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Municipal Lawyer

A publication of the Local and State Government Law Section
of the New York State Bar Association, produced in cooperation with Touro Law Center

Inside

Message from the Chair

Richard K. Zuckerman

Welcome to the long awaited 2017 issue of the Municipal Lawyer. Our Section's thanks and appreciation are extended to the many people who authored the articles that follow, and those who ensured that their work product made its way into print. That means you, **Mark Davies** and **Steve Leventhal** for the *Government Ethics Quiz*; **Noelle C. Wolfson** for *A Primer on Area Variances in New York*; **Michael Lewyn** for *Robocar Risks*; **Adam Kleinberg** for *Litigation, Then Regulations: What Procedures Should School Districts Follow When a Student Is to Be Interviewed About Possible Abuse or Mistreatment?*; and **Larry Schnapf** for *Property Contamination and Its Impact on Commercial Leasing in NYC*.

Your Section's Officers and Executive Committee Members have been working very hard to enhance your experience as Section members and to give you your money's worth for your Section dues. Among many other things that we have been addressing since your current Officers (First Vice-Chair **Sharon Berlin**, Second Vice-Chair **Mike Kenneally** and Secretary **Lisa Cobb**) and your current Executive Committee formally assumed office on June 1, 2017, and plan to address in the near future:

- Our Section's Executive Committee holds monthly conference call meetings, after which minutes are posted and made available through Communities (Communities.nysba.org: log in and you will find them in the Library). Please review them each month so that you can see what we are doing and how you can become more involved in activities of interest to you.

The 2017 Section Fall meeting in Saratoga sold out, the first time that has occurred in anyone's memory. There were two programs: one a CLE for Transitional Attorneys and the other the General CLE program. Topics and speakers for the transitional program included *The Essentials to Running Meetings of Public Bodies* **(Wade Beltramo)**, *Zoning Board of Appeals and Planning Boards, Practice and Pitfalls* **(Chris Trapp)**, and *An Overview of the Labor and Employment Laws covering Public Sector Workplaces* **(Sharon Berlin)**. Those for the general program were *Use of Search Warrants and Other Possible Investigative Tools* **(Hon. Robert Spolzino)**, *"Sanctuary" Jurisdictions and Federal Immigration Policy* **(James Bilik, Spencer Fisher** and **Anjana Samant)**, *Affordable Housing/Fair Housing/Community Land Trusts for Local Governments* **(Joseph Trapp)**, *Updates from the State's 2017 Legislative*

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Sponsored by the Section's Ethics and Professionalism Committee

Q ***Hypothetical*:** A town board member in the Southern Tier is a partner in a firm that owns the only dump in the area for bulk items. The town contracts with the firm to pick up and dispose of such items for town residents. The town board member recuses himself from having anything to do with the contract, either on behalf of the town or on behalf of the firm, and forgoes all profit from the contract, assigning it to his partner. Has the town board member violated Article 18 of the General Municipal Law? Would it make a difference if the firm were a corporation in which the town board member was an investor only, owning 5% of the stock of the corporation but having no position with the corporation and no management responsibilities?

Answer and analysis on page 8

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Save the Date!

January 25, 2018 (NYSBA Annual Meeting)
The Local and State Government Law Section Meeting
Held at New York Hilton Midtown, NYC

For registration and more information on the above event,
please visit www.nysba.org/StateandLocalGoverment

Session **(Andrea Fastenberg)**, *Public Sector Labor and Employment Law 2017 Update* **(Richard Zuckerman),** *New York State's Paid Family Leave Law is Arriving Soon—Are You Ready?* (**Thomas Wassel)**, and *Law, Government and Politics, Achieving the Perfect Mix* **(Hon. Eugene Pigott)**. Special thanks go to **Chris Trapp** and **Tom Wassell**, as well as our NYSBA Section Liaison **Beth Gould,** for going above and beyond to make this a program to remember and setting a high bar for the 2018 Fall Meeting at the Westin Buffalo.

Plans for the 2018 Annual Meeting, to be held on Thursday, January 25, 2018 at the Hilton Midtown in Manhattan, are well under way under the guidance of **A. Joseph Scott** and **Martha Krisel**. Preliminary topics being presented include *Blurred Lines–Zoning Limited to Regulation of Use Rather Than User; Navigating the Approval Process: The Interplay Between Municipal Land Use Boards*; *Update on New York State's "Zombie Law"; Takings After* Murr v. Wisconsin*; Sign Codes in the Wake of* Reed v. Town of Gilbert*; Social Media as a First Amendment Protected Forum;* and *Ethical Issues: Conflict of Interest*.

We are redoubling our efforts to reach out to former CAPS (Committee on Attorneys in Public Service) members to encourage them to help us provide relevant and timely programming of interest to them. If we haven't reached you yet, and you want your voice to be heard, please contact me at rkz@lambbarnosky.com. Also be on the lookout for a survey, being prepared by **Spencer Fisher** and **Martha Krisel**, to be sent to you in the near future seeking your direct, unvarnished feedback about how we can do more for you and get you more involved in Section activities and leadership opportunities.

The Section's new Budget Surplus Committee issued a report, adopted by the Executive Committee at its September 2017 meeting. Thanks to Committee Chair **Sharon Berlin** and members **Mike Kenneally**, **Adam Wekstein**, **Chris Trapp** and **Beth Gould** for their well-reasoned insight into how best to make appropriate use of our surplus in the context of providing you, our members, with the biggest bang for your Section dues buck. Per the Committee's recommendations, up to 25 percent of the Section's annual surplus will initially be allocated toward membership/recruitment efforts, 25 percent to the former Section Chair Carol Von Scoyoc Memorial Fund, 20 percent for the 2019 Section 75th Anniversary celebration, and the remaining 30 percent for other contingencies.

The former Section Chair Carol Van Scoyoc Memorial Fund Committee requested, and the Executive Committee agreed, to allocate $22,000 toward the Fund, of which $10,000 had already been allocated in the 2018 budget, and an additional $12,000 in the 2019 budget. These monies will be used to accomplish the Fund's mission, which is to recognize and honor Carol's selfless dedication to municipal practice, her community, the Local and State Government Law Section and the practice of municipal law by providing a financial award to recently admitted attorneys serving as in-house counsel for a public employer in order to promote continued service in the public sector by closing the pay gap with the private sector. Our thanks go to Committee Chair **Mike Kenneally** and members **Les Steinman** and **Bernis Nelson** for getting this off of the ground and into reality.

We have also formed a Program Committee, consisting of **Alyse Terhune**, **Mike Kenneally**, **Sharon Berlin**, **Adam Wekstein**, **Spencer Fisher** and **Natasha Phillip,** to begin planning for the 2018 Fall Meeting, which will be held on September 27 and 28, 2018 at the Westin in Buffalo. Please do not hesitate to reach out to Alyse if you would like to speak at the Meeting, or have a suggestion for a topic that you believe would be of interest to your colleagues.

Continuing with our programming theme, and building upon our very successful May 2017 Spring Forum in Albany, **Sharon Berlin, Mike Kenneally, Alyse Terhune and Spencer Fish** are working on a 2018 follow-up to be held in the Albany area on April 27, 2018. We are also looking into the possibility of webcasting this program. Here, too, please do not hesitate to reach out to one of them if you would like to speak or have a suggestion for an interesting topic.

NYSBA and our Section believe that Membership and Diversity issues are of paramount importance to our members. Committee Co-Chairs **Martha Krisel, Hina Sherwani and Mindy Zoghlin** are working to ensure that we as a Section meet our stated goal of promoting diversity as part of merit-based decision-making in everything from selecting program speakers to Executive Committee members and everything in between.

We will be co-sponsoring NYSBA's Administrative Agency Practice CLE program, scheduled for November 1, 2018 in New York City and November 8, 2018 in Albany. More details will be shared as soon as we know them.

It is a truism that committees are the lifeblood of any NYSBA Section, and ours is no different. We have many committees, addressing a wide range of topics of interest to lawyers practicing in the municipal law field, in which you can participate. These include Employment Relations; Ethics and Professionalism: Land Use, Green Development and Environmental; Municipal Counsel: State and Federal Constitutional Law; Taxation, Finance and Economic Development; Liabili-

ty and Insurance; and Legislation. If you are interested in joining one or more committees (there is no charge and no limit), please directly contact the committee chair, whose name you will find in Communities and on page 38 of this *Journal*.

One Committee that is actively seeking new members is our Ethics and Professionalism Committee, co-chaired by past Section Chair **Mark Davies** and **Steve Leventhal**. This Committee puts on CLEs on government ethics and professionalism-related issues, including the intersection between government and attorney ethics; acts as a resource for attorneys in New York State on the requirements of government ethics laws; writes articles on ethics, and an ethics quiz, for the *Municipal Lawyer*; helps municipal attorneys craft local ethics codes; and comments on and proposes amendments to State ethics laws. You do not have to be an ethics expert to join this highly complex and interesting area of law.

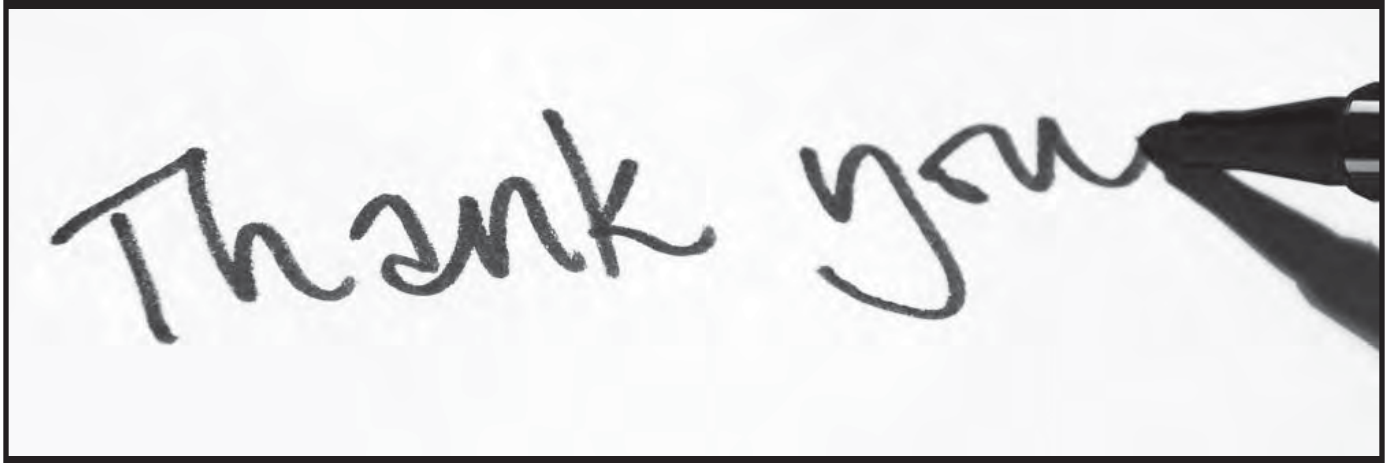
One other, but important, note: as many of you know, my immediate predecessor, **Carol Van Scoyoc**, passed away in mid-February after a protracted and courageous battle with cancer. Carol joined NYSBA and our Section in 1994, and was elected to the Section's Executive Committee in 2004 and became Section Chair in 2015.

Carol began her legal career as an Assistant County Attorney for Westchester County and ultimately became the county's Assistant Chief Deputy Attorney. From there, she became the Chief Deputy Corporation Counsel for the City of White Plains. Carol served as counsel in approximately 150 cases and also, in her "spare time," served as president of the Westchester County Bar Association, chair of its Municipal Law Section, and Editor-in-Chief of the *Westchester Bar Journal*. She was also an adjunct professor at Pace University's Graduate School of Public Administration.

Carol received the State Bar's 2012 Award for Excellence in Public Service. She was a *summa cum laude* graduate of Manhattan College and earned her law degree from Pace University School of Law. Perhaps as important to her was being a fellow lifelong Mets and, in particular, Gary Carter, fan.

We miss you, Carol, more than words can do justice, and hope that you are looking down on us with approval as we attempt to carry on your legacy.

NEW YORK STATE BAR ASSOCIATION



As a New York State Bar Association member you recognize the value and relevance of NYSBA membership.

For that, we say thank you.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Sharon Stern Gerstman
President

Pamela McDevitt
Executive Director

NYSBA

Letter from the Co-Editors

This issue of *Municipal Lawyer* features articles from new contributors as well as familiar authors. We begin with the Ethics Quiz on page 8, written by Mark Davies and Steve Leventhal. Their answer to the question appears on the nexty page. Here is a brief summary of the articles in the issue:

Noelle Wolfson, a regular contributor to this *Journal*, returns with a thorough primer on area variances in New York. Wolfson writes that New York law requires zoning boards to balance a wide range of competing interests. The state's five-part test requires boards to consider the impact of a variance on both neighborhood character and on the physical environment, as well as the size of the variance, whether the benefit sought by a variance applicant can be achieved through other means, and whether the difficulty leading to the variance petition was created by the applicant. No one factor is decisive: a variance petition that deserves to fail under factor A might nevertheless be legitimately granted based on factor B. Wolfson points out, however, that a board may not grant or deny a petition without comment; the board's decision must be well-reasoned.

Professor Michael Lewyn, one of our co-editors, has written an article on autonomous vehicles, focusing on lessons to be learned from mid-20th century American transportation policies. In the decades after automobiles first became popular, government at all levels sought to accommodate them by building highways to suburbia and by widening surface streets in ways to facilitate fast auto traffic. Because autonomous vehicles may make driving more convenient, policymakers may be tempted to facilitate traffic flow by doing more of the same—that is, building new roads and widening existing ones. Lewyn cautions that such policies had a number of negative side effects in the 20th century. For example, the suburban growth facilitated by highways led to the destruction of once-rural wetlands and the fast traffic caused by wide streets made walking unpleasant and unsafe, thus leading to increased auto traffic, which in turn increased pollution and traffic congestion.

Adam Kleinberg's first article for the *Municipal Lawyer* focuses on New York law governing school districts' duty to report child abuse to local child protective services (CPS) agencies. State law requires school districts and other agencies to report such data as will enable CPS to perform its responsibilities—but until recently, the law gave school districts little guidance on what this law means. After discussing litigation under the state statute in which he was involved as a lawyer

Rodger Citron

Michael Lewyn

representing one of the parties, Kleinberg addresses recent state regulations designed to clarify the law.

Larry Schnapf's article, previously published in the *New York Environmental Lawyer*, discusses New York City's municipal environmental law related to hazardous waste. Most of the article focuses on the city's voluntary cleanup program (VCP) for commercial real estate contaminated by hazardous waste. Under the VCP, landowners are eligible for city grants to help them clean up hazardous waste. The city also helps landowners obtain loans by certifying that they are making progress towards cleaning up contaminated land. Schnapf also addresses other city laws, such as the city's Spill Law (a municipal version of federal and state laws requiring cleanup of hazardous substances), the Hazardous Materials Storage rules (which require persons who store petroleum and hazardous substances to obtain city permits), and the Asbestos Law (which requires persons engaged in asbestos abatement to put the city on notice).

We are delighted to be publishing all of these articles—and we encourage you to contribute to the *Municipal Lawyer*. Submissions can be on any legal topic relevant to the practice of state and local government law and may vary in form from short, sparsely footnoted updates to longer, thoroughly researched articles. To contribute to the next issue, please contact either of us by email—our addresses are below. We look forward to hearing from you.

Finally, we must thank former Touro Law Professor Sarah Adams-Schoen for her outstanding service as an editor of the *Municipal Lawyer*. She has left Long Island to join the faculty of the University of Arkansas at Little Rock William H. Bowen School of Law. New York's loss is Arkansas's gain; we will miss Sarah and wish her all the best in her future endeavors—which we hope will include an occasional contribution to this *Journal*!

We thank Stephen Weinstein, a third-year law student at Touro Law Center, for his work as a Municipal

Law Fellow on this issue. And we welcome two new colleagues to the *Municipal Lawyer*. Our former fellow, Michael Spinelli, has graduated from Touro Law Center and will be joining us as a co-editor. To replace him, we have a new Municipal Law Fellow, John Bourquin, also a third-year student at Touro Law.

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Michael Lewyn (mlewyn@tourolaw.edu)

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Answer to Government Ethics Quiz

A Whether the town board member was a partner in the firm or merely an investor in the corporation, he has violated Article 18 of the General Municipal Law and rendered the contract null and void. If the violation was knowing and willful, he has committed a misdemeanor.

Section 801 of the General Municipal Law, in a nutshell, prohibits any municipal officer or employee from having an interest in any contract with his or her municipality if the officer or employee has any responsibility in regard to that contract, either individually or as a member of a board. Under section 800(3), the officer or employee has an "interest" in a municipal contract if any of the following individuals or entities receives any pecuniary or material benefit as a result of the contract: the officer or employee himself or herself; his or her spouse, minor children, or dependents; any firm in which the officer or employee is a member or employee; any corporation of which the officer or employee is an officer, director, or employee; or any corporation of which the officer or employee owns or controls, directly or indirectly, 5% or more of the corporate stock.

Note that, for a violation to occur, the municipal officer or employee does not have to exercise any authority in regard to the municipal contract but need only have "the power or duty" to exercise that authority, such as negotiating, preparing, authorizing, or approving the contract; authorizing or approving payment under the contract; auditing bills or claims under the contract; or appointing an officer or employee who has any such powers or duties. Clearly, the town board member here has such authority. Therefore, his recusal does not cure the violation.

Furthermore, the fact that the town board member forewent any profit from the contract, and thus did not personally receive any benefit from the contract, does not cure the violation because the firm in which he was a partner (or, alternatively, a corporation in which he owned 5% or more of the stock) did receive a pecuniary benefit; under section 800(3) he himself is therefore deemed to receive the benefit. In fact, a municipal officer or employee may violate section 801 even if neither he nor she nor his or her firm or corporation is a party to the contract with the municipality. A violation requires only that the municipal officer or employee or his or her firm or corporation receive a pecuniary or material benefit "as a result of" the contract. Thus, for example, if the town board member's firm did not contract with the town but rather contracted with the dump to maintain the dump for the duration of the dump's contract with the town, the town board member would still violate section 801.

Exceptions to the rule of section 801 do exist (see section 802), but none of them applies here. In particular, section 802(1)(b) excludes from the prohibition of section 801 a municipal officer or employee whose interest in a municipal contract is prohibited merely because he or she works for a firm that has a contract with the municipality, provided that the municipal officer or employee does not personally receive any benefit from the contact and has no duties with respect to the contract on behalf of his employer. Here, however, the town board member is a partner in the firm, not a mere officer or employee. Similarly, section 800(2)(a) excludes from the prohibition of section 801 a municipal officer or employee whose interest in the municipal contract is prohibited merely because he or she has stock in a corporation, provided that the municipal officer or employee owns or controls directly and indirectly less than 5% of the corporation's outstanding stock. Here, in the alternative hypothetical, the town board member owns 5% of the corporate stock.

