c).

I. **Memorandum of Law.** Not a motion, so it is not clear if there is a time limit. Court Rules §§202.8(c); 202.9. It may be difficult to prepare without the record. However, a petitioner should give the respondent adequate time to respond and the court time to review the papers. The best course is to agree to a schedule.

J. **Motions.** Noticed to be heard at time of the petition. CPLR §406.

K. **Trial.** If "triable issue of fact... tried forthwith." CPLR §7804(h). May be right to trial by jury for some issues in a *mandamus* to review an administrative decision, the petitioner may have the right to a jury trial. Alexander, *McKinney's Practice Commentary* C7804:9 at 665-666; *Green v. Commissioner of Environmental Conservation,* 94 A.D.2d 872, 463 N.Y.S.2d 574 (3d Dep't 1983).

L. **Discovery.** None without leave of court except Notice to Admit under CPLR §3123. CPLR §408.

M. **Stay.** CPLR §7805; *but see* CPLR §6313(a) (no TRO against "public officer, board or municipal corporation... to restrain the performance of statutory duties.")

IV. Procedural Issues/Defenses.

A. **Exhaustion of Administrative Remedies/Ripeness.** No review where decision "is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner`s application." CPLR §7801(1). *See, e.g., Rochester Telephone Mobile Communications v. Cole,* 224 A.D.2d 918, 637 N.Y.S.2d 878 (4th Dep't 1996).

1. "It is hornbook law that one 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).

2. Typically the ruling of a building inspector or other local zoning

official is subject to administrative review by the zoning board of appeals. *See* Town Law §267-a(4); Village Law §7-712-a(4); General City Law §81-a(4).

3. Exhaustion is not required if an administrative official lacked jurisdiction to make his or her determination. *Lehigh Portland Cement Co. v. New York State Department of Environmental Conservation*, 87 N.Y.2d 136, 638 N.Y.S.2d 136 (1995).

4. Exhaustion is not required if the administrative remedy is futile, *Counties of Warren and Washington Industrial Development Agency v. Hudson Falls Board of Health*, 168 A.D.2d 847, 565 N.Y.S.2d 236 (3d Dep't 1990), such as "where the administrative appeal is to the same body or officer whose official conduct is challenged." 6 N.Y. Jur.2d *Article 78 and Related Proceedings* §26. *See, e.g., Kaindlon v. County of Rensselaer*, 158 A.D.2d 178, 558 N.Y.S.2d 286 (3d Dep't 1990).

B. Statute of Limitations.

1. Most proceedings are governed by the four-month statute of limitations set forth at CPLR §217. *Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193, 518 N.Y.S.2d 943 (1987).

2. A 30–day time limit, running from filing from the local clerk, normally applies to actions of planning boards and zoning boards of appeals. *See* Town Law §§267-c, 274-a, 274-b, 282; Village Law §§7-712-c, 7-725-a(110, 7-725-b(9), 7-740; General City Law §§27-a(11), 27-b(9), 38, 81-c.

3. These shorter time frames may apply to the accompanying SEQRA review. *See, e.g., Purchase Environmental Protective Association, Inc. v. Town Board of Town/Village of Harrison*, 207 A.D.2d 351, 615 N.Y.S.2d 444 (2d Dep't 1994). Formerly courts held that the statute of limitations did not begin to run upon the determination of significance, whether a negative or positive declaration, until a substantive determination was made. *See, e.g., Ogden Citizens for Responsible Land Use v. Town of Ogden Planning Bd.*, 224 A.D.2d 921, 637 N.Y.S.2d 582 (4th Dep't 1996). However, recent Court of Appeals decisions have held that the statute began to run when a negative declaration was made, *Gordon v. Rush*, 100 N.Y.2d 236, 762, N.Y.S.2d 18 (2003), and when a positive declaration was made. *Stop-the-Barge v. Cahill*, 1 N.Y.3d 218, 771 N.Y.S.2d 40 (2003). Therefore, when challenging a SEQRA determination, the new rule is to sue early and often.

4. Equitable estoppel "'operates to bar a party from asserting the Statute

of Limitations when that party's own wrongful concealment has engendered the delay in prosecution.'" *Steyer v. Burns*, 70 N.Y.2d 990, 991, 526 N.Y.S.2d 422, 423 (1988); *see also Filut v. New York State Educ. Dept.*, 91 A.D.2d 722, 457 N.Y.S.2d 643 (3d Dep't 1982); *cf. Rochester of Rochester Telephone Communications v. Ober*, 224 A.D.2d 918, 637 N.Y.S.2d 878 (4th Dep't 1996).

