CASE LAW UPDATE FOR PLANNING AND ZONING
The Onondaga County Planning Federation

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1. Preemption of local land use controls - Matter of Wallach v. Town of Dryden affirmed. There is an ongoing issue, on preemption in the hydrofracking world. The State enacted the Oil, Gas and Solution Mining Law (Environmental Conservation Law §23-2701 et. seq.) and in it there is a provision that specifically states that local municipalities cannot adopt local legislation which would regulate activities covered by the OGSML. The 3rd Department in a well-reasoned decision, dad held that there was neither express preemption nor implied preemption in the OGSML. Looking at the decisions relating to the mining industry, it held that while local governments cannot regulate the activities of the use, such as manner, methods, etc., it can ban them altogether. Further, it held that there was no implied preemption. The OGSML specifically contains provisions which regulate the technical and operational aspects of drilling, whereas the local municipality is left the opportunity to designate where, if at all, such drilling can take place. The Court of Appeals granted the appeal and in June decided that in this case, municipalities were not prohibited from enacting local laws which ban hydrofracking. The Court relied on an earlier mining decision, Matter of *Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126 (1987)* and the three factors set forth in that case: (1) Plain language of the state legislature's suppression clause, (2) the statutory scheme as a whole and (3) the relevant legislative history. They compared the provision in OGSML to those in other laws which are more specific in clearly preempting home rule zoning powers and found it not to contain the provisions which preempt local zoning controls. As for the statutory scheme, the Court of Appeals agreed with the court below and noted that the law regulated the technical and operational aspects of the activities across the state and not the local zoning aspects. Likewise, their review of the legislative history made it clear that the purpose of the legislation was to prevent wasteful oil and gas practices and insure that the State would have the means to regulate the technical aspects of the oil and gas industries. ***Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014).***

2. Is an application for off-street parking variance for business an area variance or a use variance? In 2011, applicants requested the ZBA of the Town of North Hempstead to grant a parking variance so that they could install a 45 seat dine-in restaurant in a vacant storefront. A restaurant was a permitted use in the zoning district in which the parking was located, subject to the issuance of a conditional use permit. The ZBA issues the conditional use permit and the requested parking variances. They treated the request for parking variances as a request for an area variance and used the less stringent standards set forth in Town Law 267-b. The owner of a neighboring multi-tenant retail building then commenced an Article 78 proceeding to overturn the variances, claiming that they were actually applications for a use variance, based upon cases decided by the Court of Appeals in the 1970s. The Court of Appeals noted that these cases were decided prior to the revamping of the statutory provisions for granting use and area variances in the 1990s and held that current use variances relate to the purpose of the activity on the site and area variances relate to the physical dimensions of the site. Parking, they held, relates to how the property's area may be developed, akin to set-back requirements, lot size, etc. The earlier decisions are overturned. ***Matter of Colin Realty Co., LLC v. Town of N. Hempstead, 24 N.Y. 96 (2014).***

3. Municipalities can ban signs on public property so long as all signs are banned. The Town of Brookhaven adopted a portion of their Town Code which prohibited all signs on public property, including rights of way, whether commercial or non-commercial and regardless of content. An optician was charged with violating the Code and appealed, claiming that its rights of free speech had been violated. They also claimed that since other parts of the Town Code were unconstitutional, this

particular portion could not be severed. The Appellate Division agreed and overturned the decision below. The Court of Appeals, however, reversed and held that the portion could be severed and also held that the ban is constitutional since it banned all signs, regardless of purpose or content and further was appropriate because it directly served the Town's valid interests in traffic safety and aesthetics. ***People v. On Sight Mobile Opticians 2014 NY Slip Opinion 08761, decided 12/16/2104.***