A willful and knowing violation of section 801 is a misdemeanor (section 805) and renders the contract "null, void and wholly unenforceable" (section 804). A willful and knowing violation does not require that the municipal officer or employee know he or she is breaking the law but only that the officer or employee knows that the relevant facts exist—e.g., of the existence of the contract and his or her interest in it. See Penal Law § 15.05(2) ("'Knowingly.' A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.").

Mark Davies and Steve Leventhal

A Primer on Area Variances in New York

By Noelle C. Wolfson

Although municipal zoning regulations vary widely across the state, the process and standard by which a variance from those regulations may be granted is uniform.[1] This article surveys the statewide area variance standard and the large body of New York State case law interpreting it. Its goal is to provide a clear and convenient reference for practitioners, board members, and officials looking to gain a basic understanding of area variance law and related issues.

Noelle C. Wolfson

Let's start at the beginning. As defined by state law, an "area variance" is "the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the *dimensional or physical* requirements of the applicable zoning regulations."[2] In contrast, the more elusive "use variance" is defined as "[t]he authorization by the zoning board of appeals for the use of land *for a purpose* which is otherwise not allowed or is prohibited by the applicable zoning regulations."[3] These standards were codified in the early 1990s to address certain ambiguities in the previously existing body of variance law, particularly the law pertaining to area variances.[4] Although generally whether an applicant requires a use or area variance is fairly clear, the courts of this state have been asked from time to time to delineate the line between the more flexible area variance and more stringent use variance. For example, courts have held that variances from off-street parking requirements,[5] special use permit requirements prohibiting the establishment of a use within a certain distance of the same use,[6] and dimensional requirements related to uses permitted pursuant to a use variance[7] are in the nature of area variances. In contrast, variances to establish an accessory use on a lot without a principal use,[8] or enable buildings on a lot to be configured in a manner that would allow them to be used for a prohibited use[9] are in the nature of use variances. The guiding factor is generally whether the underlying use is permitted on the subject property. If it is, then a variance to relax zoning requirements should be classified as an area variance.[10]

If an area variance is what is required, the standard set forth below applies. Zoning boards of appeals *must* apply this standard, and may not supplement or replace it with elements of the former "practical difficulties" standard or import considerations not included in the factors listed below.[11]

> [T]he zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.
>
> (c) The board of appeals, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.[12]

Whose Burden?

Unlike the use variance standard, which clearly places the burden of proof on the applicant,[13] the area variance standard is not as direct. It provides that *the zoning board* may not grant the variance unless it determines that the benefit to the applicant outweighs the detriment to the health, safety, and welfare of the community. Although it is, of course, in the applicant's best interest to make the strongest record by introducing proof that the equities balance in its favor, when evaluating an area variance application the burden is on the zoning board to consider the facts and make a determination that is clearly supported by those facts; it should not rely on an applicant's lack of proof as a basis for denying a variance. Courts have annulled variance denials where the board failed to "clearly set

forth 'how' and 'in what manner' the granting of a variance would be improper."[14] If the subject of the variance application is a religious use, then the board has the added responsibility of suggesting measures to mitigate impacts to enable the variance to be granted.[15]

Highlighting the fact that a zoning board is required to affirmatively support by fact and reason its determination when granting *or* denying an area variance is not meant to suggest that the board's decision on an area variance application deserves any less deference than other administrative determinations. To the contrary, it is black letter law in this state that a determination of a zoning board of appeals will be upheld by a court unless the action taken by the board was illegal, arbitrary, or an abuse of discretion.[16] It is simply a caution that courts are more likely to find a decision to be arbitrary and capricious when the record is not complete or a board's findings are not well reasoned.[17]

The Evidence

Zoning boards of appeals are quasi-judicial administrative agencies.[18] Although the formal rules of evidence do not apply to their proceedings,[19] several controlling principles govern the evidence that the board can consider. First, a zoning board of appeals must base its decision on the evidence in the record and reviewing courts will only look to the four corners of the administrative record and the board's findings when evaluating whether the decision had a rational basis.[20] In order for evidence to be considered part of the record, due process requires that it be introduced in a way and at a time that gives all interested parties the opportunity to review and respond to it.[21] Typically evidence should be submitted in advance of or during the required public hearing on the application,[22] or during a post hearing comment period specified by the board.[23] Zoning board members can use their familiarity with an area in which a subject property is located when evaluating a variance application;[24] however, if members wish to do so they should incorporate that knowledge into the record (for example, through explanation at the hearing on the matter).[25]

Municipal zoning regulations and application forms often specify the type of evidence that must be submitted by the applicant. Boards typically require a statement of how the variance requested satisfies the statutory standard, a plan showing the precise deviation from the code, photographs of the subject property and those surrounding it, and similar information. Although an applicant is not required to submit expert proof in support of a variance application,[26] it is often helpful, particularly on the topic of anticipated impacts. Where the record includes competing evidence of equivalent value (i.e., competing experts or competing lay observations), it is within the discretion of the board to evaluate it and determine its relative weight.[27] However, a zoning board may not favor lay testimony over expert testimony within the expert's field.[28]

Likewise, although public participation in the public hearing on a variance application is welcome, and factual testimony from members of the public may properly be considered by the board,[29] a variance may not be denied based solely on generalized community opposition.[30] It is unclear from the case law when a statement offered by a community member crosses the line from permissible comment to generalized community opposition, and each case must be evaluated on its own facts. However, one hallmark feature of a board impermissibly succumbing to community opposition is a decision which discounts expert testimony in the record in favor of lay testimony on behalf of opposing community members.[31]

The Five Factors

As stated above, when considering whether to grant an area variance, a zoning board of appeals must balance the benefit to the applicant by the grant of the variance weighed against the detriment to the health, safety, and welfare of the community by such grant as informed by the consideration, weighing, and balancing of the five subsidiary factors, and no others.[32] Courts will defer to boards that correctly apply this standard; boards that do not are routinely reversed.[33] Although at times courts will search a zoning board's record to evaluate whether the board properly considered the five factors and applied the statutory test,[34] such an approach is the exception rather than the rule. Courts will normally assess the validity of a variance decision based on the board's own findings. Therefore, boards should address each factor, and the balancing standard as a whole, in a written resolution granting or denying the variance.[35]

Although the factors are exclusive, they are also broad and allow for the consideration of a wide variety of information.[36] Moreover, while the board must consider, weigh and balance the evidence in light of the five factors, it does not have to justify its decision with supporting evidence for each of them; it just has to consider and weigh them in the application of the overriding balancing test.[37] Each of the five factors is addressed in more detail below.

a. Whether an Undesirable Change Will Be Produced in the Character of the Neighborhood or a Detriment to Nearby Properties Will Be Created by the Granting of the Area Variance

The extent to which the granting of a variance will negatively impact the character of the neighborhood or surrounding properties is arguably the most important of the five factors; it is no coincidence that it is first.[38]

Boards have wide discretion in what they may consider under this broad heading, and the relevant considerations will vary depending upon the character of the neighborhood, the configuration of the property, the configuration of surrounding properties, the proposed improvements, and the proposed use. Considerations relevant under this factor typically include, but are not necessarily limited to, the consistency or lack thereof of the proposed deviation from the bulk and area requirements with the density and physical aspects of surrounding properties,[39] traffic and parking impacts,[40] aesthetic impact,[41] and noise and glare.[42] Boards should also consider whether granting the variance will achieve a community objective, such as the demolition or reduction of a non-conforming structure.[43] Boards that do not consider the impact of a variance on neighborhood character or base their determination on factors not supported by the record will find their decisions reversed.[44]

Whether the grant of a variance will set a negative precedent is also a permissible consideration.[45] As a quasi-judicial body, a zoning board of appeals must either adhere to its prior results or explain the factual or legal basis for departing from such results.[46] Although even fairly minor distinctions can be a basis for a zoning board to deviate from a prior decision provided the board explains its reasons for such deviation,[47] courts nonetheless give zoning boards great latitude to consider a decision's impact on precedent in its application of the variance standard.[48]

For example, in *Russo v. City of Albany Zoning Board of Appeals*,[49] Petitioner Russo sought an area variance to permit him to park his vehicle in his home's front yard in contravention of Albany's prohibition against such activity. The board denied Mr. Russo's variance application finding, among other things, that the proposed configuration would cause an undesirable change in the character of the neighborhood. In support of this finding, the board cited proof demonstrating that Mr. Russo's parking configuration differed from other properties on which front yard parking occurred and "would undermine existing zoning regulations by encouraging further deviations where no unique hardship exists and set a poor precedent for other property owners in the neighborhood" to the detriment of the neighborhood's character.[50] The Third Department specifically affirmed this finding as a basis to conclude that the proposed variance would have a negative impact on neighborhood character.[51]

Lodge Hotel Inc. v. Town of Erwin Zoning Board of Appeals[52] raises the somewhat novel question of whether the character of the neighborhood that forms the baseline for the evaluation of this factor is the existing condition or the character the municipality hopes to achieve through zoning and comprehensive planning. In that case, the lower court held that the existing, not the aspirational, character of the neighborhood controls, but the Fourth Department's affirmation of the lower court's decision leaves some room for doubt about whether and to what extent the community's land use goals can be considered.

In *Lodge Hotel, Inc.*, the applicant owned property in a generally commercial area. After the applicant purchased the property, the town rezoned it to prohibit retail use. The rezoning occurred as part of a larger comprehensive planning and rezoning effort by the town which sought to transform the area in the vicinity of the property into a pedestrian-friendly downtown. The applicant obtained a use variance to permit construction of a retail tractor supply store on its property and then sought three area variances from provisions of the town's code to construct a building: (1) without a functional second story; (2) which would be taller than permitted in the town's code; and (3) which would lack required second floor windows. The zoning board of appeals denied the first and third variances and granted the second to a lesser extent than requested. The Supreme Court, Stuben County, reversed the denial of the first variance, remanded the second to the board for further consideration, and affirmed the denial of the third. When analyzing the proposed effect of the variances on the character of the neighborhood the board used the aspirational character included in the town's comprehensive plan, rather than the existing character, as the basis of its analysis. The lower court found this to be in error, reasoning that:

> While the work the Town has put into its plan is commendable, denying area variances based upon what a municipality hopes the neighborhood will be like in some distant future is an impermissible restriction on the use of property not intended by the applicable statute and is contrary to case law. Courts have consistently placed great reliance on the effect that the granting of an area variance would have on the character of the neighborhood, and the analysis has always been to determine whether the plan sought to be implemented by the area variance is out of character with the *existing* scheme of development (emphasis in original).[53]

The Fourth Department affirmed, although its decision could be read to modify the above-quoted language. The Fourth Department held that:

> The evidence presented by petitioner at the hearing established that the variance was necessary to accommodate the inventory of the store and that, because of the nature of the retail sales, it could not utilize a second

> floor. *We note that, although respondent properly considered its comprehensive plan for future development of the area to have a "walkable two story look,"* the record establishes that petitioner accommodated that comprehensive plan by its proposal to install windows that would give the appearance of a two-story building. Respondent's findings that the vaulted ceiling would break the "cohesiveness" of that plan and that the building "could not be used for anything else" in the event that it became vacant are not supported by substantial evidence (emphasis added).[54]

The Fourth Department's reference to the board's "proper" consideration of the town's comprehensive plan suggests that the character of the neighborhood sought to be achieved through the comprehensive plan may be relevant in the application of the variance standard. The takeaway from *Lodge Hotel* is a bit unclear and will need to be clarified by the appellate courts. But for applicants and boards perhaps the significance of the holding should be that the aspirational character of the neighborhood, if clearly defined in a formal comprehensive plan, can be considered and addressed.

b. Whether the Benefit Sought by the Applicant Can Be Achieved by Some Method, Feasible for the Applicant to Pursue, Other Than an Area Variance

Although there are not many cases interpreting this factor, generally an applicant should explain why an area variance is the best way to accomplish the benefit it is trying to achieve. Typically, that will mean exploring whether additional land can be acquired to eliminate the need for the variance in instances in which surrounding vacant land is available,[55] or whether the project can be redesigned in a way that achieves the benefit the applicant is seeking and eliminates or lessens the need for the variance.[56] When considering alternatives, it is important that they continue to accomplish the applicant's goals. For example, in *Baker v. Brownlie*,[57] the Second Department annulled the denial of a variance to permit the applicants to construct a patio on their property. The court rejected the board's finding that the patio could be relocated to a conforming location, and thus other alternatives to the variance were available to the applicants, when the applicants' goal was to construct a patio on their Shelter Island property facing Dering Harbor, and the location suggested by the board lacked a view of the water.[58]

Similar to this factor is the directive, presumably applicable following the completion of the consideration of the five factors, that boards should only grant the minimum variance necessary.[59] Boards may impose reasonable conditions (see discussion below) or may grant smaller or fewer variances than requested;[60] however, the benefit that the applicant is seeking to achieve should be considered. An effort by a board to minimize the variance or its impacts that is not practical or reasonable will not pass judicial muster. [61]

c. Whether the Requested Area Variance Is Substantial

Zoning boards of appeals and courts appear unsure of how to apply this factor. While most boards and courts will view a large numerical deviation from a municipal zoning ordinance as "substantial," the weight they will give that finding is heavily dependent on, and cannot be separated from, the impact that deviation will have on the community.[62] Thus, courts have upheld the grant of substantial variances because of a lack of associated impacts[63] and have reversed denials of substantial variances absent proof that the deviation will cause negative impacts.[64] However, where the grant of a variance is expected to negatively impact the surrounding community, the fact that it is substantial, meaning large in size, is often cited as additional support for the variance's denial.[65]

Typically, the category of area variance requested (e.g., variances from setbacks, height limitations, or coverage requirements) does not play a significant role in a zoning board's application of the statutory test. One potential exception to this rule is a variance that will permit the creation of substandard lots. Although such variances are granted from time to time,[66] the burden on the applicant to demonstrate their benefit appears heavier in cases in which the applicant is seeking to create and develop new nonconforming lots.[67] Although substantiality is not the only consideration in the decision on such variances, it is often cited as a basis for denial.[68]

d. Whether the Proposed Variance Will Have an Adverse Effect or Impact on the Physical or Environmental Conditions in the Neighborhood or District

At times it can be difficult to distinguish between impacts to the physical environment, as referenced in factor four, and impacts on the general character of the neighborhood identified in factor one. In practice, often factors one and four are considered together. However, impacts to the physical environment may become particularly relevant when the improvements that are the subject of the variance could affect, in either a positive or negative way, environmentally sensitive land such as wetlands.[69] Additionally, applicants and boards may wish to pay particular attention to this factor when the variance requested is a part of a project undergoing a coordinated review under the State Environmental

Quality Review Act (SEQRA)[70] in which the zoning board is not the lead agency. In *Luburic v. Zoning Board of Appeals of the Village of Irvington*,[71] the Second Department annulled the village zoning board's denial of a site capacity variance needed to construct a single-family residence because the board's findings with respect to environmental impacts were contrary to those of the SEQRA lead agency. Although the board rightly concluded that the variance was substantial and the applicant's hardship was self-created, it failed to recognize and adequately consider the village planning board's conclusion that there would be no significant environmental impacts based on the applicant's commitment to working with it to achieve a mutual acceptable project plan. The court held that:

> the record reveals that, after approximately three years of, inter alia, working with the Village of Irvington Planning Board . . ., engaging in public hearings, and consulting with various experts, the petitioner obtained the requisite permit approval to build on the subject property if certain conditions were met. The Planning Board, as the lead agency under [SEQRA] issued a "Conditional Negative Declaration," concluding that, so long as certain conditions were met, the proposed construction would not have a significant adverse effect on the environment. Despite the Planning Board's extensive environmental review of the petitioner's plans, the ZBA concluded that the petitioner's proposed construction would have an adverse impact on the physical or environmental conditions of the neighborhood because the conditions imposed by the Planning Board were "impractical" and "implausible." However, given the Planning Board's role in addressing environmental concerns…and in the absence of any further evidence to support its conclusion, the ZBA's finding on this factor lacked a rational basis.[72]

e. Whether the Alleged Difficulty Was Self-Created, Which Consideration Shall Be Relevant to the Decision of the Board of Appeals, but Shall Not Necessarily Preclude the Granting of the Variance

While fatal to use variances, self-created hardships are not a death knell to area variances.[73] Indeed, the statute expressly provides that the fact that the applicant's hardship is self-created does not preclude the granting of the variance.[74] Like the substantiality factor, the self-created nature of the variance must generally be considered through the lens of the impact the variance will have if it is granted.[75] This factor often plays a more prominent role when the variance is required because the applicant made improvements or engaged in conduct contrary to the law or with the intention of not complying with the law without first seeking the required approvals,[76] or engaged in other egregious conduct.

