Date: 8/27/19 Examiner's Name: Toni Matias

BSA Calendar #: 2019-89-A and 2019-94-A Electronic Submission: ■ Email ☐ CD

Subject Property/
Address: 36 West 66th Street, MN

Applicant Name John Low-Beer on behalf of City Club of New York and Klein Slowick, PLLC on behalf of Landmark West!

Submitted by (Full Name): Michael Zoltan, Assistant General Counsel, Department of Buildings

A) The material I am submitting is for a case currently **IN HEARING,** scheduled for 9/10/19.
The reason I am submitting this material:

- ◉ Response to issues/questions raised by the Board at prior hearing
- ○ Response to request made by Examiner
- ○ Other: _____

Brief Description of submitted material: Leter statement on behalf of the Department of Buildings in response to Appellants' August 21, 2019 submissions to the Board and in response to issues discussed during the 8/6/19 public hearing.

List of items that are being voided/superseded: _____

B) The material I am submitting is for a **PENDING** case. The reason I am submitting this material:

- ○ Response to BSA Notice of Comments
- ○ Response to request made by Examiner
- ○ Dismissal Warning Letter

Brief Description of submitted material: _____

List of items that are being voided/superseded: _____

MASTER CASE FILE INSTRUCTIONS

- ***Bind** one set of new materials in the master case file*
- ***Keep master case file in reverse chronological order** (all new materials on top)*
- ***Be sure to VOID** any superseded materials (no stapling!)*
- ***Handwritten revisions to any material are unacceptable***

R. 002023

NYC Buildings

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Commissioner

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August 27, 2019

Honorable Members of the Board
Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007

RE: Cal. Nos. 2019- 89-A and 2019-94-A
Premises: 36 West 66th Street, Manhattan
Block: 1118; Lot: 45

Dear Honorable Members of the Board:

On August 6, 2019 the Board heard statements from The City Club of New York, Landmark West! (collectively, "the Appellants"), the Department of Buildings, West 66th Sponsor LLC, and members of the public regarding the referenced appeals.

This submission is in reply to Appellants' August 21, 2019 post-hearing statements and the Appellants' arguments generally.

Respectfully submitted,

Michael J. Zoltan

cc: Constadino (Gus) Sirakis, P.E., First Deputy Commissioner
Martin Rebholz, R.A., Borough Commissioner, Manhattan
Scott Pavan, R.A., Borough Commissioner, Development HUB
Mona Sehgal, General Counsel
Felicia R. Miller, Deputy General Counsel
Susan Amron, General Counsel, Department of City Planning
John R. Low-Beer, Esq.
(On behalf of City Club Appellants)
Stuart Klein, Esq.
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David Karnovsky, Fried, Frank, Harris, Shriver & Jacobson LLP
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August 27, 2019

Honorable Members of the Board
Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007

RE: Cal. Nos. 2019- 89-A and 2019-94-A
Premises: 36 West 66th Street, Manhattan
Block: 1118; Lot: 45

Dear Honorable Members of the Board:

The Department of Buildings (the "Department") respectfully submits this third statement in response to the referenced appeals by John Low-Beer on behalf of The City Club of New York, James C.P Berry, Jan Constantine, Victor A. Kovner, Agnes C. McKeon, and Arlene Simon (collectively "City Club Appellants") and by Klein Slowick, PLLC on behalf of Landmark West! ("Landmark West Appellants") (collectively, the "Appellants"), challenging the Department's April 4, 2019 approval of a post-approval amendment application (the "PAA") which changed the scope of permit 121190200-01-NB (the "Permit") authorizing construction of a new building located at 36 West 66th Street New York, New York (the "Proposed Building"). Appellants allege that the Department's approval of the PAA is inconsistent with the New York City Zoning Resolution (the "ZR").

On August 6, 2019, the Board heard statements from the Appellants, the Department, West 66th Sponsor LLC, (the "Owner"), and members of the public regarding the referenced appeals. Subsequently, on August 21, 2019, all parties submitted post-hearing submissions to the Board. This statement is in response to Appellants' August 21, 2019 submissions, specifically concerning cannons of statutory construction, a topic that the Board requested the Department address in this submission, and arguments by the Appellants generally.

For the reasons explained below, the Department respectfully requests that the Board affirm the Department's determination to approve the PAA and uphold the underlying Permit.

I. THE PLAIN LANGUAGE OF ZR § 82-34 (BULK DISTRIBUTION) CLEARLY AND UNAMBIGUOUSLY APPLIES TO THE ENTIRE SPECIAL LINCOLN SQUARE DISTRICT

As stated in the Department's two previous submissions to the Board and at the August 6, 2019 public hearing, ZR § 82-34 applies across the entire Special Lincoln Square District without differentiation between underlying zoning districts. This is seen in the plain language of the provision. ZR § 82-34 reads: "[w]ithin the Special District, at least 60 percent of the total *floor area* permitted on a *zoning lot* shall be within *stories* located partially or entirely below a height of 150 feet from *curb level*." As noted in the Department's August 21, 2019 submission to the Board, under ZR § 12-02 direct statements of zoning district applicability are a requirement of limiting a provision's zoning district applicability. The sheer lack of any verbiage indicating that the provision is limited to the C4-7 (R10 equivalent) Zoning District portion of the Special Lincoln Square District, coupled with the prefatory language of "within the Special District," clearly and unambiguously shows that, when read plainly (and indeed properly) ZR § 82-34 applies to the entire Special Lincoln Square District.

City Club Appellants erroneously attempt to sow ambiguity into the language of ZR § 82-34 by conflating "total floor area permitted on a zoning lot" with "total floor area permitted [to be utilized by the subject building] on a zoning lot." In fact, ZR § 82-34 clearly ties the bulk distribution requirement to floor area on the zoning lot—not the building itself. [1]

City Club Appellants read language into the ZR which plainly is not there. The ZR does not limit § 82-34 to the C4-7 portion of the Special Lincoln Square District, and therefore the Department acted appropriately in not limiting the provision's applicability.

II. WHEN THE ZR IS CLEAR AND UNAMBIGUOUS, LEGISLATIVE HISTORY SHOULD NOT BE ANALYZED

Given that the plain language of ZR § 82-34 is clear and unambiguous, the Board need not—in fact should not—investigate the legislative intent by turning to external sources. During the August 6, 2019 public hearing, members of the Board pondered whether an analysis of legislative history was permitted in the presence of unambiguous language. The answer in this case is no.