4. Local laws prohibiting truck deliveries at certain times are proper and will be upheld. The Town of Poughkeepsie in 2009 adopted a local law prohibiting truck travel of trucks in excess of 5 tons on certain roads during certain nighttime hours and specifically prohibited local deliveries from 10 p.m. to 6 a.m. The owner of a quarry on one of the affected roads brought a hybrid proceeding under Article 78 to declare the restrictions unconstitutional and in violation of the preemption of V&T Law §1660(a). The 2nd Department held that although the V&T Law section prohibited a municipality from preventing local deliveries, it could regulate the hours of operation of trucks, and that by implication would include the power to limit the hours of operation of local deliveries. ***Matter of Tilcon N.Y., Inc. V. Town of Poughkeepsie, 2015 N.Y. Slip Opinion 01282 (2nd Dept. Decided 2/11/15)***

5. Even in a Type I Action, an EIS isn't always required under SEQRA. The Town of New Paltz adopted a local law in which it would prevent the "despoliation and destruction of wetlands, water bodies and watercourses." Meetings and public hearings were held regarding the proposed legislation and in October of 2011, the Town Board reviewed the full EAF and issued a negative declaration. Owners of property in the Town and Village of New Paltz then brought an Article 78 proceeding to declare the law and the negative declaration. The lower court struck down the law, holding that the Board failed to take the required "hard look." On appeal, the 3rd Department held that the filing of an EIS isn't always required in a Type I action where a review indicates that no adverse environmental impacts will result or those identified will not be significant. They noted that an agency's obligation under SEQRA must be viewed in light of a rule of reason, noting that not every conceivable environmental impact must be identified and addressed before the substantive requirements of SEQRA are satisfied. It is also noteworthy that here the legislation regulated activities which are exempt form DEC regulation under the ECL. The Court noted that the Town was assuming concurrent jurisdiction with the DEC and this was permissible. Finally, procedural objections under Town Law §264 were overruled because the legislation was enacted under the Municipal Home Rule Law and not as an ordinance. Another case noting the differing procedural requirements in adopting zoning laws or amending existing zoning laws, depending on the type of legislation used. ***Matter of Gabrielli v. Town of New Paltz, 116 A.D.3d 1315 (3rd Dept. 2014)***

6. Vested rights and Pre-existing use - A case of land use in transition. Landowner owned property in the Town of Newburgh which was zoned R-3, which allowed multi-family residences. An application was made for a site plan to allow for a large project, consisting of several buildings containing 134 units. The Town was engaged in producing a comprehensive plan, but the initial draft did not mention any rezoning of the property. During the process before the planning board, the Town's consultant recommended that certain R-3 areas be rezoned R-1, providing only for single family residences. Included was the property in question. The chairman of the planning board wrote to the applicant and indicated that if the consultant's suggestions were adopted, the proposed use would not be allowed. Notwithstanding the letter, owner went ahead with a boundary adjustment with an adjoining neighbor an demolition of buildings, all of which were approved by the Town. The Town then rezoned the land. After the rezoning, the planning board went ahead and approved the site plan with 18 specific conditions, 11 of which were required to be fulfilled before the chairman could sign the site plan. Owner commenced an Article 78 proceeding and lost. The Appellate Division, in 2008, upheld the local law and held that the owner had not obtained vested rights. They also held that the approval of the boundary adjustment gave owner a three year period in which to move forward and obtain vested rights pursuant to Town Law 265-a. In 2009, owner applied to the planning board to amend the site plan, but was rejected because the conditions had not been complied with. A subsequent appeal to the ZBA affirmed the planning board decision. In a subsequent Article 78 proceeding, the court held that there were vested rights after all of the expenditure and permits had been issued, but on appeal, the Appellate Di vision reversed, stating that where there are unsatisfied conditions, there can be no vesting. Further, owner could not claim a common law right to vesting due to reliance because the various permits granted had to be taken for what they were, and they were not inconsistent with preparing the property for use in

R-1. This decision, in which owner sued everybody, is worth reading and contains interesting facts and circumstances. ***Exeter Building Corp. V. Town of Newburgh, 114 A.D.2d 774 (2nd Dept. 2014)*** Note: This case was discussed last year but is repeated because the Court of Appeals has granted leave to appeal on 12/16/2014.