For example, in *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*,[77] the applicant received site plan approval from the Town's planning board to construct a furniture store on its property. The plan described the store as having a main floor and a cellar. As reflected in the Second Department's decision, during the site plan review process the applicant told the planning board that the cellar would be used for storage and mechanicals only, not as retail space. The required minimum number of parking spaces could be provided on the site if the building's cellar was not used for retail space but would not be achieved if the cellar was devoted to that purpose. During construction, the town's building inspector observed that the applicant was installing partitions, walls, moldings, finishes, and carpeting in the cellar and asked that the applicant provide a plan expressly labeling the cellar as "storage." Notwithstanding the building inspector's directive, the applicant used the cellar as a display area and, in the fall of 2003, the town served it with notices of violation alleging that the cellar was impermissibly being used as retail area in direct contravention of the representations the applicant made to the planning board and building department. In response to the notice of violation, the applicant applied to the respondent zoning board for variances from the town's floor area ratio and off-street parking requirements and asserted that it was "unaware that it could not utilize the basement for retail sales."[78] The zoning board held a multi-session public hearing at which the applicant again maintained its ignorance. The applicant also submitted expert proof supporting its contention that the showroom/retail use of the cellar did not adversely impact the goals of the town's parking requirements, a position with which the board's expert agreed. Neighboring property owners spoke against the granting of the variance, citing the applicant's failure to comply with site plan conditions and arguing that granting the variance would result in negative impacts to the community. The zoning board ultimately denied the variances, basing its decision on the fact that:

> Caspian had continuously deceived the Town as to the intended use of the cellar, such that the benefit of granting the variances was outweighed by the detriment that would be caused to the Town by allowing a diminution of respect for its planning, building,

> and tax laws. The ZBA found that the retail use of the cellar burdened neighboring property owners in terms of noise, truck movement, and traffic tie-ups; that the variance requests were substantial, as they represented a 100% increase in permissible FAR and a 50% decrease in permissible parking; and that Caspian's need for the variances was self-created by its deceptive conduct.[79]

The applicant appealed the denial, arguing that it had always understood that the cellar could be used for a showroom and that its construction as such was in plain view to the building inspector. It asked the court to direct the board to grant the requested variance. Supreme Court, Westchester County, annulled the denial of the variances and remitted to the matter to the zoning board for further review, finding that although "as a matter of fact, [the applicant] had deceived the town regarding the intended use and purpose of…the cellar" deception is not one of the statutory factors and the board's reliance on the applicant's lack of candor prevented it from properly assessing the five factors.[80] The Second Department reversed. It held that the board and the lower court had a basis for finding that the applicant deceived the town with respect to its proposed use of the cellar, and that, although the zoning board could not rely on the applicant's deception standing alone as a basis for denial, it could be considered as a part of the self-created hardship component of the statutory balancing test. The court reasoned as follows:

> Town Law § 267–b(3) also requires consideration of whether the applicant's need for variances is self-created. While the self-imposed nature of a hardship is fatal to a use variance application,…the self-imposed nature of a hardship is significant, but not determinative, to an area variance…An area variance may be denied based in part upon the self-created nature of the difficulty as viewed among other relevant factors…Here, the ZBA determined that Caspian's difficulties were self-created by virtue of using the cellar of the building as a showroom without seeking or obtaining the required municipal approvals… We agree with the ZBA that under the peculiar circumstances of this matter, Caspian's self-created difficulties represent a particularly compelling statutory factor, given its repeated and documentable misrepresentations to the planning board, building department, tax assessor, and zoning board, both prior to and after the issuance of the Town's site plan approval and certificates of occupancy, as to its true intended use of the cellar.[81]

Conditions

If a zoning board decides to grant an area variance, it may impose reasonable conditions to mitigate anticipated impacts of the variance. On this topic, the Court of Appeals has explained that:

> A zoning board may, where appropriate, impose "reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property," and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit…Such conditions might properly relate "to fences, safety devices, landscaping, screening and access roads relating to period of use, screening, outdoor lighting and noises, and enclosure of buildings and relating to emission of odors, dust, smoke, refuse matter, vibration noise and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area"…Similarly, we have upheld, as a condition of rezoning property for commercial use, the imposition of a requirement that the owners of the property execute and record restrictive covenants relating to the maximum area to be occupied by buildings, the erection of a fence, and the planting of shrubbery…Such conditions are proper because they relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of that use. Conditions imposed to protect the surrounding area from a particular land use are consistent with the purposes of zoning, which seeks to harmonize the various land uses within a community….
>
> On the other hand, zoning boards may not impose conditions which are unrelated to the purposes of zoning….Thus, a zoning board may not condition a variance upon a property owner's agreement to dedicate land that is not the subject of the variance application…Nor may a zoning board

> impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located…Such conditions are invalid because they do not seek to ameliorate the effects of the land use at issue, and are thus unrelated to the legitimate purposes of zoning.[82]

Courts will affirm conditions that comply with this standard and will annul conditions that do not.[83] Boards and their counsel should be aware of the potentially significant impact of a defective condition, which "may be annulled although the variance is upheld[.]"[84] Further, in order to be enforceable, it is the zoning board's obligation to ensure that the condition is clearly stated in its variance determination.[85]

Other Considerations

Although most of the area variance case law pertains to the application or misapplication of the statutory standard, several cases address scenarios that do not directly relate to the test. Such cases have offered guidance for applicants and boards as follows:

- When a quorum of the board is present and participates in the proceedings on a variance application by actually casting votes, a tie vote failing to garner a majority to grant the variance is a denial and the aggrieved party may seek review of that denial pursuant to CPLR Article 78.[86] The fact that the Board was unable to agree to adopt findings on the application because of its inability to garner a majority to make a decision does not deprive the court of its ability to review the denial. The court will search the record and decide whether the denial had a rational basis.[87]

- A board's failure to file its decision with the municipal clerk within five days of the date the decision was rendered, as required by Town Law §267-a(9), Village Law §7-712-a(9), and General City Law §81-a(9), generally does not mandate the decision's invalidation.[88]

- The duration of a variance may be extended by a zoning board after it has expired provided that the applicant's request for its extension is received by the board prior to the variance's expiration. Moreover, "A zoning board's authority to issue variances includes the authority to modify previously imposed time limitations if an application for an extension is made while the variance is still valid. Such an application need not be treated as a new application for which public notice and a hearing are necessary."[89]

New York's reporters are filled with instructions on how to craft and analyze area variance requests under the state law standard. Although the case law is full of nuance, in general, boards that (i) consider the statutory standard, (ii) ensure that the record includes all relevant and supporting facts, and (iii) memorialize their decision in a written resolution addressing each of the five factors and how they informed the board's application of the overriding balancing test will almost always enjoy the approval of the courts.

Endnotes

1. *Cohen v. Bd. of Appeals of Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003) (holding that Village Law §7-712-b(3), which sets forth the statutory area variance standard, preempts the field in this area of regulation and prevents localities from adopting inconsistent variance standards).
2. Town Law §267(1) (b); Village Law §7-712(1) (b); General City Law §81-b(1) (b) (emphasis added).
3. Town Law §267(1) (a); Village Law §7-712(1) (a); General City Law §81-b(1) (a) (emphasis added).
4. See discussion of the codification of the variance standard in *Sasso v. Osgood*, 86 N.Y.2d 374, 380-382, 633 N.Y.S.2d 259, 261-263 (1995).
5. *Colin Realty Co., LLC v. Town of North Hempstead*, 24 N.Y.3d 96, 996 N.Y.S.2d 559 (2014).
6. *See Real Holding Corp. v. Lehigh*, 2 N.Y.3d 297, 778 N.Y.S.2d 438 (2004); *see also* Town Law §274-b(3); Village Law §7-725-b(3); and General City Law §27-b(3) (providing that a zoning board can grant area variances to modify special use permit criteria).
7. *Scarsdale Shopping Ctr. Assoc., LLC v. Bd. of Appeals on Zoning for City of New Rochelle*, 64 A.Ds.3d 604, 882 N.Y.S.2d 308 (2d Dep't 2009) (holding that a use variance is not required to expand a use that previously received a use variance, but an area variance may be required, based on the circumstances, for such expansion).
8. *Barsic v. Young*, 22 A.D.3d 488, 489, 801 N.Y.S.2d 829, 831 (2d Dep't 2005) (holding that petitioner required a use variance to use his lot for the principal use of "outside storage of materials" when such use was permitted in the applicable zoning district only "in conjunction with and as accessory to the use of the main building or structure erected on the premises").
9. *Doran v. Lewis*, 309 A.D.2d 1183, 764 N.Y.S.2d 899 (4th Dep't 2003) (holding that a variance to raze and reconstruct a garage on residential property to be taller than permitted in the city's code and to include a living quarters with a kitchen was a use variance, since detached structures including a kitchen were not a permitted use in the underling district).
10. *Colin Realty, Co., LLC*, 24 N.Y.3d at 112, 996 N.Y.S.3d at 568; *Mobil Oil Corp. v Vil. of Mamaroneck Bd. of Appeals*, 293 A.D.2d 679, 740 N.Y.S.2d 456 (2d Dep't 2002).
11. *Cohen, supra; Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 68 A.D.3d 62, 886 N.Y.S.2d 442 (2d Dep't 2009); *Mimassi v. Town of Whitestown Zoning Bd. of Appeals*, 124 A.D.3d 1329, 1330, 997 N.Y.S.2d 888, 889 (4th Dep't 2015) ("Here, respondent based its determination upon factors and other criteria relevant to the former 'practical difficulty' test, which is no longer followed, rather than on the factors set forth in Town Law §267–b (3) (b)" (citations omitted)).
12. Town Law §267-b(3); Village Law §7-712-b(3); General City Law §81-b(4).

13. *See, e.g.*, Town Law §267-b(2) (b) ("No such use variance shall be granted by a board of appeals without a showing *by the applicant* that the applicable zoning regulations and restrictions have caused an unnecessary hardship" (emphasis added)).

14. *Marina's Edge Owner's Corp. v. City of New Rochelle Zoning Bd. of Appeals*, 129 A.D.3d 841, 842-43, 11 N.Y.S.3d 232, 233 (2d Dep't 2015) (internal citation omitted); *Goldsmith v. Bishop*, 264 A.D.2d 775, 776, 695 N.Y.S.2d 381, 382 (2d Dep't 1999) ("Without any valid independent evidence to controvert the petitioner's evidence, the findings of the ZBA have no rational basis, are not supported by substantial evidence, and its determination is arbitrary and capricious"); *Campbell v. Town of Mount Pleasant Zoning Bd. of Appeals*, 84 A.D.3d 1230, 923 N.Y.S.2d 699 (2d Dep't 2011) (record lacked evidence to support denial); *Cacsire v. City of White Plains Zoning Bd. of Appeals*, 87 A.D.3d 1135, 930 N.Y.S.2d 54 (2d Dep't 2011).

15. *Gospel Faith Mission Intern., Inc. v. Weiss*, 112 A.D.3d 824, 825, 977 N.Y.S.2d 333,335 (2d Dep't 2013) ("'[W]hile religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made.'"… "'A local zoning board is required to suggest measures to accommodate the proposed religious use while mitigating adverse impacts'" (citations omitted)); *Capriola v. Wright*, 73 A.D.3d 1043, 900 N.Y.S.2d 754 (2d Dep't 2010); *Genesis Assembly of God v. Davies*, 208 A.D.2d 627, 617 N.Y.S.2d 202 (2d Dep't 1994).

16. *Pecoraro v. Bd. of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 781 N.Y.S.2d 234 (2004); *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98, 103 (2d Dep't 2005) (clarifying that since zoning boards are quasi-judicial and quasi-administrative in nature and their hearings are informal, determinations of such agencies are reviewed under the "arbitrary and capricious" standard of CPLR 7803(3), and not the "substantial evidence" standard of CPLR 7803); *Harris v. Zoning Bd. of Appeals of Town of Carmel*, 137 A.D.3d 1130, 1131, 27 N.Y.S.3d 660, 661 (2d Dep't 2016) ("a zoning board's determination should be sustained if it is not illegal, is not arbitrary and capricious, and has a rational basis").

17. *See, e.g., Marrov v. Libert*, 40 A.D.3d 1100, 836 N.Y.S.2d 691 (2d Dep't 2007); *Rosasco v. Vil. of Head of Harbor*, 52 A.D.3d 611, 859 N.Y.S.2d 731 (2d Dep't 2008); *Millpond Mgt., Inc. v. Town of Ulster Zoning Bd. of Appeals*, 42 A.D.3d 804, 839 N.Y.S.2d 355 (3d Dep't 2007).

18. *Knight v. Amelkin*, 68 N.Y.2d 975, 510 N.Y.S.2d 550 (1986); *Halperin, supra* note 16.

19. *Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 929, 841 N.Y.S.2d 650, 653 (2d Dep't 2007); *Halperin, supra* note 16.

20. *Merlotto*, 43 A.D.3d at 930, 841 N.Y.S.2d at 654 (holding that the lower court improperly considered photographs introduced by the petitioner in an Article 78 proceeding denying them an area variance because the photographs were not in the administrative record before the ZBA); *Kaufman v. Inc. Vil. of Kings Point*, 52 A.D.3d 604, 607, 860 N.Y.S.2d 573, 575 (2d Dep't 2008) ("A litigant is required to address his or her "complaints initially to administrative tribunals, rather than to the courts, and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts") (internal citations omitted); *Millpond Management Inc.*, A.D.3d at 805, 839 N.Y.S.2d at 356 (fn1: "We agree with Supreme Court's decision not to consider affidavits submitted by two of respondent's members to the extent that they addressed grounds beyond the one set forth in respondent's determination, as these post hoc rationalizations are not permitted.").

21. *Stein v. Bd. of Appeals of Town of Islip*, 100 A.D.2d 590, 473 N.Y.S.2d 535 (2d Dep't 1984).

22. *See* Town Law §267-a(7), Village Law §7-712-a(7) and General City Law §81-a(7) (zoning boards must hold a public hearing on a variance application).

23. *Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 536 (board improperly considered evidence submitted after the close of the public hearing); *Hampshire Mgt. Co. v. Nadel*, 241 A.D.2d 496, 497, 660 N.Y.S.2d 64, 65-66 (2d Dep't 1997) ("We note that while the Zoning Board, in making its determination, was permitted to consider, and properly disclosed its reliance upon, its members' personal knowledge and observations of the site…it should not have relied on and considered an unspecified newspaper article, which was published the day after the public hearings were closed in this matter, without affording the petitioner an opportunity to rebut the information contained therein") (citations omitted)); *Greenvale Civic Ass'n, Inc. v. Zoning Bd. of Appeals of Town of Oyster Bay*, 248 A.D.2d 714, 670 N.Y.S.2d 549 (2d Dep't 1998) (holding that the zoning board properly considered evidence submitted during a specified post-hearing comment period); *Sunset Sanitation Serv. Corp. v. Bd. of Zoning Appeals of Town of Smithtown*, 172 A.D.2d 755, 569 N.Y.S.2d 141 (2d Dep't 1991) (zoning board improperly considered planning department report after the close of the public hearing); *but see Applebaum v. Vil. of Great Neck Bd. of Appeals*, 138 A.D.3d 830, 28 N.Y.S.3d 459 (2d Dep't 2016) (permitting a zoning board of appeals to consider letters from the Village's fire and building departments, presumably after the close of the public hearing, even though an opponent did not get to respond to the letters because they did not contain any new factual allegations and were prepared by municipal officials without a vested interest in the outcome of the proceeding).

24. *Friedman v. Bd. of Appeals of Vil. of Quogue*, 84 A.D.3d 1083, 1085, 923 N.Y.S.2d 651, 653 (2d Dep't 2011) ("in making that determination, the personal observations of members of the Board may be considered"); *Sacher v. Vil. of Old Brookville*, 124 A.D.3d 902, 903, 3 N.Y.S.3d 69, 71 (2d Dep't 2015) ("making that determination, the personal observations of members of the zoning board may be considered").

25. *Stein*, 100 A.D.2d 590 at 591, 473 N.Y.S.2d at 536 ("A zoning board of appeals is not constrained by the rules of evidence and may conduct informal hearings…In addition, it may act of its own knowledge, so long as its return sets forth the facts known to its members but not otherwise disclosed…The findings of the board must disclose all evidence upon which it relied in reaching a decision") (citations omitted).

26. *Ifrah v. Utschig*, 98 N.Y.2d 304, 309, 746 N.Y.S.2d 667, 669 (2002); *Morando v. Town of Carmel Zoning Bd. of Appeals*, 81 A.D.3d 959, 960, 917 N.Y.S.2d 672 (2d Dep't 2011) ("In determining whether to grant an area variance, '[s]cientific or other expert testimony is not necessarily required; objections based upon facts may be sufficient'"); *Merlotto*, 43 A.D.3d at 929, 841 N.Y.S.2d at 653.

27. *See Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 196, 746 N.Y.S.2d 662, 666 (2002) ("expert opinion regarding traffic patterns, when presented, may not be disregarded in favor of generalized community opposition … However, where there are other grounds in the record on which to base denial, such as contrary expert opinion regarding traffic conditions, deference must be given to the discretion and commonsense judgments of the board."); *Jonas v. Stackler*, 95 A.D.3d 1325, 1328, 945 N.Y.S.2d 405, 408 (2d Dep't 2012); *White Castle System, Inc. v. Board of Zoning Appeals Town of Hempstead*, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159, 162 (2d Dep't 2012).

28. *See Greenfield v. Bd. of Appeals of Vil. of Massapequa Park*, 21 A.D.3d 556, 800 N.Y.S.2d 728 (2d Dep't 2005) (annulling board's denial of a variance because it was based on generalized community opposition).

29. *See Ifrah v. Utschig*, 98 N.Y.2d at 308, 746 N.Y.S.2d 669.

30. *Greenfield, supra* note 28; *Marina's Edge Owner's Corp.*, 129 A.D.3d at 841, 11 N.Y.S.3d at 233; s*ee Ramapo Pinnacle Properties, LLC v. Vil. of Airmont Planning Bd.*, 145 A.D.3d 729, 730–731, 45 N.Y.S.3d 105, 107 (2d Dep't 2016) ("'Although scientific or other expert testimony is not required in every case to support a zoning board's determination, the board may not base its decision on generalized community objections'… In contrast, a zoning board's reliance upon specific, detailed testimony of neighbors based on personal knowledge does not render a variance determination the product of generalized and conclusory community opposition") (internal citations omitted).

31. *Necker Pottick, Fox Run Woods Builders Corp. v. Duncan*, 251 A.D.2d 333, 335, 673 N.Y.S.2d 740, 741 (2d Dep't 1998); *Gonzalez v. Zoning Bd. of Appeals of Town of Putnam Valley*, 3 A.D.3d 496, 497–98, 771 N.Y.S.2d 142 (2d Dep't 2004) ("The generalized and unsubstantiated concerns of neighboring owners, upon which the Zoning Board based its determination, that the character of the neighborhood would be detrimentally changed if the petitioner's application for variances was granted, were unsupported by any empirical data or expert testimony and were insufficient to counter the evidence presented by the petitioner").

32. *See Caspian Realty, Inc.*, 68 A.D.3d at 70-71, 886 N.Y.S.2d at 449. One potential exception from the rule that only the five factors may be considered are variances pursuant Town Law §280-a. In such applications the board may also consider whether the applicant "has the lawful right to build or utilize a proposed access road." *Morando*, 81 A.D.3d at 960, 917 N.Y.S.2d at 674.

33. *Kaufman*, 52 A.D.3d at 608, 860 N.Y.S.2d at 556-557 ("since the record does not reflect that the BZA considered each of the five factors enumerated in the statute, based upon the evidence before it, its determination was properly annulled."); *Margaritis v. Zoning Bd. of Appeals of Inc. Vil. of Flower Hill*, 32 A.D.3d 855, 821 N.Y.S.2d 611 (2d Dep't 2006) (reversing grant of variance because board did not issue specific findings, nor did it correctly apply the standard); *Mimassi*, 124 A.D.3d at 1330, 997 N.Y.S.2d at 889; *Nye v. Zoning Bd. Of Appeals of Town of Grand Is.*, 81 A.D.3d 1455, 917 N.Y.S.2d 499 (4th Dep't 2011); *Hannett v. Scheyer*, 37 A.D.3d 603, 830 N.Y.S.2d 292 (2d Dep't 2007); *Josato, Inc. v. Wright*, 288 A.D.2d 384, 733 N.Y.S.2d 214 (2d Dep't 2001); *Miller v. Zoning Bd. of Appeals of Town of E. Hampton*, 276 A.D.2d 633, 714 N.Y.S.2d 908 (2d Dep't 2000); *Millpond Mgt., Inc.*, 42 A.D.3d at 805-806, 839 N.Y.S.2d 356-357 (3d Dep't 2007).