[1] Indeed, the aggregate floor area for a merged zoning lot will always include more floor area than is permitted for a building on one portion of the zoning lot. Floor area utilized by other buildings on the zoning lot is not permitted to be used for new buildings; however, the floor area contained within those other buildings, below the 150-foot height limit is certainly included in the calculation of 60 percent of the total floor area below a height of 150 feet laid out in ZR § 82-34.

This rule is clearly laid out, *vis-à-vis* the ZR, in *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98 (1997).[2] In *Raritan*, the Court of Appeals reaffirmed the "well-respected plain meaning doctrine" of statutory construction. *Id*. at 106. The Court emphasized the importance of legislative intent, but clarified that, "where the statutory language is clear and unambiguous, *the court should construe it so as to give effect to the plain meaning of the words used*." *Id*. at 107. (emphasis in original) (internal citations omitted). In fact, in *Raritan*, the Court of Appeals went so far as to declare that courts should not drift into canons of construction to impermissibly broaden the scope of a statute, "because no rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal*." *Id*. (emphasis in original) (internal citations omitted). A court may not adopt a legislative hand in interpreting unambiguous statutes. The legislature is "best suited to evaluate and resolve" any unintended consequences of the plain language. *Id*.

To put it simply, the Court of Appeals held that, when the language of a statute (including the ZR) is clear, the language itself is the only indicator of legislative intent. While legislative history shadows every statute, the Board should not read such legislative history absent ambiguity in the statute.

City Club Appellants, in an effort to show that this rule should not be applied in the instant case, cite *City v. Stringfellow's of New York*, 253 A.D.2d 110 (1st Dep't 1999).[3] In *Stringfellow's*, the Appellate Division, First Department, overturned the New York Supreme Court's decision to interpret a provision of the ZR that had been based on the plain language of the ZR's definition of "adult establishment." City Club Appellants cite statutory interpretive guidance from the decision: "the fundamental rule in construing any statute, or in this case an amendment to the City's Zoning Resolution, is to ascertain and give effect to the intention of the legislative body, here the New York City Council." *Id.* at 115-116. However, City Club Appellants strategically omit the crucial remaining sentences of the paragraph:

> "[s]uch intent is ascertained from the words and language used in the statute and if the language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation. Only when words of the statute are ambiguous or obscure may courts go outside the statute in an endeavor to ascertain their true meaning." *Id.* at 116.

The *Stringfellow's* Court did in fact overturn the Supreme Court's ruling, but only because it found that the text as written wasn't actually clear and unambiguous, and therefore legislative

[2] A copy of *Raritan* was attached to Owner's July 24, 2019 submission in Appendix A.
[3] A copy of *Stringfellow's* was attached as an exhibit to City Club Appellants' August 21, 2019 submission to the Board.

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history was necessary to fill in the gaps. Without a finding that the statute was ambiguous, even the First Department in *Stringfellow's* would not have been able to delve into legislative history.

City Club Appellants also state that the Court of Appeals has not mentioned the plain meaning doctrine in the context of "zoning" cases since 1999.[4] However, a search shows that the Court of Appeals has, as recently as two years ago, decided a land use case based on this specific notion. In *Matter of Avella v. City of New York*, 29 N.Y.3d 425 (2017), the Court of Appeals reviewed whether the then-proposed "Willets West" comported with the New York City Administrative Code § 18-118.[5] The question turned on whether the language of the statute authorized the construction of a shopping mall or movie theater in a location which was originally intended for Shea Stadium. Like the predecessor cases, the Court of Appeals instructed that statutes should be interpreted to effectuate legislative intent and that the "text of a statute is the 'clearest indicator' of such legislative intent." *Id.* at 434. (internal citations omitted).

The Court of Appeals proceeded to find that the plain language of the Administrative Code did not authorize the proposed construction and therefore it was not permitted. The Court of Appeals understood that, even though an interpretation of a provision contrary to the plain language may lead to laudable goals which would "immensely benefit the people of New York City," the Court could not consider outside information in the presence of plain unambiguous text, and that the legislature is the proper route to achieve this goal but it must do so "through direct and specific legislation." *Id.* at 440.

Furthermore, it is also important to note the prevalence of the Appellate Division's reliance on the doctrine of plain meaning in zoning cases: *Erin Estates, Inc. v. McCracken*, 84 A.D.3d 1487, 1489 (2011) ("Unambiguous language is to be construed to give effect to its plain meaning"); *Oakwood Prop. Mgmt., LLC v. Town of Brunswick*, 103 A.D.3d 1067, 1071 (2013) ("In reviewing the ordinance, however, we must 'read[ ] all of its parts together,' construe any unambiguous language contained therein in such a fashion as to 'give effect to its plain meaning' and avoid a construction that 'render[s] any of [the] language [employed] superfluous'"); *Watkins v. Town of N. E. Zoning Bd. of Appeals*, 136 A.D.3d 836, 837 (2016) ("'Where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used'"). Moreover, there has been no consequent Court of Appeals case that overturned, modified, or limited this statutory cannon as applied to the ZR. Therefore, contrary to City Club Appellants' assertions, the plain meaning doctrine is alive and well when interpreting land use and zoning cases.

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[4] This is not accurate even with respect to Court of Appeals decisions limited to those identified as "zoning" matters as opposed to "land use" matters. In *Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 91 (2001), the Court of Appeals stated, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning."

[5] A copy of *Avella* was attached as an exhibit to City Club Appellants' August 1, 2019 submission to the Board.

The Appellants would have the Board introduce district limitations on ZR § 82-34 which are not found within the plain reading confines of the ZR. This is a request that the Court of Appeals has specifically deemed impermissible, stating "BSA has (sometimes) grafted onto the language of the current Zoning Resolution an addendum of its own…[t]ypically, we have declined to uphold such an interpretation. *Raritan*, *supra*, at 104-05. Just as in *Raritan,* where a party asked the Court of Appeals to read language into the ZR contrary to plain reading, based on legislative history, and the Court of Appeals refused, so too here, where the Appellants have asked the Board to read in language not found in the ZR, the Board should refuse.

III. THE BOARD CORRECTLY STATED THAT THE TWO-DIMENSIONAL MECHANICAL EQUIPMENT COVERAGE IS NOT A FINAL DETERMINATION BEFORE THE BOARD IN THE CONTEXT OF THE INSTANT APPEALS

During the August 6, 2019 public hearing, and subsequently in their August 21, 2019 post-hearing submission to the Board, Landmark West Appellants request that the Board review the floor area deductions attributed to mechanical equipment in the Proposed Building. During the public hearing, the Board stated that this issue was not ripe for Board review since there was no final determination issued by the Department on this matter for which the Appellants have appealed.