C. Standing.

1. **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). However, if a petitioner's only interest in a case is purely economic and not environmental, there may not be standing to bring an environmental 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). Under most zoning provisions, the petitioner must be an "aggrieved" person. *See* Town Law §§267-c, 274-a, 274-b, 282; Village Law §§7-712-c, 7-725-a(110, 7-725-b(9), 7-740; General City Law §§27-a(11), 27-b(9), 38, 81-c.

2. **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." But recent cases, particularly from the Third Department, have been stricter. *Oates v. Village of Watkins Glen*, 290 A.D.2d 758, 736 N.Y.S.2d 478 (3d Dep't 2002); *Save Our Main St. Bldgs. v. Greene County Legislature*, 293 A.D.2d 907, 740 N.Y.S.2d 715 (3d Dep't 2002), *lv. den'd* 98 N.Y.2d 609, 747 N.Y.S.2d 409 (2002).

However, several recent cases have taken restrictive viewpoints. In *Oates v. Village of Watkins Glen*, 290 A.D.2d 758, 736 N.Y.S.2d 478 (3d Dep't 2002), the challenge to a Super Wal-Mart dismissed by the Third Department due to lack of standing, although a petitioner lived 530 feet from the site, since "[t]he test is whether the neighbor is close enough to suffer some harm other than that experienced by the public generally and 'even where petitioner's premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular petitioner itself has a legally protectable

interest so as to confer standing." Likewise, in *Save Our Main St. Bldgs. v. Greene County Legislature*, 293 A.D.2d 907, 740 N.Y.S.2d 715 (3d Dep't 2002), *mot. den'd* 98 N.Y.2d 609, 747 N.Y.S.2d 409 (2002), the same court held that a citizen group lacked standing to complain of demolition of historic buildings, since it failed to show specific injuries different from the public at large, although one group member had an antique business two blocks away, and one even "regularly conducts educational walks through the Village to highlight the historic and aesthetic qualities of Main Street." In *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), the Fourth Department standing to a group that included the owner of adjacent plaza, that challenged an abortion clinic, since "[s]tatus of neighbor, however, does not automatically provide the 'admission ticket' to judicial review," and since "the State has preempted the subject of abortion legislation, thereby prohibiting local authorities from such regulation," therefore "any alleged injury due to abortion protests and the concomitant threat of violence cannot be said to encroach upon the valid interests underlying local zoning and land use ordinances."

3. **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.

4. **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.** Must include 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. **Intervention**. CPLR §7802(d) - court "may allow other interested persons to intervene." *See Rochester Telephone Mobile Communications v. Cole*, 224 A.D.2d 918, 637 N.Y.S.2d 878 (4th Dep't 1996).

F. **Appeal.** Not interlocutory orders. CPLR §5702(b)(1).

G. **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).

V. Substantive Decision

A. **Illegality.** The court should conduct *de novo* review of legal issues. However, 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, 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).

B. Arbitrary and Capricious. "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 a recent trilogy, the Court of Appeals underscored the deferential nature of this standard. *See Retail Prop. Trust v. Bd. of Zoning Appeals*, 98 N.Y.2d 190; 746 N.Y.S.2d 662 (2002); *P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals*, 98 N.Y.2d 683, 746 N.Y.S.2d 440 (2002); *Ifrah v. Utschig*, 98 N.Y.2d 304, 746 N.Y.S.2d 667 (2002). In *Ifrah v. Utschig*, the Court elaborated as follows on the standard of review:

> Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion. Thus, a determination of a zoning board should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence.

98 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 669 (2002) [cites omitted].

C. 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).

D. **Findings.** Generally, a planning board or zoning board of appeals must render findings of fact 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).