34. *Frank v. Zoning Bd. of Town of Yorktown*, 82 A.D.3d 764, 917 N.Y.S.2d 697 (2d Dep't 2011); *Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals*, 126 A.D.3d 1152, 6 N.Y.S.3d 171 (3d Dep't 2015); *Jonas*, 95 A.D.3d at 1328, 945 N.Y.S.2d at 408.

35. *Margaritis*, 32 A.D.3d at 856, 821 N.Y.S.2d at 613 (annulling a zoning board's determination because it "failed to issue specific findings or reasons that it relied upon in making its determination to grant the variance").

36. *Caspian Realty, Inc.*, 68 A.D.3d at 74, 886 N.Y.S.2d at 452 (holding that although the applicant's deceptive conduct could not be considered on its own, it was properly considered under the self-created hardship factor of the variance standard).

37. *Patrick v. Zoning Bd. of Appeals of Vil. of Russell Gardens*, 130 A.D.3d 741, 15 N.Y.S.3d 50 (2d Dep't 2015); *John Hatgis, LLC v. DeChance*, 126 A.D.3d 702, 5 N.Y.S.3d 236 (2d Dep't 2015); *Harris*, 137 A.D.2d at 1131, 27 N.Y.S.2d at 662.

38. *See Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, 21 Misc.3d 1120(A), 873 N.Y.S.2d 512 (Sup. Ct. Stuben Co. 2007), *affd*, 43 A.D.3d 1447, 843 N.Y.S.2d 744 (4th Dep't 2007) ("While no one factor is dispositive, the effect on the prevailing character of the neighborhood is a highly significant consideration in evaluating an area variance.").

39. Density and physical impacts: *Defreestville Area Neighborhood Ass'n, Inc. v. Planning Bd. of Town of N. Greenbush*, 16 A.D.3d 715, 790 N.Y.S.2d 737 (3d Dep't 2005) (zoning board properly considered all aspects of a proposed project, including density relative to density in the surrounding neighborhood, traffic impacts, the provision of recreation space and parking in its determination to grant the requested area variance); *Gonzalez*, 3 A.D.3d at 497, 771 N.Y.S.2d at 144("The record reveals the existence of several substandard lots adjacent to, or across the street from, the subject parcel, and other nearby nonconforming garages, similar to that sought to be erected by the petitioner, some of which were granted area variances from the street setback requirements of the relevant zoning ordinance."); *Crystal Pond Homes, Inc. v. Prior*, 305 A.D.2d 595, 759 N.Y.S.2d 366 (2d Dep't 2003); *Traendly v. Zoning Bd. of Appeals of Town of Southold*, 127 A.D.3d 1218, 1219, 7 N.Y.S.3d 544, 545-546 (2d Dep't 2015) (upholding board's determination to deny the requested variance because it would allow the applicant to create the most nonconforming lot in a unique community); *Kaiser v. Town of Islip Zoning Bd. of Appeals*, 74 A.D.3d 1203, 1205, 904 N.Y.S.2d 166, 168-169 (2d Dep't 2010) (upholding board's denial of a variance to permit the applicant to install an above-ground pool on its substandard lot finding that there were no swimming pools on substandard lots within 500 feet of the petitioners' property. Moreover, within the relevant community of approximately 300 homes, only two permanent above-ground pools were permitted by prior variances); *Allstate Properties, LLC v. Bd. of Zoning Appeals of Vil. of Hempstead*, 49 A.D.3d 636, 637, 856 N.Y.S.2d 130, 132 (2d Dep't 2008).

40. *Ifrah*, 98 N.Y.2d at 309, 746 N.Y.S.2d at 669-670 ("These undisputed facts, corroborated by the maps, support the concerns expressed to the Board that the variances would exacerbate the already difficult traffic and parking situation along Fenimore Drive, including blind turns and the difficulty snow plows have negotiating the narrow streets. Based upon this objective evidence, the Board could rationally conclude that the proposed subdivision would have substantial adverse impacts on the neighborhood."); *Rivero v. Voelker*, 38 A.D.3d 784, 785, 832 N.Y.S.2d 616, 617 (2d Dep't 2007) (upholding denial because grant of variance would exacerbate existing traffic and parking problems).

41. *Rosewood Home Builders, Inc. v. Zoning Bd. of Appeals of Town of Waterford*, 17 A.D.3d 962, 964, 794 N.Y.S.2d 152, 154 (3d Dep't 2005); *Ifrah*, 98 N.Y.2d at 308, 746 N.Y.S.2d at 669 ("Here, there was evidence of the distinctive neo-Tudor architectural style of the houses lining Fenimore Drive, popular when those homes were built more than 60 years ago, which would be disturbed by the addition of a modern home on the subdivision.").

42. *Isle Harbor Homeowners v. Town of Bolton Zoning Bd. of Appeals*, 16 A.D.3d 830, 831, 790 N.Y.S.2d 585, 586 (3d Dep't 2005) ("In denying petitioner's application, respondent reasoned that a metal dock would potentially create more noise than a wooden dock, that sunlight reflected off a metal dock would be a potential nuisance for petitioner's neighbors and that the physical appearance of a metal dock did not aesthetically conform with the surroundings.").

43. *Schumacher v. Town of E. Hampton, New York Zoning Bd. of Appeals*, 46 A.D.3d 691, 693, 849 N.Y.S.2d 72, 75 (2d Dep't 2007) ("by constructing a new home the petitioners would actually increase the distance between the wetlands and their residence"); *Friedman*, 84 A.D.3d at 1085, 923 N.Y.S.2d at 653.

44. *Daneri v. Zoning Bd. of Appeals of Town of Southold*, 98 A.D.3d 508, 949 N.Y.S.2d 180 (2d Dep't 2012); *Cassano v. Zoning Bd. of Appeals of Inc. Vil. of Bayville*, 263 A.D.2d 506, 693 N.Y.S.2d 621 (2d Dep't 1999); *Russia House at Kings Point, Inc. v. Zoning Bd.*

of Appeals of Vil. of Kings Point, 40 A.D.3d 767, 835 N.Y.S.2d 450 (2d Dep't 2007); *Suffern v. Zoning Bd. of Appeals of Town of Greenville*, 17 A.D.3d 373, 792 N.Y.S.2d 562 (2d Dep't 2005).

45. *Kaiser*, 74 A.D.3d at 1205, 904 N.Y.S.2d at 169.

46. *Knight*, 68 N.Y.2d at 975, 510 N.Y.S.2d at 550; *Pecoraro*, 2 N.Y.3d at 615, 781 N.Y.S.2d at 238 ("The Board was also entitled to consider that granting a variance for an illegally substandard parcel with 40 feet of frontage width could set a precedent within the neighborhood."); *Genser v. Bd. of Zoning and Appeals of Town of North Hempstead*, 65 A.D.3d 1144, 1147, 885 N.Y.S.2d 327, 330 (2d Dep't 2009); *Amdurer v. Vil. of New Hempstead Zoning Bd. of Appeals*, 146 A.D.3d 878, 879, 45 N.Y.S.3d 186, 187 (2d Dep't 2017) ("Here, the Zoning Board's failure to set forth a factual basis as to why it was departing from its prior precedent rendered its determination arbitrary and capricious."); *see Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 834 N.Y.S.2d 295 (2d Dep't 2007).

47. *Waidler v. Young*, 63 A.D.3d 953, 882 N.Y.S.2d 153 (2d Dep't 2009); *Todd Kramer v. Zoning Bd. of Appeals of Town of Southampton*, 131 A.D.3d 1170, 16 N.Y.S.3d 832 (2d Dep't 2015); *Blandeburgo v. Zoning Bd. of Appeals of Town of Islip*, 110 A.D.3d 876, 972 N.Y.S.2d 693 (2d Dep't 2013); *Monte Carlo 1, LLC v. Weiss*, 142 A.D.3d 1173, 1175, 38 N.Y.S.2d 228 (2d Dep't 2016).

48. *Pecoraro*, *supra* note 16; *Genser*, *supra* note 46; *Kearney v. Vil. of Cold Spring Zoning Bd. of Appeals*, 83 A.D.3d 711, 714, 920 N.Y.S.2d 379 (2d Dep't 2011).

49. *Russo v. City of Albany Zoning Bd.*, 78 A.D.3d 1277, 910 N.Y.S.2d 263 (3d Dep't 2010).

50. *Russo,* 78 A.D.3d at 1280, 910 N.Y.S.2d at 265-266.

51. *Id*.

52. *Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, 21 Misc.3d 1120(A), 873 N.Y.S.2d 512 (Sup. Ct. 2007), *affd,* 43 A.D.3d 1447, 843 N.Y.S.2d 744 (4th Dep't 2007).

53. *Id.*

54. *Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, 43 A.D.3d 1447, 1448, 843 N.Y.S.2d 744, 745 (4th Dep't 2007).

55. *Chandler Prop., Inc. v. Trotta*, 9 A.D.3d 408, 780 N.Y.S.2d 163 (2d Dep't 2004).

56. *Johnson v. Town of Queensbury Zoning Bd. of Appeals*, 8 A.D.3d 741, 777 N.Y.S.2d 562 (3d Dep't 2004) ("Although the record reflects that there were reasonable alternatives had the application been made preconstruction, it is significant that no alternatives or compromises have since been proposed by petitioners despite a request for a compromise from at least one member of respondent."); *see Friedman*, 84 A.D.3d at 1085, 923 N.Y.S.2d at 653(proposed alternative not feasible because it would impact views of neighboring property owners).

57. *Baker v. Brownlie*, 248 A.D.2d 527, 670 N.Y.S.2d 216, 218 (2d Dep't 1998).

58. *Id.* ("Moreover, even assuming that a concrete patio with removable supports and a cloth awning constitutes a building, the proposed patio will face the water and will have no genuinely detrimental impact upon neighboring parcels, several others of which have received variances for other recreational improvements. Furthermore, since the petitioners' desired benefit is to have a patio facing the water, the Board's finding that it could be located elsewhere on the petitioners' property is clearly erroneous.").

59. Town Law §267-b(3) (c); Village Law §7-712-b(3) (c); General City Law §81-b(4) (c).

60. *Braunstein v. Bd. of Zoning Appeals of Town of Copake*, 100 A.D.3d 1091, 1094, 952 N.Y.S.2d 857, 859 (3d Dep't 2012); *Merlotto*, 43 A.D.3d at 929-930, 841 N.Y.S.2d at 653; *Friedman*, 84 A.D.3d at 1085, 923 N.Y.S.2d at 653; *Jonas*, 95 A.D.3d 1325, 945 N.Y.S.2d 405 (upholding the granting of some but not all of the variances applied for).

61. *Rosasco v. Vil. Of Head of Harbor*, 52 A.D.3d at 611, 859 N.Y.S.2d at 732.

62. *Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, *supra* note 54

> (Looking at the variance request in such a vacuum is not an adequate indicator of the substantiality of Petitioner's application. Substantiality cannot be judged in the abstract; rather, the totality of relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one. *Aydelott v. Town of Bedford Zoning Board of Appeals,* 6/25/03 N.Y.L.J. 21 (col.4) (Supreme Court, Westchester Co., 2003). When reviewing the application in the context of the overall impact it would have on the neighborhood, it is clear that the variance request is not substantial, especially when considering that the structure will have the outside appearance of a two-story building. *Aydelott v. Town of Bedford Zoning Board of Appeals,* 6/25/03, N.Y.L.J. 21 (col.4); *Cortland LLC v. Zoning Board of Appeals, Village of Roslyn Estates,* 8/13/03 N.Y.L.J. 24 (col.1) (Supreme Court, Nassau Co., 2003)).

63. *Wambold v. Vil. of Southampton Zoning Bd. of Appeals*, 140 A.D.3d 891, 893, 32 N.Y.S.3d 628, 630 (2d Dep' 2016) ("While we agree with the petitioner that the proposed variance was substantial, there was no evidence that the granting of the variance would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community."); *Marina's Edge Owner's Corp.*, 129 A.D.3d at 843, 11 N.Y.S.3d at 843; *Borrok v. Town of Southampton*, 130 A.D.3d 1024, 1025, 14 N.Y.S.3d 471, 473 (2d Dep't 2015); *Goodman v. City of Long Beach*, 128 A.D.3d 1064, 1065, 10 N.Y.S.3d 302, 304 (2d Dep't 2015); *Friends of Shawangunks, Inc. v. Zoning Bd. of Appeals of Town of Gardiner*, 56 A.D.3d 883, 886, 867 N.Y.S.2d 238, 241 (3d Dep't 2008).

64. *L & M Graziose, LLP v. City of Glen Cove Zoning Bd. of Appeals*, 127 A.D.3d 863, 7 N.Y.S.3d 344 (2d Dep't 2015) (affirming the boards' finding that the variance was substantial, but reversing the denial of the variance on that basis because the granting of the variance would not cause any undesirable impacts); *Quintana v. Bd. of Zoning Appeals of Inc. Vil. of Muttontown*, 120 A.D.3d 1248, 992 N.Y.S.2d 332 (2d Dep't 2014) (reversed denial; even though the variance was substantial, there was no proof that it was detrimental to the character of the neighborhood); *Cacsire,* 87 A.D.3d at 1135, 930 N.Y.S.2d at 54; *Lodge Hotel, Inc.,* 43 A.D.3d at 1448, 843 N.Y.S.2d at 745; *Filipowski v. Zoning Bd. of Appeals of Vil. of Greenwood Lake*, 38 A.D.3d 545, 547, 832 N.Y.S.2d 578, 581 (2d Dep't 2007).

65. *Affordable Homes of Long Is., LLC v. Monteverde*, 128 A.D.3d 1060, 1062, 10 N.Y.S.3d 283, 284 (2d Dep't 2015) ("the BZA engaged in the required balancing test and considered the relevant statutory factors. In its written determination, the BZA concluded that the petitioner's need for variances was self-created, the requested 20% variance from the required minimum lot area was substantial, and the proposed variances would create a negative impact on the physical and environmental conditions of the neighborhood, which had existed in its present form for over 50 years"); *Millennium Custom Homes, Inc. v. Young*, 58 A.D.3d 740, 873 N.Y.S.2d 91 (2d Dep't 2009); *Nathan v. Zoning Bd. of Appeals of Vil. of Russell Gardens*, 95 A.D.3d 1018, 943 N.Y.S.2d 615 (2d Dep't 2012); *JSB Enterprises, LLC v. Wright*, 81 A.D.3d 955, 917 N.Y.S.2d 302 (2d Dep't 2011); *Mary T. Probst Family Trust v. Zoning Bd. of Appeals*

of Town of Horicon, 79 A.D.3d 1427, 913 N.Y.S.2d 813 (3d Dep't 2010); *Traendly,* 127 A.D.3d at 1218, 7 N.Y.S. at 546.

66. *See Waidler*, 63 A.D.3d at 954, 882 N.Y.S.2d at 153 (upholding grant of area variance to create substandard lots); *Saunter v. Amster*, 284 A.D.2d 540, 540, 728 N.Y.S.2d 54, 55-56 (2d Dep't 2009) (reversing denial of variance to create two substandard lots).

67. *Ifrah*, 98 N.Y.2d at 309, 746 N.Y.S.2d at 735 (upholding denial of area variance to create two substandard lots notwithstanding the fact that many of the surrounding lots in the neighborhood were substandard); *Gebbie v. Mammina,* 13 N.Y.3d 728, 885 N.Y.S.2d 450 (2009*); Rossney v. Zoning Bd. of Appeals of Inc. Vil. of Ossining*, 79 A.D.3d 894, 914 N.Y.S.2d 190 (2d Dep't 2010)*; Petikas v. Baranello*, 78 A.D.3d 713, 910 N.Y.S.2d 515 (2d Dep't 2010); *Grigoraki v. Bd. of Appeals of Town of Hempstead*, 52 A.D.3d 832, 860 N.Y.S.2d 216 (2d Dep't 2008); *Nathan,* 95 A.D.3d at 1019, 943 N.Y.S.2d at 618.

68. *See, e.g., Ifrah*, *supra* note 26*; Rossney, supra* note 67*; Petikas, supra* note 67.

69. *See, e.g., Wambold,* 140 A.D.3d at 893, 32 N.Y.S.3d at 630 ("In fact, as noted by the Zoning Board, the proposed variance would have a beneficial impact on the environment by eliminating wetlands set-back nonconformities and removing the existing septic system, which is located within the wetlands regulated area.").

70. SEQRA, collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617.

71. *Luburic v. Zoning Bd. of Appeals of Vil. of Irvington*, 106 A.D.3d 824, 826, 966 N.Y.S.2d 440, 442 (2d Dep't 2013).

72. *Id.*

73. *Compare Millpond Management Inc.*, A.D.3d at 805, 839 N.Y.S.2d at 356 (a self-created hardship does not preclude the granting of an area variance) *with Friends of Lake Mahopac v. Zoning Board of Appeals of the Town of Carmel*, 15 A.D.3d 401,790 N.Y.S.2d 470 (2d Dep't 2005) (annulling the grant of a use variance because the applicants acquired the property subject to the objectionable use regulations and thus the hardship was self-created, precluding the grant of a use variance).

74. Town Law §267-b(3) (b) (5); Village Law §7-712-b(3) (b) (5); General City Law §81-b(4) (b) (5); *Sasso*, 86 N.Y.2d at 385, 633 N.Y.S.2d at 260 ("Nevertheless, the statute expressly states that the fact that the applicant's difficulty was self-created does not necessarily preclude the granting of the area variance (Town Law § 267–b[3][b][5]).").

75. *Goodman,* 128 A.D.3d at 1065, 10 N.Y.S.3d at 304; *Gonzalez*, 3 A.D.3d at 497, 771 N.Y.S.2d at 144; *Daneri* 98 A.D.3d at 510, 949 N.Y.S.2d at 182.

76. *Inlet Homes Corp. v. Zoning Bd. of Appeals of Town of Hempstead*, 2 N.Y.3d 769, 770 (2004) ("the alleged difficulty here was self-created in that when purchasing the property, petitioner was aware that the Board had previously denied to the contract vendor an area variance for the same lot and under the same circumstances"); *Switzgable v. Bd. of Zoning Appeals of Town of Brookhaven*, 78 A.D.3d 842, 844–45 (2d Dep't 2010) (*Rosewood Home Builders, Inc.*, 173 A.D.3d at 963, 794 N.Y.S.2d at 153-154l; *Merlotto*, 43 A.D.3d at 929, 841 N.Y.S.2d at 653; *Sacher*, 124 A.D.3d at 904, 3 N.Y.S.2d at 70.