In response, Landmark West Appellants cite a November 19, 2018 ZRD2 denial signed by Development Hub Borough Commissioner, Scott Pavan. Landmark West Appellants state that since this ZRD2 was included in their original submission, it is part of the record before the Board. To clarify, this ZRD2 denial form was a response to a previous public challenge submitted by Landmark West Appellants to the Department pursuant to 1 RCNY § 101-15. The referenced ZRD2 was subsequently appealed to the Board under Cal. No. 2018-199-A. However, the Department ultimately issued an "Intent to Revoke Approval" letter to the Owner based on the original Zoning Diagram. In the Intent to Revoke Approval letter, the Department explicitly stated that "the ZRD2 issued on November 19, 2018, in response to a public challenge pursuant to 1 RCNY § 101-15, of the Subject ZD1, is hereby rescinded."[6] Since the ZRD2 was rescinded, the Board rendered BSA Cal. No. 2018-199-A as moot. Therefore, Landmark West Appellants' assertion that the ZRD2 is a final determination before the Board is incorrect.

[6] Landmark West Appellants attached a copy of the "Intent to Revoke Approval" letter as Exhibit I to their May 14, 2019 submission to the Board.

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IV. CONCLUSION

Based on the foregoing, the Department respectfully requests that the Board affirm the determination to issue the Permit.

Respectfully submitted,

Michael J. Zoltan

cc: Constadino (Gus) Sirakis, P.E., First Deputy Commissioner
Martin Rebholz, R.A., Borough Commissioner, Manhattan
Scott Pavan, R.A., Borough Commissioner, Development HUB
Mona Sehgal, General Counsel
Felicia R. Miller, Deputy General Counsel
Susan Amron, General Counsel, Department of City Planning
John R. Low-Beer, Esq.
(On behalf of City Club Appellants)
Stuart Klein
(On behalf of Landmark West Appellants)
David Karnovsky, Fried, Frank, Harris, Shriver & Jacobson LLP
(On behalf of West 66th Street Sponsor LLC)

Appendix A – Cited Case Law

- Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86 (2001).
- Erin Estates, Inc. v. McCracken, 84 A.D.3d 1487 (2011).
- Oakwood Prop. Mgmt., LLC v. Town of Brunswick, 103 A.D.3d 1067 (2013).
- Watkins v. Town of N. E. Zoning Bd. of Appeals, 136 A.D.3d 836 (2016).

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Ridge Transport Systems, Inc. v. City of New York, N.Y.Sup., August 20, 2010

97 N.Y.2d 86
Court of Appeals of New York.

In the Matter of TALL TREES CONSTRUCTION CORP., Appellant,
v.
ZONING BOARD OF APPEALS OF THE TOWN OF HUNTINGTON, Respondent.

Nov. 19, 2001.

Synopsis

Property owner brought Article 78 proceeding after town zoning board of appeals took no action on owner's applications for area variances, based on its tie votes. The Supreme Court, Suffolk County, Peter Fox Cohalan, J., granted petition, annulled determination, and directed that applications be granted. Zoning board appealed, and the Supreme Court, Appellate Division, 262 A.D.2d 494, 692 N.Y.S.2d 110, reversed and remitted. After granting permission to appeal, the Court of Appeals, Wesley, J., held that: (1) when a quorum of a zoning board of appeals is present and participates in the proceedings on a variance application, a tie vote failing to garner a majority to grant the application is in effect a denial, abrogating *Walt Whitman Game Room v. Zoning Bd. of Appeals*, 54 A.D.2d 764, 387 N.Y.S.2d 698; (2) tie votes on applications by four-member quorum of board were thus denials of applications; and (3) board acted arbitrarily and capriciously by denying variance.

Appellate Division reversed, and judgment reinstated.

West Headnotes (13)

[1] Zoning and Planning
Determination

Zoning and Planning
Voting; bias and disqualification

When a quorum of a zoning board of appeals 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 application is not "nonaction" but, in effect, a denial; abrogating *Walt Whitman Game Room v. Zoning Bd. of Appeals*, 54 A.D.2d 764, 387 N.Y.S.2d 698. McKinney's General Construction Law § 41; McKinney's Town Law § 267–a.

2 Cases that cite this headnote

[2] Zoning and Planning
Power and Authority

Zoning and Planning
Discretion in general

Zoning boards of appeals were created to interpret, to perfect, and to insure the validity of zoning through the exercise of administrative discretion.

Cases that cite this headnote

[3] Zoning and Planning
Nature and extent of power

Zoning and Planning
Hardship, Loss, or Injury

Zoning boards of appeals, which are often regarded as a safety valve, are invested with the power to vary zoning regulations in specific cases in order to avoid unnecessary hardship or practical difficulties arising from a literal application of the zoning law.

3 Cases that cite this headnote

[4] Statutes
Plain language; plain, ordinary, common, or literal meaning

Statutes
Superfluousness

Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning, and words are not to be rejected as superfluous.

37 Cases that cite this headnote

[5] Statutes
Subject or purpose

Statutes relating to the same subject matter must be construed together unless a contrary

legislative intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible.

13 Cases that cite this headnote

[6] Zoning and Planning

Voting; bias and disqualification

Although the participation of a majority of a zoning board of appeals is necessary for the board to exercise its authority in considering a variance application, as long as a quorum is present and votes, a concurring vote of the majority is not required for that vote to constitute a denial of the application. McKinney's General Construction Law § 41; McKinney's Town Law § 267–a.

3 Cases that cite this headnote

[7] Municipal Corporations

Quorum or number required to be present or act

Provision of General Construction Law which states that the majority of the members of a public board constitute a quorum allows valid action by such a board so long as there is participation by a majority of the whole number, but imposes no specific voting requirement other than majority participation. McKinney's General Construction Law § 41.

1 Cases that cite this headnote

[8] Zoning and Planning

Voting; bias and disqualification

If after participation and voting by a majority of a zoning board of appeals no concurring vote of the majority exists to grant a variance application, the application must be, a fortiori, denied. McKinney's General Construction Law § 41; McKinney's Town Law § 267–a.