7. Is it spot zoning to rezone a lot so a hotel can be built? Not if it comports with the comprehensive plan. The City of Oswego rezoned a parcel of land so that a hotel could be built. Plaintiffs challenged the legislation as "spot zoning." The 4th Department held that because the decision to allow the hotel was part of the city's comprehensive plan (the "2020 Vision Plan") where a "Future Land Use Map" included the property in a new zone entitled "Highway Commercial." Because of the extensive review by the Common Council and the City Planning Board and its connection to the comprehensive plan, the court held that the law was reasonably related to a legitimate governmental purpose, the City's planned development. **Restuccio v. City of Oswego, 114 A.D.3d 1191 (4th Dept. 2014)**

8. Pay attention to the procedural requirements of your own laws - also be careful when you have outside counsel speak. The Town of Colonie adopted a rezoning local law in 2007 to allow a developer to create a planned development district. Unfortunately for the developer, 2008 happened and financing disappeared and the development did not go forward. Prolonged inactivity at the construction site angered the neighbors and the Town Board held a public hearing to revoke the planned development district designation. They adopted the law and the developer appealed. The 3rd Department held that because the Town did not follow its own procedural rules, which stated that planned development districts could be revoked in limited circumstances, the Board acted in an arbitrary and capricious manner and the law could not be sustained. Of interest in this case was the fact that the Town hired outside counsel, who prepared a report on the matter. At public meetings, the report was relied upon and at one meeting, the attorney appeared and openly discussed the matter and gave his opinion. Plaintiff requested a copy of the report under FOIL and the request was denied on the basis that the attorney-client privilege applied. The 3rd Department, in a companion decision, however, held that because it was apparent that there may have been a reliance on the report and because it was discussed openly and perhaps statements from the report were "parroted" verbatim, there may have been a waiver of the privilege. Since the report was not viewed *in camera* by the trial judge, and since a copy was not included in the record on appeal, the matter was sent back for a determination. Moral of the story - if your board hires outside counsel, don't have counsel openly give legal advice based on a report which is purportedly privileged. ***Matter of Louden House, LLC v. Town of Colonie, 123 A.D.3d 1406,1409 (3rd Dept. 2014)***

9. If you are involved in an Article 78 Proceeding, make sure that the property owners are parties. Many times in an Article 78 proceeding, the parties are the objecting neighbors and the ZBA or the Planning Board. But what of the applicants? The 2nd Department recently reiterated that where the granting of a variance is appealed, the property owners must be brought into the litigation because they have a right to be heard. Nonparties Barry and Harriett Wetherall had been granted an area variance to construct an outdoor shed and outdoor shower stall. The variance was granted and the appeal progressed without making the Wetheralls parties. The trial court ordered the variances annulled and the certificate of compliance revoked, and on appeal the 2nd Department reversed and ordered the matter dismissed because the Wetheralls were not brought into the litigation. **Matter of Feder v. Town of Islip Zoning Bd. Of Appeals, 114 A.D.3d 782 (2nd Dept. 2014)**

10. Default Subdivision Approval. From time to time, an application for subdivision approval is submitted but for one reason or another it languishes and is not finalized for a long period of time. Town Law §276(8) provides that if the time periods prescribed for a Planning Board to act are not followed, and there has not been a mutually agreed upon extension of time, the developer may obtain approval of the proposed subdivision by default. But what if the submission is incomplete? What about SEQRA? One recent case discuses these issues. In the Town of Ithaca, the owner of 48 acres of undeveloped land submitted a proposed subdivision. The Town Planning Board as lead agency issued a negative declaration and in 2006 granted preliminary approval.