77. *Caspian Realty, Inc.,* 68 A.D.3d at 65, 886 N.Y.S.2d at 442.

78. *Caspian Realty, Inc.*, 68 A.D.3d at 65, 886 N.Y.S.2d at 444.

79. *Caspian Realty, Inc.,* 68 A.D.3d at 66, 886 N.Y.S.2d at 445.

80. *Caspian Realty, Inc.,* 68 A.D.3d at 66, 886 N.Y.S.2d at 446.

81. *Caspian Realty, Inc.*, 68 A.D.3d at 74, 886 N.Y.S.2d at 451.

82. *St. Onge v. Donovan*, 71 N.Y.2d 507, 515–517, 527 N.Y.S.2d 721, 725 (1988); *see also Baker v. Brownlie*, 270 A.D.2d 484, 485, 705 N.Y.S.2d 611, 613-614 (2d Dep't 2000).

83. *Voetsch v. Craven*, 48 A.D.3d 585, 852 N.Y.S.2d 225 (2d Dep't 2008) (affirming one condition to a variance and annulling another); *Zupa v. Zoning Bd. of Appeals of Town of Southold*, 31 A.D.3d 570, 817 N.Y.S.2d 672 (2d Dep't 2006) (affirming imposition of a condition); *Gentile v. Vil. Of Tuckahoe Zoning Bd. Of Appeals*, 87 A.D.3d 695, 929 N.Y.S.2d 167 (2d Dep't 2011) (invalidating a condition because record lacked proof that it would be feasible for the applicant to comply with it and it was therefore unreasonable); *Martin v. Brookhaven Zoning Bd. of Appeals*, 34 A.D.3d 811, 825 N.Y.S.2d 244 (2d Dep't 2006).

84. *See, e.g., Citrin v. Bd. of Zoning and Appeals of Town of N. Hempstead*, 143 A.D.3d 893, 895, 39 N.Y.S.3d 229, 230 (2d Dep't 2016) ("[I]f a zoning board imposes unreasonable or improper conditions, those conditions may be annulled although the variance is upheld"); *Baker*, 270 A.D.2d at 485, 705 N.Y.S.2d at 614.

85. *Sabatino v. Denison*, 203 A.D.2d 781, 783, 610 N.Y.S.2d 383, 385 (3d Dep't 1994) ("We disapprove of respondents' assumption that every item discussed at the public hearings on the application became an express condition of the approval. To the contrary, it was the Zoning Board's obligation to clearly state the conditions it required petitioners to adhere to in connection with the approval.'").

86. *Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 735 N.Y.S. 2d 873 (2001); *Jonas*, 95 A.D.3d at1327–1328, 945 N.Y.S.2d at 408 ("[W]hen a quorum of the board is present and participates in a vote on an application, a vote of less than a majority of the Board is deemed a denial"…That no factual findings were provided or articulated does not preclude judicial review. Where there is no formal statement of reasons for the rejection, "an examination of the entire record, including the transcript of the meeting at which the vote was taken along with affidavits submitted in the article 78 proceeding can provide a sufficient basis for determining whether the denial was arbitrary and capricious'") (citations omitted).

87. *Id.*

88. *Frank*, 82 A.D.3d at 764-765, 917 N.Y.S.2d at 699; *but see Barsic*, 22 AD3d at 489, 801 N.Y.S.2d at 831 (remitting a variance application to the board for a new determination because the board waited 27 months to file the decision in the town clerk's office and offered no explanation for the delay).

89. *420 Tenants Corp. v. EBM Long Beach, LLC*, 41 A.D.3d 641, 643, 838 N.Y.S.2d 649, 651 (2d Dep't 2007).

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Robocar Risks

By Michael Lewyn

Michael Lewyn

Google has been testing driverless cars since 2009, and other companies such as Tesla are following suit.[1] Waymo (a company affiliated with Google) is giving hundreds of Phoenix residents free access to autonomous vehicles (AVs) in order to learn what features customers prefer in such vehicles, as well as how customers would like to use them.[2] Similarly, in California there are 30 companies testing AVs.[3] Although Waymo will have a "safety driver" present to monitor rides,[4] fully autonomous vehicles will become more common over the next couple of decades. New York has historically required motorists to have at least one hand on a steering wheel at all times, thus effectively prohibiting AVs.[5] However, in 2017 the New York legislature approved legislation that will enable AV tests for one year, under direct supervision of the New York State Police.[6]

Many commentators view AVs as a public good; because most car crashes occur as a result of human error, the rise of AVs may make American roads far safer.[7] Thus, cities and states will be tempted to adopt a variety of rules in order to facilitate the growth of such vehicles, much as 20th century policymakers privileged automobile users over nondrivers.

This article focuses on one possible accommodation to AVs: the expansion and widening of streets and highways. In particular, the article shows how 20th century policymakers put cars first, and discusses the costs of these pro-car policies. The article then explains how policymakers might be tempted to adopt similar policies to facilitate the growth of AVs and discusses some of the possible costs of these options.

I. 20th Century Policies and Their Results

A. Highways

As early as the 1920s, states accommodated the growth of the automobile by adopting motor fuel taxes and earmarking the revenue from these taxes to fund highway construction.[8] In addition, states received highway grants from the federal government; after 1956, the federal government subsidized 90 percent of the cost of interstate highways, even though planning decisions were left to states.[9] Today, the federal government alone spends $45 billion per year on highways,[10] while state and local governments spend roughly $120 billion.[11]

By making suburbs more accessible, these highways facilitated post-World War II suburbanization.[12] Nathaniel Baum-Snow of Brown University has calculated that each new regional highway reduces central city population by about 18 percent,[13] and that had the interstate highway system not been built, American central city population would have grown by 8 percent since 1950 (rather than declining by 17 percent).[14] Consumer surveys also suggest that highways affect housing choices. A 2013 survey by the National Association of Realtors asked Americans about a variety of factors related to housing choices. Out of 19 factors listed, "easy access to the highway" was fourth: 67 percent said that this factor was either "very important" or "somewhat important."[15] Thus, highways clearly make suburbs more attractive to commuters.

And in older cities, such as New York and Buffalo, limited-access highways actually reduced the supply of urban housing because city neighborhoods were destroyed in order to build highways. During the 1950s and 1960s, millions of dwellings were destroyed to make room for highways and other "urban renewal" plans[16]—mostly in low-income and African-American urban neighborhoods.[17] For example, New York planners condemned large chunks of the South Bronx in order to make room for the Cross-Bronx Expressway.[18] Even the threat of a new highway was sometimes enough to destroy an urban neighborhood. In the 1960s, Buffalo planners debated a highway to be known as the West Side Arterial; if the highway had been built, it would have destroyed much of that city's Lower West Side.[19] Banks and insurance companies were unwilling to invest in a neighborhood slated for condemnation; as a result, homeowners left the neighborhood in large numbers.[20] The highway construction boom of the 20th century thus made suburbia more appealing in two ways: by making suburbia easier to get to *and* by reducing urban housing supply.

While government planners were using highways to build suburbs, they often failed to expand public transit in those suburbs; as a result, many highway-created suburbs have minimal or nonexistent public transit.[21] Thus, American suburbs tend to be highly automobile-dependent.

B. Streets

While government was building new highways, it was also widening existing streets in order to facilitate fast driving.[22] In the 1950s, the American Association of State Highway and Transportation Officials recommended that major streets have six to eight 12-foot lanes,[23] and some municipalities followed this recom-

mendation. For example, in Tuscon, Arizona, major "collector" streets must be 90-120 feet wide, and "arterial" streets (the most heavily traveled streets other than limited-access highways) must be six lanes and 150 feet wide.[24] In addition, minor streets have become wider as well: for example, the Federal Housing Administration recommended residential streets with 24 feet of pavement in 1936,[25] while 1950s local regulations often mandated 36-40 foot streets.[26] Municipalities have also subtly widened streets by expanding curb radii—that is, by curving intersections to allow cars to turn corners without slowing down.[27] For example, 1920s streets often ended blocks at right angles, while some modern suburbs require 30-50 foot radii.[28]

These reforms have undoubtedly allowed cars to travel faster, but at a cost to pedestrians: the wider the street, the longer it takes for pedestrians to cross the street. And the more seconds pedestrians spend crossing a street, the more seconds they spend being exposed to automobile traffic. Supersized streets also endanger walkers less directly, by encouraging motorists to drive more rapidly. High-speed auto traffic increases the likelihood of serious walker-driver collisions,[29] for three reasons. First, the fastest drivers have the narrowest field of vision, and are thus least likely to notice pedestrians or other road users: a motorist driving 30 miles an hour has a 150-degree field, while one driving 60 miles per hour has only a 50-degree field.[30] Second, the fastest drivers, even if they notice a pedestrian, are unlikely to be able to stop in time to avoid a crash. A motorist who is driving 20 miles per hour will be able to stop 40 feet after seeing a pedestrian, while one who is driving 40 miles per hour will not be able to stop until after he has driven 120 more feet.[31] Third, should a crash occur, the fastest drivers are more likely to kill a pedestrian than slower drivers. A pedestrian has a 5 percent chance of death if she is hit by a car traveling 20 miles per hour and a 90 percent chance of death if she is hit by a car traveling 40 miles per hour.[32]

C. Side Effects

The street and highway policies of the 20th century have caused millions of Americans to move to suburbs and have made both cities and suburbs more oriented towards automobiles rather than pedestrians.

The automobile-dependent nature of American streets and suburbs has had a variety of side effects. First, the poor are especially disadvantaged by car-dependent development because people too poor to afford cars are more likely to be shut out of labor markets. Even poor people who are able to drive to suburban jobs suffer from having to drive to work because people who live or work in automobile-dependent suburbs have higher transportation costs than residents of cities with plentiful public transit. For example, in Manhattan and Brooklyn, transportation costs are less than 10 percent of household income, while residents of suburban Suffolk County pay 21 percent of their income for transportation.[33] Similarly, households in the city of Atlanta pay 14 percent of household income for transportation, while households in suburban Cherokee County pay 25 percent.[34]

Second, automobile-dependent development may make Americans less fit by reducing their chances for physical exercise. If people must drive to every conceivable destination, they obviously will walk less and engage in less physical activity, all else being equal. And in fact, some studies suggest that people living in less walkable areas are more likely to be obese and to suffer from diabetes and other obesity-related diseases.[35] For example, one study created a "walkability index" (measuring the distance of churches, schools, and entertainment from neighborhoods studied)[36]and found that a "1 percent increase in the walkability index of a neighborhood is associated with a 50 percent reduction in the likelihood that it will belong to a high disease as opposed to a low disease cluster for obesity…49 percent lower likelihood for diabetes, 39 percent lower likelihood for hypertension, and 40 percent lower likelihood for heart disease."[37]

Third, automobile-dependent development may increase pollution. As Americans have moved to automobile-dependent suburbs, automobile travel exploded.[38] Other things being equal, more auto travel means more greenhouse gas emissions and other forms of pollution. A study by Harvard economist Edward Glaeser and UCLA economist Matthew Kahn found in every single one of 66 cities surveyed, transportation-related carbon dioxide emissions (including both emissions from automobiles *and* emissions from transit) were higher in suburbs than in cities. For example, in New York, the city's per-household transportation emissions were 3,783 pounds fewer than those of the suburbs.[39] Similarly, automobile-dependent cities tend to have higher emissions than other cities: Glaeser and Kahn found that among the six regions surveyed where 1 percent or fewer of commuters used public transit,[40] all had automobile-related carbon dioxide emissions higher than the national median.[41]

The growth of suburbia also created environmental costs unrelated to air pollution. For example, as farmland and forests are turned into suburbia, wetlands are destroyed to create suburban houses and businesses. Suburbanization causes 51 percent of wetland losses in the United States.[42] Wetlands mitigate flooding and make water less polluted; thus, filling in wetlands may increase flooding and water pollution.[43] Because wetlands include 50 percent of the animals and 33 percent of the plant species listed as endangered or threatened by the U.S. government,[44] wetland destruction endangers these species by reducing wildlife habitat.

In addition, suburban growth may affect water quality. Rain falling on land is usually absorbed into the ground.[45] By contrast, parking lots and roadways are "impervious"—that is, rain falling on such surfaces does not stay on the ground.[46] Instead, the rain runs off into rivers and streams, causing rubbish from impervious surfaces to flow into those waters,[47] thus increasing bacterial contamination of water and other forms of pollution.[48] A one-inch rainstorm on a meadow creates 218 cubic feet of runoff, while the same amount of runoff on a one-acre impervious surface creates 3450 cubic feet of runoff.[49] It logically follows that by increasing the number of parking lots, roads and other impervious surfaces in a region, suburbanization increases the amount of runoff.

On the other hand, it could be argued that suburbanization and highway-building reduced traffic congestion. But if this argument was fully persuasive, traffic congestion and its negative side effects would have decreased as low-density suburbia grew. Between 1982 and 2015, however, the amount of fuel wasted due to American traffic congestion grew six-fold.[50] Moreover, congestion increased not only in growing regions, but in rapidly suburbanizing areas. For example:

- Detroit lost over 40 percent of its central city population between 1980 and 2014,[51] yet the amount of fuel per auto commuter lost to regional traffic congestion nearly doubled.[52]
- Similarly, St. Louis lost 30 percent of its central city population between 1980 and 2014,[53]but the amount of fuel lost per driver quadrupled.[54]

II. Conclusion: 21st Century Policy

How is the growth of suburbia relevant to 21st century AV policy? Because 21st century policymakers might adopt the same policies as 20th century policymakers. In particular, 21st century policymakers might look at the growth of the AV industry and reason as follows: AVs will make driving more convenient, causing rising demand for vehicle use. To accommodate this rising demand, government should build highways and widen streets in order to prevent traffic congestion. But the experience of 20th century America shows that this reasoning is likely to be a self-fulfilling prophecy: new highways will make driving even easier, causing demand for vehicle use to rise even more, thus offsetting reduced congestion from expanded highway capacity.

Moreover, new highways and wider streets might create the same side effects as 20th century streets: if these policies encourage people and jobs to move to automobile-dependent suburbs, the carless poor might be shut out of labor markets, and those who can barely afford cars might suffer financially from the costs of car ownership. Moreover, the impacts of AVs on exercise and pollution might be similar to those of traditional automobiles Thus, the rise of AVs need not support 20th century policies of new highways and wider streets.

Endnotes

1. *See* Chasel Lee, *Grabbing the Wheel Early: Moving Forward on Cybersecurity and Privacy Protections for Driverless Cars*, 69 Fed. Comm. L.J. 25, 27-28 (2017).
2. *See* Michael Laris and Steven Overly, *Waymo is giving hundreds of people access to their own self-driving cars*, Washington Post, April 25, 2017, at https://www.washingtonpost.com/news/dr-gridlock/wp/2017/04/25/googles-waymo-offers-everyday-access-to-self-driving-cars-for-select-families/?utm_term=.0e0e3ccc2d58.
3. *See* Joel Stashenko, *Autonomous Vehicle Technology Gets Green Light in NY*, New York Law Journal, April 24, 2017, at http://www.newyorklawjournal.com/id=1202784441323/Autonomous-Vehicle-Testing-Gets-Green-Light-in-NY.
4. *See* Laris and Overly, *supra* note 2.
5. *See* N.Y. Vehicle & Traffic Law sec. 1226.
6. *See* Stashenko, *supra* note 3.
7. *See* Andrew R. Swanon, *"Somebody Grab the Wheel!": State Autonomous Vehicle Legislation and the Road to a National Regime*, 97 Marq. L Rev. 1085, 1088-89 (2017).
8. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 380 n. 149 (1990).
9. *See* Benjamin K. Olson, *The Transportation Equity Act for the 21st Century: the Failure of Metropolitan Planning Organizations to Reform Federal Transportation Policy in Metropolitan Areas*, 28 Transp. L. J. 147, 151 (2000).
10. *See* Office of Management and Budget, *Fiscal Year 2016 Historical Tables: Budget of the United States Government, Table 9.6*, at https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/hist.pdf.
11. *See* Congressional Budget Office, *Public Spending on Transportation and Water Infrastructure, 1956 to 2014*, at 8, at https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49910-Infrastructure.pdf (total government highway spending is $165 billion; thus, if federal government spends $40 billion per year, state and local spending is $125 billion).
12. *See* Olson, *supra* note 9, at 151.
13. *See* Nathaniel Baum-Snow, *Did Highways Cause Suburbanization*?, 122 Quarterly J. Econ. 775, 776 (2007) Baum-Snow.
14. *Id. See also* Nathaniel Baum-Snow, *Reply to Cox, Gordon and Redfearn's Comment on "Did Highways Cause Suburbanization?"*, Econ J. Watch 5(1) 46 (2008) (responding to critique of article).
15. National Association of Realtors and American Strategies, *National Community Preference Survey October 2013, Slide 35*, at http://www.realtor.org/sites/default/files/reports/2013/2013-community-preference-analysis-slides.pdf.
16. *See* Bernadette Hanlon Et. Al., Cities and Suburbs: New Metropolitan Realities in the United States 40-42 (2010) (330,000 housing units demolished to make room for highway construction; in addition, two million people were displaced to make room for federally funded public housing).
17. *Id.* at 40.
18. *See* Bekah Mandell, *Racial Reification and Global Warming: A Truly Inconvenient Truth*, 28 B.C. third world l.j. 289, 325 (2008).
19. *See* Mark Goldman, City on the Lake 31-33 (1990).
20. *Id*. at 33 (between 1960 and 1973, attendance at one neighborhood church decreased from 1900 families to 500).