3 Cases that cite this headnote

[9] Zoning and Planning

Voting; bias and disqualification

Tie votes of four members of seven-member zoning board of appeals on zoning variance applications, which occurred at meetings in which two members of board voted to grant application, two members voted to deny application, two members were absent, and one member abstained, were in effect denials of applications. McKinney's General Construction Law § 41; McKinney's Town Law § 267–a.

1 Cases that cite this headnote

[10] Zoning and Planning

Area variances in general

Zoning board of appeals acted arbitrarily and capriciously by denying application for minor area variance, through which property owner sought to divide parcel of land into two lots, one of which would be a "flagstaff" lot located behind second lot and with only a narrow strip of land to access adjoining road, where undisputed testimony indicated that existing lot was only one of its size in neighborhood, that lots to be created by subdivision would be indistinguishable from other neighborhood lots, that variances would present no adverse impact on neighborhood or real property values or on environment, and that board had previously granted a similar variance application.

5 Cases that cite this headnote

[11] Zoning and Planning

Decisions Reviewable

Zoning and Planning

Variances and exceptions

Fact that no factual findings either supporting or opposing requested zoning variances were provided by zoning board of appeals did not preclude judicial review of denials of applications, which resulted from tie votes of a quorum of board; in light of tie votes, an examination of the entire record, including the transcript of the meeting at which the vote was taken along with affidavits submitted in Article 78 proceeding challenging denials, could provide a sufficient basis for determining whether the

denial was arbitrary and capricious. McKinney's CPLR 7801 et seq.

5 Cases that cite this headnote

[12] Zoning and Planning

Area variances in general

In determining whether or not to grant area variances, zoning board of appeals is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the area variance is granted.

2 Cases that cite this headnote

[13] Administrative Law and Procedure

Explanation or reasons for change

A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious.

14 Cases that cite this headnote

Attorneys and Law Firms

*****875 *88 **567** Flynn & Flynn, Huntington (Robert J. Flynn, Jr., of counsel), for appellant.

Thomas A. Abbate, P. C., Woodbury (Thomas A. Abbate of counsel), for respondent.

***89 OPINION OF THE COURT**

WESLEY, J.

This case calls into question the effect of repeated tie votes rendered by the Town of Huntington Zoning Board of Appeals on petitioner's application for area variances. We conclude that when 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.

In 1996, petitioner Tall Trees Construction Corporation applied to the seven-member Zoning Board of Appeals for the Town of Huntington for minor area variances, seeking to divide a 1.94 acre parcel of land into two lots, one of which would be a flagstaff lot,[1] and to construct a home on each. The property abuts the lot of Lawrence Lamanna, the vice-chair of the Board. Following a hearing on the application, the Board issued a "NO ACTION" decision when petitioner failed to obtain a majority vote in favor of the application: two members voted to deny the application; two voted to grant the application; two were absent; and Lamanna abstained. The Board ignored petitioner's subsequent letter requesting another vote.

Petitioner then commenced a CPLR article 78 proceeding seeking to annul the Board's decision and to direct the Board to grant the variances. Supreme Court, relying on *Matter of Walt Whitman Game Room v. Zoning Bd. of Appeals*, 54 A.D.2d 764, 387 N.Y.S.2d 698, *lv. denied* 40 N.Y.2d 809, 392 N.Y.S.2d 1026, 360 N.E.2d 1108, held that the Board's tie determination was a nonaction and remitted the matter to the Board for another vote on the application. The Appellate Division affirmed (262 A.D.2d 494, 692 N.Y.S.2d 110). The Board, however, failed to conduct a new vote, and after repeated requests for compliance, ***90** petitioner commenced a contempt proceeding against the Board. Only then did the Board consider the matter. Once again, it filed a "NON–ACTION" determination based on a vote identical to *****876 **568** that rendered in the first.[2] The Board "authorize[d] the applicant to return" for a new hearing on the application.

Petitioner then initiated the present CPLR article 78 proceeding. Supreme Court granted the petition, annulled the Board's second decision and granted the requested variances. The court reasoned that under Town Law § 267–a (4), a tie vote of the Board should be deemed a denial of the variance. It noted that *Matter of Walt Whitman* could not be read to perpetuate an endless cycle of tie votes. Although expressing concern with some of the Board's actions and directives in this case, the Appellate Division reversed the judgment and remitted the matter to the Board for further proceedings, including a new hearing (278 A.D.2d 421, 717 N.Y.S.2d 369). The Appellate Division again concluded that the Board's vote was not a denial of the application because a majority of the Board did not vote either for or against it. We granted leave to appeal, and now reverse.

[1] Petitioner urges that 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 application is not "nonaction" but, in effect, a denial. We agree.

[2] **[3]** Zoning Boards of Appeals were created "to interpret, to perfect, and to insure the validity of zoning" through the exercise of administrative discretion (2 Salkin, New York Zoning Law and Practice § 27:08, at 27–14—27–15 [4th ed.]). Often regarded as a "safety valve," Zoning Boards of Appeals are invested with the power to vary zoning regulations in specific cases in order to avoid unnecessary hardship or practical difficulties arising from a literal application of the zoning law (*id.* § 27:09, at 27–15).

General Construction Law § 41 and Town Law § 267–a govern the procedures of a Town Zoning Board of Appeals. Under ***91** General Construction Law § 41, a majority of the members of a public board constitute a quorum and "not less than a majority of the whole number may perform and exercise such power, authority or duty." Town Law § 267–a (4) provides that "[t]he concurring vote of a majority of the members of the [zoning] board of appeals shall be necessary to *reverse* any * * * determination of any * * * administrative official [charged with the enforcement of any zoning ordinance or local law], or to *grant* a use variance or area variance" (emphasis added).

[4] **[5]** Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning; words are not to be rejected as superfluous (*see, Rosner v. Metropolitan Prop. & Liab. Ins. Co.,* 96 N.Y.2d 475, 479, 729 N.Y.S.2d 658, 754 N.E.2d 760; *Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978; *see also,* McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 94, 231). We have also recognized that statutes relating to the same subject matter must be construed together unless a contrary legislative *****877** ****569** intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible (*see, Matter of Dutchess County Dept. of Social Servs. v. Day,* 96 N.Y.2d 149, 153, 726 N.Y.S.2d 54, 749 N.E.2d 733; *see also,* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 221).

[6] Applying these principles here, a plain and harmonious reading of the related statutes leads to the conclusion that although the participation of a majority of the Board is necessary for the Board to exercise its authority in considering a variance application, as long as a quorum is present and votes, a concurring vote of the majority is not required for that vote to constitute a denial of the application.