The final application was then amended to change the stormwater drainage plans. Everyone agreed that the changes required a renewed SEQRA review. A revised long form EAF was submitted in 2007 along with the final plat. The Town Board then adopted a moratorium prohibiting the Planning Board from considering the final plat application and prohibiting development of owner's property. The moratorium was extended three times and ultimately expired in late 2009. The Planning Board took no action on the application. In September of 2014, owner applied for a certificate of default approval. This request was denied and the Article 78 proceeding ensued. The Planning Board indicated that the application was not complete because additional information was required. The court noted that although an incomplete application is grounds for disapproval, if no action is taken it does not excuse a failure to act, and the default would occur. In this case, however, the SEQRA proceedings on the revised EAF had not been completed, and by the provisions of Town Law §276(8), the time for the Planning Board to act does not run until SEQRA review has been completed. Accordingly, here the owner was not entitled to a default approval. ***Matter of Lucente v. Terwilliger, 2015 N.Y. Slip Opinion 50109(U) (Tompkins County decided 2/9/15).***

11. Delay in construction and SEQRA requirements for amended submissions, Part II. A sister entity of Mirbeau of Skaneateles, Mirbeau of Rhinebeck, LLC, submitted plans for a multi-use spa, hotel and restaurant to the Village of Rhinebeck. An area variance was granted by the Village ZBA and under Rhinebeck's rules, the variance has to be utilized or a building permit has to be obtained within a year or the variance is nullified. The variance had been issued on October 24, 2013, and on November 21, 2014, the ZBA adopted a one-year extension. Ultimately, a special permit and site plan approval were granted by the Planning Board. An article 78 proceeding, challenging the variance extension and the approvals ensued. The court invalidated the variance extension resolution because it was granted after the variance had expired. Modifications to a variance can only be made while the variance is in existence. Accordingly, no retroactive extension is possible. As for SEQRA, the Planning Board had declared itself lead agency in 2009 when the original application was made, and had adopted a negative declaration. In January of 2014, it adopted a SEQRA Statement of Consistency which basically adopted the prior negative declaration. The court, however, reviewed the original application and saw that it was for a 36 unit residential condominium. The current project is for a three story lodging facility with a wine bistro, spa and other improvements. The court held that when there is a substantial change in an application, a separate SEQRA determination must be made. The resolutions adopting the site plan and special use permit were nullified and the matter sent back to the planning board for a new determination as to environmental significance. The court noted that "Literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice." ***Beekman Props. LLC v. Village of Rhinebeck Zoning Board of Appeals, 44 Misc. 3d 1227(A) (Dutchess County 2014)***

12. SEQRA needs literal compliance - Part III. A "hard look" means verification of the details on the EAF and a look at the map. Once more, failure to comply literally with the requirements of SEQRA results in actions being invalidated. A 7-Eleven wanted to construct a new project in the Town of Huntington. The matter was placed before the Town of Huntington ZBA when an application for a special use permit was filed. A short form EAF was filed, the matter was determined to be an unlisted action and Part I of the EAF was completed. Various expert opinions were presented and the application was held open for comment. DOT permits had been obtained for curb cuts and roadway changes. A public hearing was held and closed on May 9, 2013. At that hearing, a neighbor indicated that because the project was near a house with an historic designation, the action might be a Type I action. At a later meeting, on June 6 2013, the ZBA discussed the need to reclassify the project as Type I. One week later, on June 13th, they took action to reclassify the project, adopt Parts II and III of the EAF which were completed by the Town, and they then adopted a negative declaration and granted the special permit and an area variance. Thereafter, the Article 78 proceeding was filed. The court reviewed the proceedings and held that initially, the ZBA did not adequately review the determination by applicant that the matter was an unlisted action. Further, when they discovered, based on a comment at a public hearing, that it was a Type I action, no long form EAF or EIS was required. All of the action, including the reclassification, took place after the public hearings were closed, and therefore the public was not allowed to participate in a meaningful way in the SEQRA process. Further, the ZBA failed to require the applicant to complete Part I of a full EAF and they never reviewed the comments in the Parts II and III competed by the Town, in which environmental concerns were raised, particularly the traffic issues. While the ZBA did investigate the traffic issues, the ultimate resolution failed to set forth in detail the reasons for adopting the negative declaration. To make matters worse, the ZBA never sent the County Planning Board a complete and full statement of the proposed project as required by General Municipal Law §239-m. As noted, the special permit and area variance were annulled. **Pickerell v. Town of Huntington 45 Misc. 3d 1208(A) (Suffolk County 2014)**