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21. *See* Adie Tomer et. al, *Missed Opportunity: Transit and Jobs in Metropolitan America* 9, 12, 17, at https://www.brookings.edu/wp-content/uploads/2016/06/0512_jobs_transit.pdf (suburbanites less likely to be near frequent transit service; as a result, suburbanites can reach fewer jobs by transit than city residents).
22. See Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. Envtl. L.J. 691, 701 (1996) (traffic engineers build wide streets out of "solicitude towards fast traffic").
23. Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 Ala. L. Rev. 257, 265 (2006).
24. *See* Emily Talen, City Rules: How Regulations Affect Urban Form 162 (2012).
25. *See* Michael Southworth and Eran Ben-Joseph, *Street Standards and the Shaping of Suburbia*, 61 Journal of the American Planning Association 65, 74 (1995), at http://web.mit.edu/ebj/www/doc/JAPAv61n1.pdf.
26. *Id.* at 77 (citing homebuilders' publication criticizing local insistence on such street widths).
27. *See* Talen, *supra* note 24, at 164, 276.
28. *Id.* at 168-69.
29. As well as other types of collisions. *See* Peter Swift, *Residential Street Typology and Injury Accident Frequency*, at www.sierraclub.org/sprawl/articles/narrow.asp (in one community studied, "a typical 36 foot wide residential street has 1.21 [accidents per mile per year] as opposed to 0.32 for a 24 foot wide street").
30. *See* Burrington, *supra* note 22, at 704 n. 50.
31. *See* Joey Ledford, Speeding Cars Terrify Neighborhoods, Atl. J. and Const., Aug. 27, 1997, at B, 1997 WLNR 3173969 ("At 20 mph, it takes you 20 feet to react [to a pedestrian or vehicle in the street] and another 20 feet to stop. At 40 mph, it's 40 feet to think and another 80 feet to stop.").
32. *Id.*
33. Data are from the Center for Neighborhood Technology, *H & T Fact Sheet*, http://htaindex.cnt.org/fact-sheets/. For information on each city or county, place the city's name in the search engine.
34. *Id.*
35. *See*, *e.g.*, Vanessa Russell-Evans & Carl S. Hacker, *Expanding Waistlines and Expanding Cities: How the Adoption of Smart Growth Statutes Can Help Build Healthier and More Active Communities*, 29 VA. Envtl. L.J. 63, 75-88 (2011); Falk Muller-Riemenschneider et al., Neighborhood Walkability and Cardiometabolic Risk Factors in Australian Adults, 13 BMC Pub. Health 755 (2013), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3844350/; Vasudha Lathey et al., *The Impact of Subregional Variations in Urban Sprawl on the Prevalence of Obesity and Related Morbidity*, 29 J. Planning Education & Research 127, 137, 139-41 (2009) http://jpe.sagepub.com/content/29/2/127.full.pdf+html (finding that "walkability … is the strongest predictor of disease prevalence" and citing numerous other studies).
36. *Id.* at 132.
37. *Id.* at 134.
38. *See* U.S. Environmental Protection Agency, *Our Built and Natural Environments: A Technical Review of the Interactions Among Land Use, Transportation, and Environmental Quality* 26 (2d ed. 2013), http://www2.epa.gov/sites/production/files/2014-03/documents/our-built-and-natural-environments.pdf ("While the population roughly doubled between 1950 and 2011… vehicle travel during this same period increased nearly sixfold") ("Built and Natural").
39. *See* Edward L. Glaeser and Matthew Kahn, *The Greenness of Cities*, http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/working_papers/glaeser_08_greencities.pdf.
40. *See* Wendell Cox, *Major Metropolitan Commuting Trends: 2000-2010, available at* http://www.newgeography.com/content/002500-major-metropolitan-commuting-trends-2000-2010 (listing Memphis, Raleigh, Birmingham, Nashville, Oklahoma City and Indianapolis as regions with transit shares of 1 percent or lower). Cox's tables also mention that only 1 percent of Jacksonville commuters used transit to get to work. *Id.* However, Glaeser and Kahn did not include emissions date for that region.
41. *See* Glaeser & Kahn, *supra* note 39, at 41. The lowest-emission region of this group, Memphis, produced more automobile-related emissions (28,440 pounds of carbon dioxide per household) than all but 16 of the 66 areas surveyed. The other five were Raleigh (29,922), Indianapolis (29,222), Birmingham (30,041), Nashville (30,495) and Oklahoma City (28,953). Glaeser and Kahn did not include statistics for Jacksonville, a seventh major metropolitan area where only 1 percent of commuters used transit to get to work. *See* Cox, *supra* note 40.
42. *See* Oliver Gillham, the Limitless City 90 (2002).
43. *See* Built and Natural, *supra* note 38, at 36.
44. *See* Gillham, *supra* note 42, at 90.
45. *Id*.
46. *Id.* at 115 (describing runoff as "rainfall or snowmelt moving over and through the ground [that] can carry pollutants").
47. *See* Douglas A. Mittenberger, *Development on the Banks of the Letort Spring Run: What Can Be Done to Save Pennsylvania's Waterways from Post Construction Stormwater Runoff*?, 11 Penn St. Envtl. L. Rev. 127, 127 (2002).
48. *Id.* at 128 ("Studies of pollution in urban stormwater runoff, conducted by the United States Environmental Protection Agency (EPA) and others, have consistently identified stormwater runoff as one of the nation's largest remaining sources of water impairment."), *id* at130 ("untreated stormwater runoff transports 40 to 80 percent of nutrient pollution into receiving waters, and bacterial contamination may be 10 to 100 percent greater in concentration than acceptable safe drinking water levels.").
49. *Id.* at 129.
50. *See* David Schrank et. al., *2015 Urban Mobility Scorecard* 2, at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/mobility-scorecard-2015.pdf. The only period during which fuel loss due to congestion decreased was between 2006 and 2009, presumably due to the American economic downturn during that period.
51. *See* Sarah Janssen, Ed., the World Almanac and Book of Facts 2016, at 614 (decrease from over 1.2 million in 1980 to just under 700,000).
52. *See* Texas Transportation Institute, *Performance Measure Summary-Detroit MI*, at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/ums/congestion-data/detroit.pdf (fuel losses per auto commuter increased from 14 in 1982 to 25 in 2014).
53. *See* Jannsen, *supra* note 51, at 614 (decrease from over 450,000 million in 1980 to just over 317,000).
54. *See* Texas Transportation Institute, *Performance Measure Summary-St. Louis, MO* at http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/ums/congestion-data/st-louis.pdf (fuel losses increased from 5 gallons per driver in 1982 to 21 in 2014).

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Litigation, Then Regulations: What Procedures Should School Districts Follow When a Student Is to Be Interviewed About Possible Abuse or Mistreatment?

By Adam Kleinberg

Introduction

Adam Kleinberg

The following scenario is familiar to school officials, social workers, and police officers who work with them: a report is made that a child enrolled in the school is being abused or mistreated by a parent. On the one hand, concern for the child's welfare suggests that the child should be interviewed without the child's parents present. On the other hand, the involvement of a number of state officials—from the school, social services agencies, and police—may result in an encounter that raises constitutional issues and possibly exposure to civil liability if the report turns out to be unfounded.

In May 2016, the New York State Social Services Commissioner announced emergency regulations to address concerns that school districts could face liability by permitting Child Protective Services (CPS) to interview students without parental consent or a court order. This was a direct response to an August 2015 decision issued in the U.S. District Court for the Southern District of New York. The regulations were adopted and became effective in November 2016.

Prior to the enactment of the regulations in 2016, school districts were left on their own to interpret the requirements of New York Social Services Law § 425(1). This statute provides that agencies must provide "such assistance and data as will enable…local child protective services to fulfill their responsibilities properly." Whether that mandatory assistance meant providing unrestricted access to interview children in school was an open question.

This article provides the background leading to the regulations adopted in 2016. It describes in detail the litigation of the case preceding the regulations, in which a number of state officials and entities were sued by the parents of a child who was interviewed at school by a social worker and a police officer without parental notice or consent. The article will describe in detail the underlying events that led to the child's parents bringing a lawsuit. It then will discuss the claims made in the parents' lawsuit and the trial court's rulings on dispositive motions filed by the defendants. This discussion draws heavily on the judicial decisions made during the case—one on defendants' motions to dismiss, the other on the parties' motions for summary judgment. Ultimately the case was resolved through a confidential settlement.

The article then summarizes the clarification provided to school district officials in regulations enacted after the case was resolved and concludes with a discussion of what effect these regulations may have on municipalities participating in a Multi-Disciplinary Child Protective Services team.

The Statewide Central Register of Child Abuse and Maltreatment

The New York State Office of Children and Family Services maintains a hotline and reporting system that transmits reports of child abuse to local CPS units.[1] The system is called the Statewide Central Register of Child Abuse and Maltreatment (SCR). When SCR receives a report of abuse, a Statewide CPS specialist evaluates whether there is reasonable cause to suspect the child has been abused or maltreated, or is in imminent danger of abuse or maltreatment, because a person legally responsible for the child is failing to follow a minimum standard of care.

The Statewide specialist makes an informed decision on whether reasonable cause exists before registering a report to be investigated by a local CPS unit. Statewide specialists are trained that reasonable cause is what a reasonable person would conclude to be occurring based on the circumstances presented on the call.

Certainty of proof is not required to accept a report. SCR determines only whether the allegations, if true, constitute a valid report. It is the local CPS unit's responsibility to determine whether there is any credible evidence to support the report. When SCR determines there is reasonable cause to suspect abuse or maltreatment, it simply registers a report and transmits it to the local CPS for investigation.

The Pastor's Report

On November 3, 2009, a pastor contacted SCR to report concerns about the suspected sexual abuse of TCP, then a kindergarten student in the Goshen Central School District ("District"), a public school district in Orange County, NY.[2] The pastor told SCR that none of the information was from her own direct observa-

tion, but rather from a close family friend.[3] The pastor reported the belief that TCP's father, SP, was sexually abusing TCP and that TCP's mother, MC, was aware but doing nothing about it.[4] SCR determined the report constituted reasonable cause to suspect that TCP was being sexually abused.[5]

Within an hour, SCR transmitted the report to Orange County (the "County") for further investigation.[6] The report stated that the parents had nude pictures of TCP on their refrigerator, which they considered "art."[7] The report stated SP talked about TCP's body inappropriately and referred to her as having a "sweet ass."[8] The report stated SP slept in a bed with TCP and that MC slept in a bed with their other daughter.[9] The report stated that the concerns of abuse had been going on for three months.[10] The report stated that close friends of the family witnessed specifics and confronted the family.[11]

Referral to the Multi-Disciplinary Team

Because the report involved sexual abuse by a person legally responsible for the child, the Statewide CPS specialist transmitted the report to the Orange County Child Abuse Investigation Unit Multi-Disciplinary Team (MDT) for follow up.[12] The MDT consists of both CPS caseworkers and law enforcement officers.[13] The members of the MDT work as a team to investigate and make a determination on suspected abuse.[14]

The CPS caseworker's role is to investigate the child protective components of the report.[15] The law enforcement member's role is to determine whether there is conduct rising to the level of a crime.[16]

The MDT adheres to the guidelines in the Orange County Child Abuse Investigation Protocol ("MDT Protocol"). The MDT Protocol is a series of guidelines and options on how to investigate. The MDT also looks to the New York State Office of Children and Family Services Program Manual ("CPS Program Manual") for guidance. The CPS Program Manual requires a CPS unit to commence an investigation within 24 hours of receiving an SCR report.

The MDT Protocol provides that the safety of the child is the primary factor in determining how soon to interview a possible child victim. The factors to be considered in this determination include the relationship of the perpetrator to the child, the nature of the sexual contact alleged in the report, and the willingness of the non-offending parent to protect the child from further abuse. The MDT Protocol states that schools are a commonly utilized location for victim interviews and "often the only option in cases [that] require an immediate response and risk assessment."[17]

The MDT Protocol does not address interviewing alleged child abuse victims without: (1) prior parental notice or consent; (2) having a determination of reasonable cause to suspect abuse; or (3) a court order.

The Village's Provision of a Police Officer

Since 2002, the Village of Goshen (the "Village") has provided a police officer of patrolman rank to the MDT.[18] The county reimburses the Village for the salary and benefits of the assigned officer. While on the MDT, Police Officer Andrew Scolza was issued a county business card listing his title as Investigator, a County Department of Social Services identification card, a cross-designation card from the New York State Police, and an identity card from the County Sheriff's Department. Officer Scolza wore plain clothes while working for the MDT.[19]

District Policies Regarding MDT Investigations

There was no written agreement between the MDT and the District regarding allowing investigators into schools to interview children without parental notice or consent. For the safety of the children, the District had permitted CPS to conduct in-school interviews of students. A parent could put a notice in his or her child's file prohibiting interviews by CPS absent prior notification.

The District required that CPS teams that come to school to interview students present identification. CPS members could then interview students, but a District social worker, psychologist, principal, or nurse had to sit in on the interviews. The District believed it was prohibited from notifying parents that a child would be interviewed in school. The District believed that, by law, it had to allow CPS to interview children in school.

The MDT Investigation Protocol

The MDT must perform a safety assessment by contacting the child and/or the family, or the source of the report, within 24 hours of receipt of the report from SCR. The child victim is typically interviewed first to assess his or her safety. The child victim identified in a report is always interviewed if the child is verbal and able to be interviewed.

CPS determines whether the child is in imminent danger of harm by considering the age, severity of the abuse alleged in the report, nature of the allegations, and information obtained from the source. Sexual abuse may create an imminent danger depending on the facts and circumstances. The foremost priority of the MDT is the safety of the child. Both CPS and law enforcement members of the team interview the child together.

Sometimes the MDT conducts interviews of children with notice and the consent of one or both parents. If the parent is the target of the investigation, the MDT will attempt to interview the child victim first at school, before notifying the alleged perpetrators.[20] This is done for the safety of the child, as the child will return home to the alleged perpetrator after school is over. The basis for not notifying the suspect-parent(s) ahead of time is to prevent the parent(s) from influencing, coaching, or threatening the child. This practice is advantageous in assessing a child's safety, free from possible threats and intimidation by the parents who are considered suspects.

The CPS Program Manual recommends interviewing children, if possible, outside of the presence of the subjects of a report, as it assists in evaluating the safety of the child, determining whether the child is in imminent danger, providing first-hand information about the validity of the report, and assessing risk of future abuse. Interviewing the child first, without notifying the parents, allows the MDT to make a good assessment of the allegations and the safety of the child.

The CPS Program Manual specifically stated that nothing in law prevented CPS from speaking with the child prior to notifying the parents or without their permission. The location of the interview of a child can vary on a case-by-case basis, factoring in the current location of the victim in relation to the location of the alleged suspects.

The interview is conducted at the best possible location for the child and based on the specifics of that case, the least impact to the child, and the best possible interview for the child. The CPS Program Manual provides that a school may be an appropriate location in cases with allegations of sexual abuse. To set up the interview, the caseworker contacts the school district where the child is a student to find out information about which school the child attends in the district.

Once the MDT members arrive at the school, they present county identification to school personnel. The law enforcement team member accompanies the CPS caseworker during the interviews of child victims. The law enforcement member's police equipment is not visible to the child during the interview.

If the child reveals sexual abuse during the interview, the law enforcement member can take the child's written statement. If the alleged perpetrator is a biological parent, the MDT must act to alleviate that immediate threat.

After the child interview, the MDT members interview the parents or guardians of the alleged victim. The parent interview typically is conducted at a CPS office. The MDT cannot require the parents to participate in the interview; that is, a parent can refuse to be interviewed.

CPS can deem reports "indicated" or "unfounded." To deem a report "indicated" requires some credible evidence of abuse.

The November 4, 2009 Interview of TCP

In November 2009, Officer Scolza worked exclusively as an investigator for the MDT.[21] Jamie Scali-Decker was a CPS caseworker on the investigative team.[22]

An MDT supervisor had felt that because the father was the alleged perpetrator, and the mother allegedly knew and did nothing, it was best practice to interview the child alone at school to gauge the situation. There was a safety concern for TCP because the SCR report made allegations of ongoing sexual abuse. Neither Scali-Decker nor Scolza notified the parents, MC or SP, of the planned interview of TCP, as they were the subjects of the report of sexual abuse.

On November 4, 2009, Scali-Decker and Scolza arrived at the main office of a district elementary school. Scolza and Scali-Decker identified themselves as members of the County Department of Social Services. Scali-Decker told school staff they were from CPS and that they needed to speak with TCP. Scali-Decker did not reveal the nature of the allegations to any school employees. The front office personnel asked to see Scolza's and Scali-Decker's identification, which they both produced.

Scali-Decker and Scolza were met by Mary Kay Jankowski, a district social worker. Jankowski took them to the vice principal's office where they waited while Jankowski retrieved TCP from the lunchroom.

Jankowski's practice is to tell the child there are people at the school to talk to them, that the child is not in trouble, and that it is okay to talk to them.[23] Jankowski took TCP into the vice principal's office where Scali-Decker and Scolza were waiting.[24]

The office has two doors with access to the hallway and the inner office. The doors were not locked. There was a desk in the room, but nobody was sitting behind it. There were child-sized chairs in the room and toys. Scali-Decker was sitting in a chair next to the desk and Scolza sat behind her. When TCP entered the room she felt "normal." No one told TCP to sit down.

Both Scali-Decker and Scolza introduced themselves by their first names. Scali-Decker told TCP they were there to discuss safety. TCP never asked to leave the room and did not want to leave the room.

Jankowski was present for the entire interview but did not ask any questions. The interview lasted 15 to

20 minutes. Scolza did not speak at the interview, as Scali-Decker asked all questions of TCP. At the time of the interview, neither Scolza nor Scali-Decker knew the report of child abuse to SCR to have been false.

Scali-Decker asked TCP several questions to determine her safety and perception of her safety, including relationships between people in the home, sleeping arrangements, the presence of domestic violence, drug or alcohol use in the home, discipline, bathing, and the difference between a "good touch" and a "bad touch."[25] TCP did not appear to be uncomfortable with any of the questions or the questioning process.[26] TCP was cooperative and answered the questions.[27] TCP did not ask Scolza or Scali-Decker any questions and was not scared of Scali-Decker or Scolza. After the interview was over, TCP went back to the cafeteria.

Jankowski asked whether Scali-Decker or Scolza would be in touch with the parents, who said they would. Jankowski provided contact information for TCP's parents. The interview of TCP revealed no evidence of child abuse or child sexual abuse.

November 4, 2009 Contact With the Parents

Later on November 4, 2009, Scali-Decker went to the parents' home to speak with them. Scali-Decker left a note on the door asking the parents of TCP to contact her. The parents first learned that TCP had contact with CPS that day after seeing the note on the door.

Scali-Decker spoke to SP over the phone and reported there were allegations against SP regarding his daughter. Scali-Decker did not go into detail about the allegations, but mentioned there was an allegation of inappropriate pictures on his refrigerator. Scali-Decker told SP that he and his wife must meet with her.

SP told Scali-Decker he could be at Scali-Decker's office in five minutes to meet, but Scali-Decker was not available at that time. SP agreed to meet with Scali-Decker at 9:00 a.m. the following day. Scali-Decker told SP that the allegations involved inappropriate pictures on the refrigerator and it was protocol to only discuss the allegations with law enforcement present. Scali-Decker would not reveal the name of the person who reported the allegations.

November 5, 2009 Call Between Scali-Decker and Falletta

On the morning of November 5, 2009, Scali-Decker spoke with a woman named Theresa Falletta about the allegations against the parents of TCP. Falletta revealed that she was the source of the information behind the pastor's report to SCR.[28]

Falletta told Scali-Decker that SP had commented about people believing he was a sexual predator and that he "puts it out there" as a joke.[29] Falletta told Scali-Decker she had concerns about SP's behavior and some of the vulgar and inappropriate comments he made in the presence of other adults.[30] Falletta described pictures of TCP in a mermaid costume in the home that she felt were inappropriate and sexual in nature, one of which featured TCP bent over.[31] Falletta reported that a friend spoke to her after having spent a day with SP and reported having a "sick feeling" and that she would never spend the day with SP again.[32] Scali-Decker did not feel that Falletta's report to the pastor was malicious or a false report but rather was based on Falletta's perception of SP's behavior.