[7] **[8]** General Construction Law § 41 "allows valid action by a body so long as there is *participation* by 'a majority of the whole number' " (*Matter of Wolkoff v. Chassin,* 89 N.Y.2d 250, 254, 652 N.Y.S.2d 712, 675 N.E.2d 447 [emphasis added]). However, other than majority participation, that section imposes no specific voting requirement. On the other hand, Town Law § 267–a (4) mandates a concurring majority vote of the Board in order to "reverse" a determination of the appropriate administrative official (*e.g.,* a Town building inspector) or to "grant" a variance application. Section 267–a (4) conspicuously fails to require the same majority vote concurrence for the *denial* of an application. Thus, if after participation and voting by a majority of the Board, no concurring vote of the majority exists to grant an application, the application must be, a fortiori, denied (*see, Matter of Monro Muffler/Brake v. Town Bd.,* 222 A.D.2d 1069, 635 N.Y.S.2d 882; *see also, Matter of Zagoreos v. Conklin,* 109 A.D.2d 281, 296, 491 N.Y.S.2d 358).

***92** To the extent that *Matter of Walt Whitman,* 54 A.D.2d 764, 387 N.Y.S.2d 698, *supra* holds to the contrary, that decision is not to be followed. In *Walt Whitman,* the same Board issued a nearly identical tie vote on a special use permit application. Applying General Construction Law § 41, the Appellate Division concluded that the vote was equivalent to nonaction. The Court relied on our decision in *Matter of Squicciarini v. Planning Bd.,* 38 N.Y.2d 958, 384 N.Y.S.2d 152, 348 N.E.2d 609. That reliance was misplaced. In *Squicciarini,* only three members of the seven-member Board voted on a motion to deny an application for a special permit, in direct contravention of the statutory requirement of General Construction Law § 41 of majority participation for effective action. Other cases are similarly inapposite (*see, e.g., Matter of Jung v. Planning Bd.,* 258 A.D.2d 865, 686 N.Y.S.2d 147; *Matter of Hoffis v. Zoning Bd. of Appeals,* 166 A.D.2d 850, 563 N.Y.S.2d 183).

We find it curious that this particular Zoning Board of Appeals has a history of "nonaction" tie votes which, in effect, block an applicant's right to judicial review.[3] Adopting the Board's view—that a tie vote on a variance application cannot be deemed a denial—would be contrary to the plain language of the statutes and, as was *****878** ****570** so aptly characterized by Supreme Court, would leave petitioner's application in "zoning purgatory"—a place from which an

applicant can escape only at the whim and pleasure of the Board. That is, most certainly, a result the statutes do not countenance. [4]

[9] [10] Having concluded that the tie votes were, in effect, a denial of petitioner's variance applications, we also agree with Supreme Court that the denial of the variances was arbitrary ***93** and capricious and an abuse of discretion (*see, Matter of Fuhst v. Foley,* 45 N.Y.2d 441, 444, 410 N.Y.S.2d 56, 382 N.E.2d 756 [citing *Conley v. Town of Brookhaven Zoning Bd. of Appeals,* 40 N.Y.2d 309, 386 N.Y.S.2d 681, 353 N.E.2d 594]). In this case, the unrefuted evidence in the record is sufficient, as a matter of law, to support our conclusion that the variances should have been granted.

[11] No factual findings, either supporting or opposing the requested variances, were provided by the Board. That, however, does not preclude judicial review of the determination. Courts have recognized that under circumstances where, as here, an application is rejected by a tie vote, "there exists and can exist no formal statement of reasons for the rejection" and, thus, 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" (*Matter of Zagoreos,* 109 A.D.2d 281, 296, 491 N.Y.S.2d 358, *supra; see also, Matter of Meyer,* 90 N.Y.2d, at 145, 659 N.Y.S.2d 215, 681 N.E.2d 382, *supra* [citing *Matter of Canfora,* 60 N.Y.2d, at 351, 469 N.Y.S.2d 635, 457 N.E.2d 740, *supra*]).

[12] [13] Nothing in the record supports the Board's denial of the variances. In determining whether or not to grant area variances, the Board is required "to engage in a balancing test, weighing the 'benefit to the applicant' against 'the detriment to the health, safety and welfare of the neighborhood or community' if the area variance is granted" (*Matter of Sasso v. Osgood,* 86 N.Y.2d 374, 384, 633 N.Y.S.2d 259, 657 N.E.2d 254 [quoting Town Law § 267–b (3)(b)]). Moreover, " '[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious' " (*Knight v. Amelkin,* 68 N.Y.2d 975, 977, 510 N.Y.S.2d 550, 503 N.E.2d 106 [citation omitted]).

Here, a review of the record reveals undisputed testimony from a real estate expert that this was the only lot of its size in the neighborhood; that if the variance to subdivide were granted, one parcel would be greater than one acre (the minimum lot size), the other parcel would be only slightly smaller than one acre and both would be "indistinguishable" from other neighborhood lots; that there are three other lots directly across the street that are smaller; and, finally, that the variances present no adverse impact on the neighborhood or real property values. *****879 **571** Petitioner also presented unrefuted testimony from the Town's former Director of Environmental Control that there would be no adverse impact on the environment. Petitioner's president testified that the lots would meet all ***94** other zoning requirements, including the side and rear yard setback conditions. Additionally, petitioner presented evidence that the Board had previously granted a similar variance application in the neighborhood and had noted in its decision that flagstaff lots were traditionally given the Board's imprimatur and that the neighborhood contained at least six other such lots.

Aside from general and conclusory assertions, the Board failed to identify any evidence to refute petitioner's claim that this case involves nothing more than a minor variance application which in prior similar circumstances was routinely granted (*see, Matter of T.J.R. Enters. v. Town Bd.,* 50 A.D.2d 836, 376 N.Y.S.2d 586 [citing *Matter of North Shore Steak House v. Board of Appeals,* 30 N.Y.2d 238, 245–246, 331 N.Y.S.2d 645, 282 N.E.2d 606]). Thus, because the benefit of granting the requested variances to petitioner is great and any detriment to the community and neighborhood is de minimis, and because nearly identical variance applications have been approved in the past, we conclude that the Board acted arbitrarily in failing to grant the requested variances.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the judgment of Supreme Court reinstated.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, ROSENBLATT and GRAFFEO concur.
Order reversed, etc.