E. **SEQRA Compliance.** The courts mandate "literal" or "strict compliance" with the SEQRA process, and "substantial compliance" has been held insufficient. *King v. Saratoga Board of Supervisors*, 89 N.Y.2d 341, 653 N.Y.S.2d 233 (1996); *Taxpayers Opposed To Floodmart, Ltd. v. City of Hornell Industrial Development Agency*, 212 A.D.2d 958, 624 N.Y.S.2d 689, 690 (4th Dept. 1995), *stay vac'd* 85 N.Y.2d 961, 628 N.Y.S.2d 48 (1995), *app. dis'd* 85 N.Y.2d 812, 631 N.Y.S.2d 289 (1995); *Matter of West Branch Conservation Ass'n v. Planning Bd. of the Town of Ramapo*, 177 A.D.2d 917, 576 N.Y.S.2d 675, 677 (3d Dep't 1991). However, judicial review of the content of the EIS and other "substantive obligations under SEQRA must be viewed in light of a rule of reason. 'Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before an FEIS will satisfy the substantive requirements of SEQRA.'" *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986). Further, there need not be "scientific unanimity" with regard to the conclusions reached. *Schodack Concerned Citizens v. Town Board of Schodack*, 148 A.D.2d 130, 134, 544 N.Y.S.2d 49, 51 (3d Dep't 1989), *app. den'd* 75 N.Y.2d 701, 551 N.Y.S.2d 905 (1989).

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).

B. DECLARATORY JUDGMENT ACTIONS

I. **Statute of Limitations.** A challenge to legislative action should be brought by a declaratory judgment action rather than an Article 78 proceeding, so the four-month statute of limitations under CPLR §217 does not apply to such an action. *Janiak v. Town of Greenville*, 203 A.D.2d 329, 610 N.Y.S.2d 286 (2d Dep't 1994); *Norman v. Town Board of Town of Orangetown*, 118 A.D.2d 839, 500 N.Y.S.2d 324 (2d Dep't 1986); *Amerada Hess Corp. v. Acampora*, 19 A.D.2d 719, 486 N.Y.S.2d 38 (2d Dep't 1985. Rather, where legislative actions are challenged, the applicable limitations period is provided by the "catch–all" six–year statute under CPLR §213(1). *Costantakos v. Board of Education of the City of New York*, 105 A.D.2d 825, 482 N.Y.S.2d 27 (2d Dep't 1984); *see also Connell v. Town Board*, 113 A.D.2d 359, 496 N.Y.S.2d 106 (3d Dep't 1985). However, legislation is generally only invalidated if the plaintiff carries their burden of "proof beyond a reasonable doubt that the [law] is unreasonable and arbitrary." *Morgan v. Town of W. Bloomfield*, 295 A.D.2d 902, 903, 744 N.Y.S.2d 274, 276 (4th Dep't 2002).

II. **Conversion of Form.** CPLR §103(c) provides that "[i]f a court has obtained jurisdiction over the parties, a civil action shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution." Thus, a court should convert an action to proper form. *Matter of Phalen v. Theatrical Protective Union*, 22 N.Y.2d 34, 290 N.Y.S.2d 881 (1968). Furthermore, the courts typically entertain "hybrid" actions that seek both a declaratory judgment action and relief under Article 78. *See, e.g., 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). Even an action brought by a Summons with Notice should be converted where appropriate.. *Babcock Farms Neighborhood Association v. Town of Pittsford Planning Board*, Index No. 12105/93 (Sup. Ct. Monroe Co. 1994, Siragusa, J.).

III. **Legislative Actions.** Courts have established guidelines for determining whether an action is legislative, and thus subject to challenge in a declaratory judgment action, or administrative, and subject to review by Article 78. As noted in *International Paper Company v. Sterling Forest Pollution Control Corp.*, 105 A.D.2d 278, 282, 482 N.Y.S.2d 827, 831 (2d Dep't 1984), a legislative action has the following characteristics: "general applicability, indefinite duration, and formal adoption, *i.e.* the enactment of legislation," while an administrative action is characterized by "individual application, limited duration, and informal adoption...."

C. ENFORCEMENT

I. **Local Legislation.** A zoning law may specifically provide for enforcement by fine or imprisonment. *See* Town Law §268(1); Village Law §20-2006; General City Law §20(22). Furthermore, a municipality may seek an injunction in Supreme Court to enforce its law. *See* Town Law §268(2); Village Law §7-714. Town Law §268(2) specifically provides:

> In case any building or structure is erected, constructed, reconstructed, altered, converted or maintained, or any building, structure or land is used, or any land is divided into lots, blocks, or sites in violation of this article or of any local law, ordinance or other regulation made under authority conferred thereby, the proper local authorities of the town, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, use or division of land, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure, or land or to prevent any illegal act, conduct, business or use in or about such premises....