November 5, 2009 Meeting With the Parents

Also on the morning of November 5, 2009, MC, SP, and their then-two year old daughter RFP attended a meeting at the CPS office.[33] Officer Scolza did not introduce himself but handed MC a business card. After the interview, Scali-Decker set up a date and time for a home inspection.[34]

After the interview, Scali-Decker and Scolza discussed the case and Officer Scolza determined there was not enough evidence to pursue a criminal charge.[35] Scolza had no further involvement in the investigation.[36]

The Parents' Meeting With District Employees

After the meeting with CPS ended, MC and SP went to the school to speak with the principal.[37] MC and SP spoke with the vice principal and Jankowski.[38] MC asked why the interview of TCP was done without prior notice.[39]

The vice principal responded that it was school policy to check the identification of the CPS representatives and to have a school employee present during the interview.[40] The vice principal told MC she could put a note in TCP's file stating that TCP was not to be spoken to without MC's consent.[41] The MDT honors parent letters placed in a student's file indicating their children cannot be interviewed without parental consent.[42]

Subsequent Communication With the District

On November 6, 2009, MC wrote a letter to the District Superintendent of Schools. In the letter, MC requested a copy of the school policy concerning checking identification of CPS workers.

A few days later, MC spoke with an attorney for the district. MC asked the attorney about interviewing students in school without prior parental consent. The attorney responded that, essentially, state law mandated that the school allow such interviews.

Case Deemed Unfounded

On November 9, 2009, Scali-Decker informed MC by telephone that the investigation of child abuse was deemed "unfounded."[43] In her investigation conclusion narrative, Scali-Decker noted that TCP had disclosed no evidence of abuse and that the "mermaid pictures" were not inappropriate.[44] Scali-Decker also noted that the law enforcement investigation was closed.[45]

On November 13, 2009, MC received a letter from the county informing her that the case had been deemed unfounded. In January 2010, MC received a similar letter from the State of New York notifying her that the case was deemed unfounded.

The Federal Lawsuit

About two months later, the parents, MC and SP, commenced a federal lawsuit on January 13, 2010.[46] The county, the village, the district, Scali-Decker, Scolza, and Jankowski were named as defendants. The specific claims asserted by the parent plaintiffs will be discussed below. After the complaint was filed, the defendants filed motions to dismiss.

On September 18, 2012, the Honorable Kenneth M. Karas granted the defendants' motions to dismiss in part, and denied them in part.[47] The court dismissed plaintiffs' procedural and due process claims and a Fourth Amendment claim for an illegal search.[48] However, it permitted plaintiffs to proceed to discovery on their Fourth Amendment seizure claim against the county, the district, and the village for the in-school interview of TCP.

In permitting discovery, the court recognized the absence of any Second Circuit precedent addressing whether an in-school interview by CPS workers constitutes a seizure under the Fourth Amendment.[49] As a result, the court analyzed plaintiffs' allegations about the questioning of TCP to determine whether the child could have felt free to leave and decline to answer the questions posed.[50]

The court relied upon plaintiffs' allegations in the pleadings that the kindergarten student was removed from her class by a school administrator, taken to a room with three adults with the door closed, told that she "had to" answer their questions, and that the examination was "like a test."[51] Plaintiffs further alleged none of TCP's interviewers offered to call her parents or let TCP know that she could decline to answer their questions.[52]

Based upon these allegations, the court found that a reasonable five-year-old child would not have thought she could leave the room or decline the adults' questioning.[53] Therefore, plaintiffs stated a claim that TCP was "seized" within the meaning of the Fourth Amendment.[54]

Having found an adequately pleaded seizure, the next question was whether plaintiffs adequately alleged the seizure was unreasonable and a violation of the Fourth Amendment. Judge Karas noted the Second Circuit has not yet determined what standard applies to child abuse investigations to determine whether the seizure of a child is reasonable.[55] Further complicating the inquiry, the court noted, is that all of the Second Circuit cases addressing the reasonableness of a child's seizure involved situations where the child was physically removed either from the school or from the parents' custody. That was note the case here, in which the seizure did not result in a deprivation of custody.[56]

Judge Karas found that plaintiffs adequately pleaded the absence of probable cause or reasonable suspicion to suspect abuse when TCP was interviewed.[57] The SCR report lacked firsthand knowledge of the suspected abuse and did not allege interaction with plaintiffs in the professional capacity for a mandated reporter.[58] The court also relied upon the allegation that municipalities maintained policies that allowed children to be interviewed by CPS without parental consent or sufficient cause to believe the child was abused.[59]

Judge Karas granted qualified immunity to the individual defendants, as no Supreme Court or Second Circuit precedent existed to define a clearly established right to Fourth Amendment protection during an interview on school grounds.[60] In the "specific context of [this] case, [] the contours of the right [are not] sufficiently clear [such] that a reasonable official would understand that the in-school interview of TCP could implicate her Fourth Amendment rights."[61]

The Summary Judgment Decision

Following discovery, all of the parties moved for summary judgment. In August 2015, the Honorable Sidney H. Stein rendered a decision.[62] The court awarded summary judgment to the plaintiffs on their Fourth Amendment seizure claim against the county.[63] It found that the MDT's discretionary investigatory protocols caused an unconstitutional seizure to trigger *Monell* liability.[64]

Judge Stein stated that "[t]he County's practices, which were to interview children without notification or authorization of the parents and to interview them at school whenever possible and without making a determination of probable cause were unquestionably the moving force behind the unconstitutional seizure for purposes of Monell liability."[65]

The court acknowledged the MDT had to investigate the SCR report, but found the MDT could have

sought corroboration of the report from adults with direct knowledge of the allegations.[66] "Additional investigation could have established probable cause or cast further doubt on the allegations. The MDT could have sought parental permission" and, if refused, obtained a court order.[67] The court found no evidence of imminent danger to TCP, but had there been "the MDT could have used the exigent circumstances exception to probable cause."[68]

The court rejected the *Monell* claim against the village, finding no evidence the village played any role in creating the MDT's policies or guiding its investigations.[69] The assignment of a law enforcement officer was not the "moving force" behind the seizure.[70] Summary judgment was awarded in favor of the village.[71]

The court denied the summary judgment motions against and by the district finding material issues of fact in dispute.[72] Judge Stein found it undisputed the district believed it was obligated by law to allow CPS to interview children in school without parental consent or notification.[73] However, he also found there was no statute or regulation on which the belief was formed.[74] Accordingly, there was a material issue of fact as to whether such a requirement existed.

In December 2015, the county and the district entered a confidential settlement with plaintiffs.

The New Regulations

The new regulations can be found at 18 N.Y.C.R.R. 432.3(i)(1)(2).[75] They provide more specific direction to school districts when faced with a request from CPS to produce a student for an interview.

Under the regulations, school districts must provide access to records relevant to the investigation of suspected abuse or maltreatment. School districts must also provide access to any child named as a victim in a report of suspected abuse or maltreatment.

This access includes permitting an interview to be conducted without a court order or consent of the parent or guardian when CPS knows of circumstances that warrant interviewing the child apart from family members and/or the home where the abuse of maltreatment allegedly occurred.

School officials may request identification from the CPS workers and MDT but may not require any other information or documentation to get access to a child. The school district may have a representative observe the interview and require CPS to comply with reasonable visitor policies or procedures.

Conclusion

In the wake of this lawsuit, action was taken to clarify school districts role in the process. The new regulations provide clearer guidance and specific procedures for school officials to follow when CPS members seek to interview a child on school grounds. The regulations also should shield school officials from liability if a claim is brought in connection with providing access to a student.

While the regulations have clarified the obligations of a school district and afforded protection to them, the same cannot be said for local CPS agencies. They are still left open to challenges where an interview of a child is conducted without a court order or parental consent.

Endnotes

1. Transcript of Oral Decision, *Phillips v. County of Orange*, No. 10 Civ. 236(SHS) (S.D.N.Y. 2015) (unpublished). Transcript is on file with author.
2. Transcript of Oral Decision at 4. Because the case involves a minor, the child and the parents will be referred to here only by initials.
3. *Id.*
4. *Id.*
5. *Id.* at 5.
6. *Id.*
7. Transcript of Oral Decision at 4.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Transcript of Oral Decision at 6.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Transcript of Oral Decision at 9.
18. *Id.* at 6.
19. *Id.* at 11.
20. *Id.* at 8.
21. *Id.*
22. Transcript of Oral Decision at 8.
23. *Id.* at 11.
24. *Id.*
25. *Id.* at 11-12.
26. *Id.* at 12.
27. Transcript of Oral Decision at 12.
28. *Id.* at 13.
29. *Id.*
30. *Id.*
31. *Id.*
32. Transcript of Oral Decision at 13.
33. *Id.* at 12-13.
34. *Id.* at 14.
35. *Id.* at 14-15.

36. *Id.* at 15.
37. *Phillips v. County of Orange*, 894 F. Supp. 2d 345, 356 (S.D.N.Y. 2012).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Phillips v. County of Orange*, 894 F. Supp. 2d 345, 356 (S.D.N.Y. 2012).
43. *Id.*
44. Transcript of Oral Decision at 14.
45. *Id.* at 16.
46. *See Phillips*, 894 F. Supp. 2d at 345.
47. *See id.*
48. *Id.* at 391.
49. *Id.* at 361.
50. *Id.*
51. *Phillips v. County of Orange*, 894 F.Supp.2d 345, 362 (S.D.N.Y. 2012).
52. *Id.*
53. *See id.* at 363.
54. *Id.*
55. *Id. at 365 (*citing *Estiverne v. Ersenio-Jenssen,* 833 F.Supp.2d 356, 376 (E.D.N.Y. 2011) ("[T]he Second Circuit has yet to decide definitively the [appropriate] standard by which to assess the reasonableness of a seizure in the context of a child abuse investigation . . . .").
56. *Phillips v. County of Orange*, 894 F. Supp. 2d 345, 364 (S.D.N.Y. 2012).
57. *Id.* at 366.
58. *Id.*
59. *Id.*
60. *Id.* at 387.
61. *Phillips v. County of Orange*, 894 F. Supp. 2d 345, 388 (S.D.N.Y. 2012) (citing *Doninger v. Niehoff,* 642 F.3d 334, 345-46 (2d Cir. 2011) (internal quotation marks omitted).
62. *See* generally Transcript of Oral Decision. The case had been reassigned to the Southern District's Manhattan courthouse.
63. *Id.* at 26.
64. *See id.* at 27.
65. *Id.* at 32.
66. *Id.*
67. Transcript of Oral Decision at 32.
68. *Id.* at 32-33.
69. *Id.* at 34.
70. *Id.*
71. *Id.*
72. Transcript of Oral Decision at 35-36.
73. *See id.* at 35.
74. *Id.* at 35-36.
75. (2017); Rule Making Activities: NYS Register/Sept. 7, 2016 (2006), https://www.legalbluebook.com/R-18-1.

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Property Contamination and Its Impact on Commercial Leasing in NYC

By Larry Schnapf

New York City Office of Environmental Remediation Voluntary Cleanup Program (VCP)

The New York City Office of Environmental Remediation (OER) administers a Voluntary Cleanup Program (VCP)[1] that can be used to address minimally contaminated sites such as contaminated fill sites, the "E" program and oil spills that are confined to the property. OER has entered into a Memorandum of Understanding with the New York State Department of Environmental Conservation (NYSDEC) so that NYSDEC will honor cleanups completed by OER under its VCP.

The NYC VCP is a popular tool for moderately contaminated sites because of the OER's streamlined approach that allows sites to complete remediation fairly quickly. The NYC VCP is perhaps the nimblest remedial program in the country. OER staff is particularly responsive to the needs of applicants and will work hard to find a way to accommodate the construction schedule of an applicant.

In New York City, real property sites that are complicated by presence or potential presence of detectable levels of contamination are eligible for the VCP. Properties that are remediated through the NYC VCP receive a Notice of Completion, which includes a New York City liability release, a statement from the NYSDEC showing that it has no further interest and does not plan to take enforcement or require remedial action for the property. Applicants also receive a NYC Green Property Certification that symbolizes the city's confidence that the property is protective of public health and of the environment.[2]

In addition, applicants may be able to tap a modest suite of investigation/cleanup grant programs offered by OER that can help plug the funding gap caused by the need to perform remedial actions. Sites enrolled in the NYC VCP are eligible for the Brownfield Incentive Grants (BIG) Program, which funds four types of grants including pre-enrollment investigation costs, remediation, technical assistance to non-profit developers of Preferred Community Development Projects, and purchase of pollution liability insurance or cleanup cost cap insurance. BIG grants may also be used for the Hazardous Materials E-Designation and Restrictive Declaration Remediation programs (see below).[3]

OER also recently embarked on a brownfield "jump start" program for affordable housing and certain industrial site expansion projects that were contemplating applying to the NYSDEC BCP. For qualifying sites, OER will provide upfront refundable grants of up to $125,000 for investigation and $125,000 for site remediation costs. The funds are repaid to city after the project receives BCP tax credits.

One of the key challenges facing purchasers of contaminated property is that the landowner liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and similar state laws are self-implementing.[4] While EPA may occasionally enter into a prospective purchaser agreement or issue a comfort letter, EPA and state environmental agencies do not have the resources to routinely review the thousands of phase 1 reports generated annually in commercial real estate or financing transactions. Thus, a purchaser will not know if it has qualified for one of these defenses until the purchaser has been sued or a defendant files a counterclaim in a contribution claim filed by the purchaser, and a court issues a final ruling.

To facilitate redevelopment, OER will issue several types of letters. The first, known as Environmental Review and Assessment (ERA) letter, may be used where the presence of contamination may complicate a real estate or financing transaction. OER will issue an ERA letter where it determines that existing conditions at a property are protective of public health. OER does not anticipate issuing letters where contamination requires further action beyond that contemplated under the transaction to render a property protective for its intended use. To obtain an ERA letter, a party will meet with OER to discuss the nature of the transaction, prior and current site uses and operational history of the property, the proposed development, known site contamination, and how the ERA letter will facilitate the transaction. As a part of the process, OER will review available data on the property, including a phase 1 and all phase 2 reports, and compare the identified contamination against the state cleanup standards, 6 NYCRR § 375, to determine if the existing or proposed property conditions are protective of the property's future use. If as a result of this review OER determines further environmental investigation or remedial action is warranted, OER will consider issuing an ERA letter to identify those additional studies and remedial actions if requested by both parties.

Another type of OER letter is known as an "acceptance letter." This type of letter is particularly useful when a phase 2 report identifies contaminants above the standards established by the NYSDEC, but there are not any completed pathways because of the existence of a building foundation, paved surfaces, etc. OER will review phase 2 reports and if it agrees that no further action is

required, OER will issue a letter indicating it accepts or agrees with the conclusions of the report.

OER will also issue a pre-VCP enrollment "comfort letter." Frequently, when a consultant recommends further sampling or cleanup, lenders may require a borrower to enroll in a voluntary cleanup program prior to the closing and require borrower to covenant to obtain a no further action letter from the appropriate regulatory agency. Unlike other remedial programs, the OER voluntary cleanup program does not accept applicants until after a site has been characterized and documented in a remedial investigation report. Thus, a borrower may not be able to actually enroll in the NYC VCP until after the closing. To provide assurance to a lender, OER will issue a pre-enrollment letter indicating that the borrower is making progress toward acceptance into the OER VCP. OER interprets this sentence very broadly and will write letters to satisfy concern of lenders.

"One of the key challenges facing purchasers of contaminated property is that the landowner liability protections under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) and similar state laws are self-implementing."

OER has also developed a "standstill letter" which can be used when a seller seeks to sell property but environmental issues have complicated a transaction. In such a case, the seller can investigate the site and develop a generic remedy with OER. The site would then be enrolled in VCP but would be "standstill" mode with no requirement to proceed with the remedy. It is hoped the existence of an approved remedy will provide comfort to a prospective purchaser and its lender since the buyer will be able to estimate the cleanup costs. After the purchaser acquires title, it can then implement the pre-approved remedy—provided the proposed reuse is consistent with the approved remedy.

All is not lost if you have learned about the NYC BCP after construction has started or is significantly completed. OER has developed a "look back" track where projects may be able to obtain liability protection if the remedial action conforms to the OER program requirements. However, "look back" applicants will not be eligible for the NYC BCP funding incentives.

The OER VCP may also be used to satisfy requirements of the National Environmental Policy Act (NEPA)[5] or the State Environmental Quality Review Act (SEQRA) for projects being funded by the New York City Department of Housing Preservation and Development (HPD). The federal Department of Housing and Urban Development (HUD) has established regulations implementing NEPA[6] when HUD staff performs environmental reviews and when local governments assume HUD responsibility.[7] In New York City, NPD has assumed responsibility for environmental review that would normally be performed by HUD.

All property proposed for use in HUD programs must be free of hazardous materials, contamination, toxic chemicals and gases, and radioactive substances where the hazard could affect the health and safety of occupants or conflict with the intended use of the property.[8] As a result, developers of affordable projects receiving funding from HUD or HPD often have to perform environmental reviews for the presence of hazardous materials to comply with NEPA.

HPD must have an Environmental Assessment (EA) prepared to identify all potential environmental impacts, whether beneficial or adverse, and the conditions that would change as a result of the project.[9] Environmental reviews are generally conducted for new construction, major rehabilitation, leasing, acquisition and change in use under a range of HUD programs. The most common programs for which HPD performs environmental reviews are HUD's HOME Investment Partnership Program (HOME) and the Neighborhood Stabilization Program (NSP). HPD utilizes federal HOME funds to finance the construction of new and rehabilitation of existing housing including vacant and occupied single room occupancy buildings (SRO), small homes (buildings with fewer than 12 units) and multi-family buildings. The reviews must be completed before the release of funds and acquisition of property.

The developer will be required to conduct a phase 1. If the phase 1 identifies Recognized Environmental Conditions (RECs), the developer will have to propose a phase 2 work plan for approval by New York City Department of Environmental Protection (DEP). Note that sometimes HUD or HPD may disagree with the phase 1 findings and require a Phase II even if the phase 1 did not identify RECs. If the investigation confirms the presence of contamination above applicable levels, the developer will submit a remedial action plan (RAP) for review and approval by the DEP.

The existence of an approved RAP enables HPD to issue a Notice of Finding of No Significant Impact (FONSI) certifying that the project will not have a significant impact on the environment and therefore will not require preparation of an Environmental Impact Statement (EIS). HPD will also issue Notice of Intent to Request a Release

of Funds (NOI/RROF). The developer would normally implement the RAP and submit a remedial action report to DEP for final approval.