All Citations

97 N.Y.2d 86, 761 N.E.2d 565, 735 N.Y.S.2d 873, 2001 N.Y. Slip Op. 09254

Footnotes

1 This is an arrangement of adjacent property where one lot maintains the appearance of an ordinary rectangular parcel and the second parcel is located almost entirely behind the first, with only a narrow strip of land to access the road.

2 We note that the Board's decision stated that the second vote was taken at the first opportunity that all of the members were in attendance. However, the Board does not dispute that the official minutes of the May 21, 1998 meeting, at which the second vote was allegedly taken, make no reference to a vote on petitioner's application. The official minutes also reveal that Board Member Kurtzberg, who is recorded in the Board's decision as voting in favor of the application, was not present at the May 21, 1998 meeting. Board Member Settle who, according to the Board's decision, was absent, actually was present and voted on other applications.

3 The Board's actions also appear to violate Town Law § 267–a (8), which requires that the Board "shall" render its decision "within [62] days after the conduct of said hearing." The Legislature recognized that a specific time period was necessary to "rule out the possibility of a lengthy delay which may cause so substantial a hardship that a favorable decision may be of no value" (Sponsor's Mem. of Assembly Member Arthur J. Kremer, Bill Jacket, L. 1966, ch. 657, at 1). Further, with a prompt Board decision "an applicant would be able to prepare for * * * court review * * * an unfavorable decision so as to have a prompt judicial determination of the merits of his case" (*id.*).

4 We have in at least one other context concluded that a tie vote by a public agency constituted a denial. An application for accidental disability retirement benefits for police officers and firefighters must be approved by a majority of the appropriate fund's Board of Trustees (*see,* Administrative Code of City of N.Y. § 13–216[b]; § 13–316[b]). This Court has long held that a tie vote is deemed a denial of those benefits which is then subject to judicial review (*see, e.g., Matter of Meyer v. Board of Trustees,* 90 N.Y.2d 139, 659 N.Y.S.2d 215, 681 N.E.2d 382; *Matter of Canfora v. Board of Trustees,* 60 N.Y.2d 347, 469 N.Y.S.2d 635, 457 N.E.2d 740; *see also, Matter of City of New York v. Schoeck,* 294 N.Y. 559, 63 N.E.2d 104).

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84 A.D.3d 1487
Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of ERIN ESTATES, INC., Appellant,
v.
John McCRACKEN, as Zoning Enforcement Officer of the Town of Erin, et al., Respondents.

May 5, 2011.

Synopsis

Background: Mobile home park operator initiated article 78 proceeding to review determination of zoning board of appeals prohibiting it from placing mobile home for sale on its premises. The Supreme Court, Chemung County, O'Shea, J., dismissed proceeding. Operator appealed.

[Holding:] The Supreme Court, Appellate Division, Garry, J., held that proposal did not violate ordinance.

Reversed.

West Headnotes (5)

[1] Zoning and Planning
Construction by board or agency

Fact-based interpretation of zoning ordinance that determines its application to particular use or property is entitled to great deference, but deference is not required when reviewing pure legal interpretation of terms in ordinance.

4 Cases that cite this headnote

[2] Zoning and Planning
Construction by board or agency

Meaning of term "sales lot or area" in ordinance governing manufactured home parks presented purely legal question in which no deference to zoning board of appeal's interpretation was required.

4 Cases that cite this headnote

[3] Municipal Corporations
Ordinance as a whole

Statutes
Statute as a Whole; Relation of Parts to Whole and to One Another

Statutes
Superfluousness

Statute or ordinance is to be construed as a whole, reading all of its parts together to determine legislative intent and to avoid rendering any of its language superfluous.

3 Cases that cite this headnote

[4] Statutes
Plain language; plain, ordinary, common, or literal meaning

Unambiguous language of statute is to be construed to give effect to its plain meaning.

2 Cases that cite this headnote

[5] Zoning and Planning
Mobile homes; trailer parks

Manufactured home park operator's proposal to place unoccupied manufactured home on lot for sale did not entail use of "sales lot or area" for purpose of selling manufactured homes, in violation of ordinance; purpose of proposal was "habitation," rather than display for inspection by potential buyers who would ultimately reside elsewhere.

Cases that cite this headnote

Attorneys and Law Firms

****731** Fix, Spindelman, Brovitz & Goldman, Fairport (James J. Bonsignore of counsel), for appellant.

Personius, Mattison, Palmer & Bocek, Elmira (Timothy K. Mattison of counsel), for respondents.

Before: PETERS, J.P., ROSE, LAHTINEN, MALONE JR. and GARRY, JJ.

Opinion

GARRY, J.

***1487** Appeal from a judgment of the Supreme Court ***1488** (O'Shea, J.), entered May 20, 2010 in Chemung County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent Town of Erin Zoning Board of Appeals prohibiting petitioner from placing a mobile home for sale on premises owned by it.

Petitioner operates a manufactured home park on real property that it owns in a residential zone in the Town of Erin, Chemung County. Residents of the park place manufactured homes on lots leased from petitioner. In 2009, petitioner's property manager approached respondent John McCracken, the Town of Erin Code Enforcement Officer, to inquire about obtaining a building permit to install a manufactured home owned by petitioner on a lot in the park to be offered for sale to the public. McCracken advised petitioner that the proposal was a commercial use prohibited by the Town of Erin Zoning Code. Petitioner then applied to respondent Town of Erin Zoning Board of Appeals (hereinafter ZBA) for an interpretation of the ordinance. After a public hearing, the ZBA determined that petitioner's proposed use was prohibited. Petitioner commenced this CPLR article 78 proceeding to annul that determination, and Supreme Court dismissed the petition. Petitioner appeals.

The Town of Erin Zoning Code defines a manufactured home park as "[a] parcel of land under single ownership which is improved for the placement of mobile homes and/or manufactured homes for non-transient use and which is offered to the public of two (2) or more mobile and/or manufactured homes [*sic*]" (Town of Erin Zoning Code § 1300). In a provision entitled "Commercial Sale of Mobile and/or Manufactured Homes," the zoning ordinance provides that "[a] mobile and/or manufactured home park shall be established for the purpose of permitting habitation of such mobile and/or manufactured homes. *No sales lot or area* shall be used for the purpose of selling mobile and/or manufactured homes" (Town of Erin Zoning Code § 1301[10] [emphasis added]). Relying upon the emphasized language, the ZBA found that petitioner's proposal to place an unoccupied manufactured home on a lot for sale "would have the effect of transforming said residential lot into a dedicated lot or area for the commercial sale of a mobile home" and was "an illegal commercial sale of a mobile home within a residential district." The ZBA further distinguished petitioner's proposal from sales of mobile homes by individual owners "in anticipation of moving," finding that such ****732** "casual sales" did not violate the ordinance but nonetheless would "have to be monitored on a case by case basis."