II. Prosecutorial Discretion. Ordinarily, the government has prosecutorial discretion, and need not prosecute every violator. 2 Salkin, *New York Zoning Law & Practice* (4th ed.) §36:08. However, it "denies equal protection when it treats persons similarly situated differently under the law. . ." *Matter of Abrams v. Bronstein*, 33 N.Y.2d 488, 354 N.Y.S.2d 926 (1974); *Wilson v. Crosson*, 222 A.D.2d 1085, 636 N.Y.S.2d 241 (4th Dep't 1995); *Foss v. City of Rochester*, 65 N.Y.2d 247, 254, 491 N.Y.S.2d 128, 132 (1985). In the landmark case of *Village of Willowbrook v. Olech*, 120 S.Ct. 1093 (2000), the U.S. Supreme Court held that an equal protection claim may be lodged "by a 'class of one,' where the plaintiff alleges she has been intentionally treated differently from others similarly situated and there is not rational basis for the difference in treatment."

III. Citizen Enforcement. Citizens with standing may also bring a private action to enforce a zoning law. *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 395 N.Y.S.2d 428 (1977). Furthermore, Town Law §268(2) specifically provides for taxpayers' actions where a town does not exercise its rights under the statute:

> upon the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do.

IV. Searches. Searches and seizures conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment, "subject only to a few specifically established and well–delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022 (1971). These exceptions are: (1) search by consent; (2) search by incident to an arrest; and (3) search based on probable cause in an emergency. Any evidence obtained by virtue of a warrantless search that does not fall under one of these exceptions must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961).

Clearly, the Fourth Amendment applies to warrantless administrative searches, such as those conducted by a building inspector. *Marshall v. Barlow's, Inc.*. 436 U.S. 307, 98 S. Ct. 1816 (1978). There is a line of case law which allows a lesser standard of protection for "administrative searches." In *People v. Quackenbush*, 88 N.Y.2d 534, 541, 647 N.Y.S.2d 150, 153-4 (1996), the Court of Appeals explained:

> Warrantless administrative searches may be upheld in the limited category of cases where the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation and the regulatory statute authorizing the search prescribes specific rules to govern the manner in which the search is conducted (*People v. Scott*, 79 N.Y.2d 474, 499, *supra*). As a practical matter, a person involved in a closely regulated business or activity generally has a diminished expectation of privacy in the conduct of that business because of the degree of government regulation. Because of the minimal expectation of privacy in a closely regulated business, warrantless searches of such conduct are considered "more necessary and less intrusive than such inspections would be if conducted on less heavily regulated businesses" (2 *Ringel, Searches & Seizures, Arrests and Confessions*, at 14-20 [2d ed]).

In *Village of Fairport v. Teremy*, 266 A.D.2d 909, 910, 697 N.Y.S.2d 445 (4th Dep't 1999), *app. dis'd* 94 N.Y.2d 898, 707 N.Y.S.2d 142 (2000), the Fourth Department held that the Village of Fairport code enforcement officer "conducted a warrantless search of appellant's property and thereby violated appellant's Fourth Amendment rights under the New York State Constitution" when he entered the property, and found a deck that had been erected without a building permit. The court held that the Fairport Code failed to provide "specific rules to curtail arbitrary or abusive enforcement" applicable to the inspection. 266 A.D.2d at 910, 697 N.Y.S.2d at 445-6. However, in *In the Matter of Administrative Search Warrant* (Rochester City Court 2003), the court held that the City of Rochester could obtain search warrants to inspect any non–owner–occupied dwelling every five years in the absence of probable cause, relying on *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967), which authorized area–wide searches.

D. CIVIL RIGHTS ACTIONS

I. **Section 1983.** A landowner may be able to complain of zoning actions that deny their rights to equal protection and their substantive and procedural due process rights. These constitutional wrongs are actionable under 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of and State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Gomez v. Toledo,* 446 U.S. 635, 640 (1980), the Supreme Court stated that:

> [b]y the plain terms of [section] 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Section 1983 applies in the context of land use and "provides protection against municipal actions which violate a landowner's rights under the Just Compensation Clause of the Fifth Amendment or the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution." *Town of Orangetown v. Magee,* 88 N.Y.2d 41, 49, 643 N.Y.S.2d 21, 25 (1996). A claim under 42 U.S.C. §1983 is valid if a plaintiff establishes he or she has "a protectable property interest" that was entitled to constitutional protection at the time the plaintiff was deprived of that interest "by one acting under the authority of law." *Town of Orangetown v. Magee,* 88 N.Y.2d 41, 52, 643 N.Y.S.2d 21, 27 (1996) [*citing Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-1913].