The DEP approval will simply confirm that the developer has satisfactorily completed the RAP. The certification will not confer any liability protection under CERCLA or the state Environmental Conservation Law (ECL) nor provide contribution protection. Moreover, the HPD funding often does not cover remediation costs, which can create a funding gap for a project that already has very tight margins.

When facing the prospect of implementing a remedial action, developers should consider enrolling the project in the NYC VCP. Developers can enter the NYC VCP even after DEP has approved a RAP. Oftentimes, all that a developer will have to do is to convert the DEP-approved RAP into the template form used by OER. This is because both DEP and OER follow the NYSDEC remedial program requirements set forth at 6 NYCRR Part 375.

New York City "E" Designation Program

OER also administers the E- Designation program,[10] which began as a land use program but has morphed into an important source of cleanup obligations in New York City. An E-Designation is a NYC zoning map designation that indicates the presence of an environmental requirement pertaining to potential Hazardous Materials Contamination, Window/Wall Noise Attenuation, or Air Quality impacts on a particular tax lot. The E-designation is assigned to property lots as part of a zoning action under the City Environmental Quality Review (CEQR) Act. If the CEQR review process indicates that development on a property may be adversely affected by noise, air emissions, or hazardous materials, then the Lead Agency may assign an E- Designation on the property lot to ensure that the E-Designation requirements are satisfied prior to or during a new development or new use of the property.[11]

A Hazardous Materials (Haz Mat) E-Designation may be assigned for a variety of reasons, including that the property contained:

- Incinerators;
- Underground and/or above ground storage tanks;
- Active solid waste landfills;
- Permitted hazardous waste management facilities;
- Inactive hazardous waste facilities;
- Suspected hazardous waste sites;
- Hazardous substance spill locations;
- Areas known to contain fill material;
- Petroleum spill locations; and
- Any past use identified in Appendix A to the CEQR Technical Manual.[12]

The Department of Building (DOB) incorporates the E-Designations in its Building Information System (BIS). The DOB examiner cannot issue a building permit for new development, changes of use, enlargements or certain other alternations to existing structures until DOB receives either a Notice to Proceed (NTP) or Notice of No Objection (NNO) from OER. To obtain an NTP from OER for a Haz Mat E-designation, the applicant has to submit a phase 1 environmental site assessment and a phase 2 workplan if recognized environmental conditions (RECs) are identified. After implementing the phase 2 report, OER will determine if a remedial action plan (RAP) is required. If OER determines that a RAP is not required, OER will issue a notice of no objection to DOB.[13] OER may issue NNOs for actions that do not raise potential exposure to hazardous materials, or air quality or noise impacts. Indeed, approximately 50% of the E-Designation projects OER reviews result in NNOs. If OER determines a RAP is required, the applicant must submit an acceptable RAP before OER will issue an NTP.

When the applicant wants to obtain a Certificate of Occupancy from DOB, it must obtain a Notice of Satisfaction (NOS) from OER demonstrating that the applicant has complied with OER requirements. To obtain the NOS, the applicant will submit Remedial Closure Report after completion of the RAP. In issuing an NOS, OER may require the execution of a Declaration of Covenants and Restric-tions by the title holder for the tax lot(s) subject to the (E) Designation or the Environmental Restrictive Declaration, which shall be recorded against the property prior to the issuance of a NOS.[14] If an applicant wants to remove the E-designation from the property and not have to record a Declaration of Covenants and Restrictions, it would have to implement a track 1 (unrestricted) cleanup.[15]

Parties can also comply or remove the E- Designation by enrolling the site in the state BCP as well as the NYC VCP. It is important to note that when lots with an E-Designation are merged or subdivided, the E- Designation will apply to all portions of the merged lot or to each subdivided lot. Because remediation done under the E-Designation program is not eligible for the state hazardous waste program fee, developers of sites with Haz-Mat E-Designations should consider enrolling the site in the NYC VCP.[16]

A similar approach is used for Restrictive Declarations (RD) that impose an institutional control against a property to ensure that environmental mitigation or requirements that were imposed as a condition of a land use approval are implemented. The RD runs with the land so that it binds current and future owners to comply with certain investigation and remedial requirements that may be required be OER.

Historically, RDs were used when private applicants who owned or controlled a property sought a rezoning or other action under section 11-15 of the Zoning Resolution of the City of New York. This proved to be a cumbersome process because all parties with a property interest in property including lenders, had to execute an RD. Moreover, the NYC Department of Environmental Protection (DEP) and a city agency approving the discretionary action had to expend resources reviewing the RD.

In 2012, the City Council adopted an amendment to the Zoning Resolution that authorized lead agencies to assign E-Designations for any actions, including those sought by private applicants such as rezoning, special permits or variances. The E-Designation can be imposed based on visual or historical documentation for lots not under the ownership or control of the person seeking the Zoning Amendment or Zoning Action. When the applicant owns or controls the lots, a phase 1 may be required.[17] Because of the zoning resolution amendments, RDs will no longer be used to impose environmental conditions on properties. However, owners and developers have to comply with existing RDs.

"The New York City DEP is authorized to respond to actual or threatened releases of hazardous substances, to recover its response costs from responsible parties and to impose a lien on the property subject to the cleanup."

New York City Hazardous Substance Emergency Response Law (NYC Spill Law)[18]

The NYC Spill Law operates like a local superfund law. The New York City DEP is authorized to respond to actual or threatened releases of hazardous substances, to recover its response costs[19] from responsible parties and to impose a lien on the property subject to the cleanup.[20]

DEP may also issue unilateral orders requiring a responsible party to address a release or threatened release that may present an immediate and substantial danger to the public health or welfare or the environment.[21] A responsible person who has been served with a cleanup order may submit a written request for a hearing within ten (10) working days of service of such order.[22]

Any responsible person who knows or has reason to know of any release of any hazardous substance that exceeds a reportable quantity must immediately orally notify the DEP and submit a written notice within one week of discovery of the release.[23]

Responsible parties may be jointly and severally liable without regard to fault for all response costs incurred by the DEP or another city agency responding to a release of hazardous substances. A responsible party that fails to respond to a cleanup order "without sufficient cause" may be liable for penalties as possibly three times the cleanup costs incurred by DEP.[24] In addition, any person who knowingly violates or fails to comply with any order, rule or regulation issued under this law shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not less than $25,000, or by imprisonment not to exceed one year, or both, for each violation.[25]

The categories of responsible parties are similar to those in CERCLA but are potentially broader. In general, any current owner, operator, lessee, occupant or tenant other than a residential lessee, occupant or tenant of property at the time there is a release, or a substantial threat of a release, of a hazardous substance from such property into the environment may be liable as a responsible party.[26] In addition, any former owner, operator, lessee, occupant or tenant of the property at the time of disposal of any hazardous substance may be a responsible party.[27]

Responsible parties may assert three statutory affirmative defenses (Act of God, Act of War and third party defense).[28] However, the law lacks an innocent purchaser's defense or bona fide prospective purchaser. Regulated financial institutions chartered under state or federal law that received title to the contaminated property through abandonment, foreclosure, a deed in lieu of foreclosure, or through a judicial or bankruptcy order will not be deemed to be a responsible party unless: (i) the institution willfully, knowingly, recklessly, or negligently caused or substantially contributed to the release or threatened release of hazardous substances, or (ii) the financial institution received title in order to secure the underlying credit extension for the purpose of allowing the responsible party from avoiding the provisions of the law.[29] Interestingly, one of the rare enforcement actions that DEP brought under this law was against a foreclosing lender who took control of a defunct borrower's facility to conduct an auction but left behind dozens of drums containing hazardous waste. The bank ended up footing the bill to remove the waste.

The law provides that costs incurred by the DEP or other city agency in performing a response action constitute a "debt" recoverable from each responsible party and authorizes the filing of a cleanup lien against the real property of the responsible party or the parcel that was subject to the response measures.[30] The lien becomes effective when either (i) a statement of account of costs is filed in the office of the City Collector and a notice of po-

tential liability is filed, or (ii) three days after a notice has been mailed by certified and registered mail to the owner of the real property that was a subject of the cleanup action.[31] The amount set forth in the statement of accounts continues to be a lien on the property until it is paid.[32] However, the lien is subordinated to a previously perfected mortgage.[33]

NYC Petroleum and Hazardous Materials Storage Rules

The New York City Fire Code requires owner or operators storing certain quantities of petroleum or hazardous materials to obtain permits and comply with certain design standards. Storage tanks that are not subject to regulation by NYSDEC under the Petroleum or Chemical Bulk Storage Acts may still be subject to regulation under the Fire Code.

The regulations promulgated by the New York City Fire Department provided that storage tanks that have not been used for more than 30 days but less than one year must undergo temporary closure. For fuel oil tank storage systems with a total capacity of 330 gallons or more, closure must be performed by a licensed person. The owner or operator of the temporarily abandoned tank system or the permit holder must file an affidavit with the NYFD certifying that such system complies with the temporary closure requirements.[34] Owner and operators of temporarily out of service tank systems must continue to comply with the Fire Department's permit and testing requirements as well as the registration, reporting, inspection and testing regulations of NYSEDC.

Tank systems used for storing gasoline, diesel, fuel oil or other flammable or combustible liquids that have not been used for one (1) year or more must undergo permanent closure. For fuel oil tank systems exceeding 330 gallons, the permanent closure must be performed by licensed individuals. The owner or operator of a permanently out-of-service storage system or the permit holder for the tank system must also file an affidavit with the Fire Department certifying that the tank system was removed and disposed or abandoned in place in compliance with the requirements of Fire Code.[35] If an environmental site assessment is required by federal or state law or regulations, the owner/operator of the storage system, the permit holder for the system, or the person filing the affidavit of compliance must submit a written statement to the Fire Department that such environmental site assessment has been performed in accordance with such law and regulations.[36]

The Fire Code prohibits discharges of hazardous material unless permitted under federal or state law. The Fire Commissioner must be notified of discharges of hazardous materials that exceed the applicable reportable quantity for that substance.[37] The owner of a facility or other person responsible for a discharge shall undertake all actions necessary to remediate such discharge. When deemed necessary by the commissioner, cleanup may be initiated by the department or other city agency. Costs associated with such cleanup shall be borne by the owner or other person responsible for the discharge. The department shall give such owner or other person written notice of such costs and an opportunity to be heard. Payment of such costs shall be recoverable in any manner authorized by law, rule or regulation. Failure to pay such costs shall cause a lien to be placed upon the premises pursuant to the provisions of FC117.4.[38]

NYC Asbestos Law

Federal, state and local asbestos regulations can impose significant and unexpected costs and delays for building renovation and demolition projects. Owners and tenants conducting renovation or demolition projects that are likely to disturb asbestos-containing materials are responsible for notifying regulatory agencies and ensuring that asbestos abatement activities performed by their agent or contractor comply with certain asbestos notifications and work-practice requirements.

Beginning in the 1970s, EPA has banned the use of many forms of asbestos in building materials. As a result, many building owners, tenants and lenders mistakenly believe that newer buildings do not contain any asbestos-containing materials (ACM). Contrary to this popular misconception, there are a number building materials in use today that may still contain asbestos. The more common types asbestos-containing building materials, include vinyl-asbestos tile, roofing felt, roofing coatings, caulking putties, construction mastics, textured coatings, asbestos-cement shingle, corrugated sheet, asbestos-cement flat sheet, pipeline wrap, millboard, asbestos-cement pipe, and asbestos-cement. As a result, it is still important for parties contemplating building renovations or demolitions and their lenders not to assume a building does not have ACM based on its construction date, but to assess the presence and condition of suspect ACM. Building owners and tenants performing renovation may consider inserting requirements in their construction contracts requiring contractors and architects to use asbestos-free material.

It should be noted that ACM is considered a "non-scope item" in the standard phase ASTM E1527-13 environmental site assessment (Phase 1 ESA) that is customarily used in real estate transactions. This means that the presence of ACM will not be evaluated as part of the Phase 1 ESA unless the party hiring the environmental consultant specifically requests that ACM be included as part of the scope of services.

The asbestos regulations adopted by the NYC Department of Environmental Protection DEP are stricter than the federal requirements and can apply to smaller projects that are not subject to the federal asbestos requirements.[39]

The NYC DEP asbestos rules define an "asbestos project" as any work performed in a building or structure or in connection with the replacement or repair of equipment, pipes, or electrical equipment not located in a building or structure that will disturb more than 25 linear feet or more than 10 square feet of asbestos-containing materials. A large asbestos project is defined as one that will disturb 260 linear feet or 160 sq./ft. [40]

Prior to the state of alteration, renovation, demolition, or even plumbing work, the building owner or tenant is responsible for having an asbestos survey performed by a DEP-certified asbestos investigator to determine if asbestos-containing material may be disturbed during the course of the work.[41]

If after a survey the DEP-certified asbestos investigator determines that the building (or the portion affected by the work) is free of asbestos-containing material or the amount of ACM to be abated constitutes a minor project, the ACP-5 Form is filed with the NYC DEP.[42] Where the work to be performed constitutes an asbestos project, an asbestos project notification (ACP-7 Form) shall be submitted to DEP at least one week before the work is schedule to commence.[43] It is important to note that the NYC DEP asbestos-notification obligation is separate and different from the federal asbestos-notification requirement, which is ten days. If the start date changes, both the federal and NYC rules require a new notification be submitted.

Endnotes

1. RCNY § 14-1401 et seq.
2. *See NYC Voluntary Cleanup Program*, NYC Office of Environmental Remediation, http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/vcp.shtml (last updated 2016) for more information about the NYC VCP.
3. *See Grant Types: BIG*, NYC Office of Environmental Remediation, http://www.nyc.gov/html/oer/html/brownfield-incentive-grants/grant-types.shtml (last updated 2016) for more information about the BIG program.
4. *See Larry* Schnapf, *Property Contamination and Leasing: The Federal Law*, Environmental Law Net (May 2015), www.environmental-law.net/wp-content/uploads/2011/05/Schnapf-May-2015.pdf.
5. 42 U.S.C. § 4321 et seq.
6. 24 C.F.R.pt 50.
7. 24 C.F.R. pt 58.
8. *See* 24 C.F.R. pts 50.3(i) and 58.5(i)(2).
9. 24 C.F.R. pt 58.40(b).
10. *See* RCNY § 24-02 et seq. (where the "e" rules are authorized by § 1403 of the New York City Charter and § 11-15 of the Zoning Resolution of the City of New York).
11. *See CEQR Documents*, NYC Office of Environmental Remediation. http://www.nyc.gov/html/oer/html/e-designation/ceqr-documents.shtml (last updated 2016) for the "e" requirements for individual properties.
12. 15 RCNY § 24-04.
13. 15 RCNY § 24-06.
14. 15 RCNY § 24-07.
15. 15 RCNY § 24-08.
16. *See State Hazardous Waste Fee and Special Assessment Exemption*, NYC Office of Environmental Remediation, http://www.nyc.gov/html/oer/html/voluntary-cleanup-program/hazardous-waste.shtml (last updated 2016) for more information about NYC sites qualifying for the hazardous waste program fee.
17. 15 RCNY § 24-04.
18. 15 RCNY § 24-600 et seq.
19. 15 RCNY § 24-604.
20. 15 RCNY§ 24-605.
21. 15 RCNY § 24-608.
22. 15 RCNY § 11-05.
23. 15 RCNY § 11-03.
24. 15 RCNY § 24-610(c).
25. 15 RCNY § 24-610(d).
26. 15 RCNY § 24-603(g)(1).
27. 15 RCNY § 24-603(g)(3).
28. 15 RCNY § 24-604.
29. 15 RCNY § 24-603(g)(1).
30. 15 RCNY § 24-605.
31. 15 RCNY § 24-605(c).
32. 15 RCNY § 24-605(g).
33. 15 RCNY § 24-605 (h).
34. 3 RCNY § 3404-01(c).
35. 3 RCNY § 3404-01(d).
36. 3 RCNY § 3404-01(d)(3).
37. FC § 2703.3.1.
38. FC § 2703.3.1.4.
39. The federal renovation and demolition rules apply to projects that are likely to disturb 260 linear feet, 160 sq./ft. or 35 cubic feet of ACM.
40. 15 RCNY § 1-02.
41. 15 RCNY § 1-23.
42. 15 RCNY § 1-23(c).
43. 15 RCNY § 1-25.

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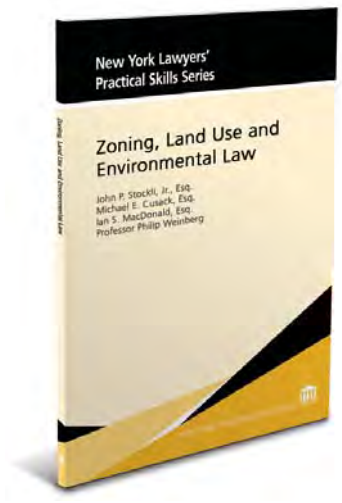

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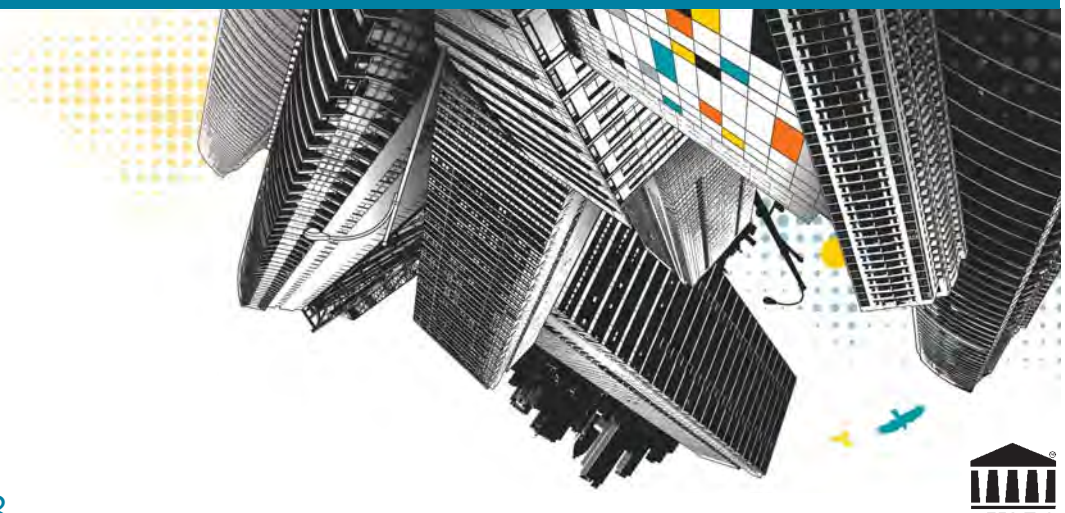

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