[1] **[2]** Supreme Court accorded deference to the decision of the ZBA, ***1489** but that heightened standard was not merited here. A fact-based interpretation of a zoning ordinance that determines its application to a particular use or property is entitled to "great deference" (*Matter of West Beekmantown Neighborhood Assn., Inc. v. Zoning Bd. of Appeals of Town of Beekmantown,* 53 A.D.3d 954, 956, 861 N.Y.S.2d 864 [2008]; *see Matter of New York Botanical Garden v. Board of Stds. & Appeals of City of N.Y.,* 91 N.Y.2d 413, 420–421, 671 N.Y.S.2d 423, 694 N.E.2d 424 [1998]). However, " deference is not required when reviewing a pure legal interpretation of terms in an ordinance" (*Matter of Shannon v. Village of Rouses Point Zoning Bd. of Appeals,* 72 A.D.3d 1175, 1177, 903 N.Y.S.2d 539 [2010]; *see Matter of Mack v. Board of Appeals, Town of Homer,* 25 A.D.3d 977, 980, 807 N.Y.S.2d 460 [2006]). Here, the meaning of the term "sales lot or area" in the ordinance at issue presents a purely legal question in which no deference to the ZBA's interpretation is required (*see Matter of Shannon v. Village of Rouses Point Zoning Bd. of Appeals,* 72 A.D.3d at 1177, 903 N.Y.S.2d 539; *Matter of Blalock v. Olney,* 17 A.D.3d 842, 843–844, 793 N.Y.S.2d 583 [2005]).

[3] **[4]** A statute or ordinance is to be construed as a whole, reading all of its parts together to determine the legislative intent and to avoid rendering any of its language superfluous (*see Friedman v. Connecticut Gen. Life Ins. Co.,* 9 N.Y.3d 105, 115, 846 N.Y.S.2d 64, 877 N.E.2d 281 [2007]; *Matter of Veysey v. Zoning Bd. of Appeals of City of Glens Falls,* 154 A.D.2d 819, 821, 546 N.Y.S.2d 254 [1989], *lv. denied* 75 N.Y.2d 708, 554 N.Y.S.2d 833, 553 N.E.2d 1343 [1990]; McKinney's Cons Laws of N.Y., Book 1, Statutes § 97). Unambiguous language is to be construed to "give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington,* 97 N.Y.2d 86, 91, 735 N.Y.S.2d 873, 761 N.E.2d 565 [2001]; *see Matter of Shannon v. Village of Rouses Point Zoning Bd. of Appeals,* 72 A.D.3d at 1177, 903 N.Y.S.2d 539). Applying these principles to this ordinance, we find that its plain language does not support the ZBA's interpretation.

[5] Read as a whole, Town of Erin Zoning Code § 1301(10) identifies and prohibits commercial sales within manufactured home parks by looking to the purpose of the contemplated use of land in the park. The first sentence of the ordinance provides that manufactured home parks are to be established for the purpose of "habitation." The second sentence prohibits the use of a "sales lot or area" within such a park for the contrasting "purpose of selling mobile and/or manufactured homes." Nothing in the ordinance distinguishes between acceptable and unacceptable sales of homes according to the previous use of the home (that is, whether the home was previously owned and occupied by a resident, or never occupied and owned by petitioner or some other non-resident). Instead, the ordinance looks to the future, distinguishing between permissible and impermissible ***1490** uses based upon whether the home was placed in the park to be inhabited or to be sold.

The purpose of petitioner's proposal—by which a manufactured or mobile home would be affixed to a residential lot within the park and then sold to be inhabited on that lot—is plainly that of "habitation." Thus, it does not fall within the use prohibited by the ordinance—that is, the designation of a "sales lot or area" that has no residential purpose, but is dedicated instead to the display of model homes to be inspected by potential buyers and ultimately ****733** resided in elsewhere. To construe the language otherwise would render the adjective "sales" in the phrase "sales lot or area" superfluous (*see Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d at 91, 735 N.Y.S.2d 873, 761 N.E.2d 565). As petitioner's proposed use does not violate the Town of Erin Zoning Code, Supreme Court's judgment must be reversed.

ORDERED that the judgment is reversed, on the law, without costs, petition granted and determination annulled.

PETERS, J.P., ROSE, LAHTINEN and MALONE JR., JJ., concur.

All Citations

84 A.D.3d 1487, 921 N.Y.S.2d 730, 2011 N.Y. Slip Op. 03707

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103 A.D.3d 1067
Supreme Court, Appellate Division,
Third Department, New York.

In the Matter of OAKWOOD PROPERTY MANAGEMENT, LLC, Appellant,
v.
TOWN OF BRUNSWICK et al., Respondents.

Feb. 28, 2013.

Synopsis

Background: After town zoning board of appeals (ZBA) sustained notices of violation issued by town's Code Enforcement Officer, landowner, which operated a landscaping and mulching business, brought combined Article 78 proceeding and action for declaratory judgment. The Supreme Court, Albany County, Devine, J., granted summary judgment to town. Landowner appealed.

Holdings: The Supreme Court, Appellate Division, Egan Jr., J., held that:

[1] town was not estopped from enforcing zoning restrictions on two parcels owned by landowner, which adjoined parcel on which landowner originally conducted its landscaping and mulching business;

[2] assuming that ZBA violated Open Meetings Law, its zoning decision would not be voided;

[3] town's "schools and cemeteries" designation on its zoning map was not unconstitutionally vague;

[4] ZBA rationally concluded that commercial mulching was not a permitted use in schools and cemeteries zone; and

[5] ZBA rationally concluded that commercial mulching was not a permitted use in agricultural zone.

Affirmed.

West Headnotes (12)

[1] Estoppel
Municipal corporations in general

Estoppel cannot be invoked against a municipality to either: (1) prevent it from discharging its statutory duties; (2) ratify administrative errors; or (3) preclude it from enforcing its zoning laws.