II. Substantive Due Process. Due process is violated when local officials deprive a landowner of vested property rights such as a permit without compensation. *Town of Orangetown v. Magee,* 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996); *see also Ellington Construction Corp. v. Zoning Board of Appeals of Town of Hempstead,* 77 N.Y.2d 114, 564 N.Y.S.2d 1001 (1990); *Cicci v. State,* 31 A.D.2d 733, 297 N.Y.S.2d 291 (4th Dep't 1968). The taking may be temporary, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 122 S.Ct. 1465 (2002), and need not be substantial. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164 (1982) (use of no more than 1½ cu. ft. was a physical taking). It may be accomplished by physical invasion, or regulatory action. *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003, 112 S.Ct. 2886 (1992) (beachfront regulations); *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309 (1994) (designated greenspace and flood protection zone).

III. Procedural Due Process. The very meaning of "due process of law" has been interpreted by the courts to mean the granting of a reasonable opportunity to a person to have his personal and property rights adjudicated. *Application of Coates,* 14 Misc.2d 89, 181 N.Y.S.2d 599 (Sup. Ct. Monroe Co. 1958), *app. dis'd* 5 N.Y.2d 917, 183 N.Y.S.2d 96 (1959), *aff'd in part and rev'd in part on other grounds,* 8 A.D.2d 444, 188 N.Y.S.2d 400 (4th Dep't 1959), *aff'd* 9 N.Y.2d 242, 213 N.Y.S.2d 74 (1961), *app. dis'd* 368 U.S. 34, 82 S.Ct. 147. '[D]ue process requires that when a State seeks to terminate [a protected] interest..., it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.'" *Board of Regents v. Roth,* 408 U.S. 564, 570, 92 S. Ct. 2701,

n.7 (1972), *citing Bell v. Burson*, 402 U.S. 535, 542.

IV. Equal Protection. The government "denies equal protection when it treats persons similarly situated differently under the law..." *Matter of Abrams v. Bronstein*, 33 N.Y.2d 488, 354 N.Y.S.2d 926 (1974); *Wilson v. Crosson*, 222 A.D.2d 1085, 636 N.Y.S.2d 241 (4th Dep't 1995); *Foss v. City of Rochester*, 65 N.Y.2d 247, 254, 491 N.Y.S.2d 128, 132 (1985). In *Weaver v. Town of Rush*, 1 A.D.3d 920, 768 N.Y.S.2d 58 (4th Dep't 2003), the Fourth Department allowed an equal protection claim to proceed where the plaintiff alleged that "similarly situated property owners are not subjected to such treatment and that defendants lacked a rational basis for their disparate treatment of plaintiff." The court held:

> The basic guarantee of the Equal Protection Clause is that government will act evenhandedly in allocating the benefits and burdens prescribed by law and will not, without at least a rational basis, treat similarly situated persons differently or disparately (see *City of Cleburne v Cleburne Living Ctr.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249; *Plyler v Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382). Indeed, the purpose of the Equal Protection Clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents" of the government (*Village of Willowbrook v Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 [internal quotation marks omitted]; *see Sioux City Bridge Co. v Dakota County*, 260 U.S. 441, 445, 67 L. Ed. 340, 43 S. Ct. 190; *Sunday Lake Iron Co. v Township of Wakefield*, 247 U.S. 350, 352, 62 L. Ed. 1154, 38 S. Ct. 495). An equal protection claim may be "brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" (*Olech*, 528 U.S. at 564, *citing Sioux City Bridge Co.*, 260 U.S. at 441; *Allegheny Pittsburgh Coal Co. v County Commn. of Webster County, W. Va.*, 488 U.S. 336, 102 L. Ed. 2d 688, 109 S. Ct. 633).

Weaver v. Town of Rush, 1 A.D.3d 920, 768 N.Y.S.2d 58 (4th Dep't 2003).