1 Cases that cite this headnote

[2] Estoppel
Municipal corporations in general

An estoppel defense may lie where the municipality engages in fraud, misrepresentation, deception, or similar affirmative conduct upon which there is reasonable reliance.

2 Cases that cite this headnote

[3] Estoppel
Municipal corporations in general

Town's alleged conduct did not involve fraud, misrepresentation, or deception, as would estop town from prohibiting owner of landscaping and mulching business, which had received site plan approval to conduct those activities on five-acre parcel zoned for industrial use, from conducting those activities on owner's adjoining 43–acre parcel zoned for schools and cemeteries and abutting 26–acre parcel zoned for agricultural use; alleged conduct included town supervisor encouraging owner to purchase 43-acre parcel for use in owner's existing operations, town's issuance of fill permits for 43–acre parcel, town's issuance of building permit and certificate of occupancy for structure built on five-acre parcel, town's enactment of resolutions supporting inclusion of 43-acre and 26-acre parcels in a New York State Empire Zone, and various inspections of owner's properties by town officials.

Cases that cite this headnote

[4] **Zoning and Planning**

Mode of enforcement and proceedings in general

Even assuming that town zoning board of appeals (ZBA) violated Open Meetings Law by going into executive session during a meeting without stating with sufficient particularity a valid reason for doing so, its actions with respect to landowner's appeals, regarding notices of violation issued by town's Code Enforcement Officer, were not void, but rather voidable upon good cause shown. McKinney's Public Officers Law §§ 105, 107(1).

6 Cases that cite this headnote

[5] **Zoning and Planning**

Review

Assuming that town zoning board of appeals (ZBA) violated Open Meetings Law by going into executive session during a meeting without stating with sufficient particularity a valid reason for doing so, good cause did not exist for court to exercise its discretion to invalidate ZBA's decision sustaining notices of violation issued by town's Code Enforcement Officer, in light of substantial public input at an earlier public hearing and parties' extensive documentary submissions, and in the corresponding absence of any indication that ZBA intentionally violated Open Meetings Law. McKinney's Public Officers Law §§ 105, 107(1).

6 Cases that cite this headnote

[6] **Constitutional Law**

Particular issues and applications

Zoning and Planning

Mortuaries, cemeteries, and mausoleums

Zoning and Planning

Schools and education

Town's "schools and cemeteries" designation on its zoning map was not unconstitutionally vague, as would violate due process; the average person would be able to grasp the meaning of the designation without resorting to guesswork, and the common understanding of those words was not so expansive as to lead to arbitrary enforcement. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[7] **Constitutional Law**

Certainty and definiteness; vagueness

Constitutional Law

Zoning and Land Use

There is no requirement, for due process purposes, that every term in a statute or zoning ordinance be precisely defined; rather, a statute or zoning ordinance will pass constitutional muster so long as it provides persons of ordinary intellect reasonable notice of the proscribed conduct. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[8] **Zoning and Planning**

Construction by board or agency

Interpretation of town's zoning ordinance presented a purely legal question, and thus, the court was not required to give deference to the interpretation by town's zoning board of appeals (ZBA).

Cases that cite this headnote

[9] **Zoning and Planning**

Ambiguity

Zoning and Planning

Ordinance as a whole, and intrinsic aids

In reviewing a zoning ordinance, the court must read all of its parts together, construe any unambiguous language contained therein in such a fashion as to give effect to its plain meaning, and avoid a construction that renders any of the language employed superfluous.

Cases that cite this headnote

[10] **Zoning and Planning**

Mortuaries, cemeteries, and mausoleums

Zoning and Planning

Schools and education

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Town's zoning board of appeals (ZBA) rationally concluded that commercial mulching was not a permitted use in the schools and cemeteries zone on town's zoning map.

1 Cases that cite this headnote

[11] Zoning and Planning

Agricultural uses, woodlands and rural zoning

Town's zoning board of appeals (ZBA) rationally concluded that commercial production, storage, and distribution of mulch/topsoil was not a permitted use in agricultural zone, which allowed farms and forestry and nursery operations.

Cases that cite this headnote

[12] Zoning and Planning

Uses in general

Generally, use of land in one zoning district for an access road to another zoning district is prohibited where the road would provide access to uses that would themselves be barred if they had been located in the first zoning district.

Cases that cite this headnote

Attorneys and Law Firms

****537** Whiteman, Osterman & Hanna, LLP, Albany (John J. Henry of counsel), for appellant.

Tuczinski, Cavalier, Gilchrist & Collura, PC, Albany (Andrew Gilchrist of counsel), for respondents.

Before: MERCURE, J.P., STEIN, McCARTHY and EGAN JR., JJ.

Opinion

EGAN JR., J.

***1067** Appeal from an order and judgment of the Supreme Court (Devine, J.), entered January 23, 2012 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, among other things, granted respondents' cross motion for summary judgment and dismissed the petition/complaint.

Petitioner operates a landscaping and mulching business in the Town of Brunswick, Rensselaer County. In April 2002, petitioner obtained site plan approval from the Planning Board of respondent Town of Brunswick to operate its business on a five-acre parcel of land zoned for industrial use. Shortly thereafter, petitioner purchased an adjoining 43–acre parcel that fell within a "Schools and Cemeteries" zone as depicted on the Town's zoning map [1] and, in 2004, acquired an abutting 26–acre parcel zoned for agricultural use. As each parcel was acquired, petitioner expanded its operations accordingly and, as the business grew, neighboring property owners began to complain of noise and other issues.

In June 2007, respondent John Kreiger, the Town's Code Enforcement Officer, sent a letter to petitioner expressing concern that petitioner's business had expanded beyond the scope of the original site plan. No response from petitioner apparently was forthcoming, prompting Kreiger to advise petitioner in July 2008 that it was in violation of its approved site plan and directing petitioner to submit an amended application with respect thereto. Petitioner submitted the requested application in October 2008 and, when the Planning Board convened in November 2008, the application was adjourned at petitioner's request to allow petitioner to compile "additional ***1068** information." [2] The matter thereafter was tabled several times and, in January 2009, was "adjourned without date[ ] pending further research regarding zoning compliance matters."

In June 2010, Kreiger issued a notice of violation alleging that petitioner was conducting operations on the 43– and 26–acre parcels without the required approvals and, further, had exceeded the bounds of the 2002 site plan approval with respect to the original five-acre parcel. Petitioner appealed that notice of violation to respondent Town of Brunswick Zoning Board of Appeals (hereinafter ZBA) and, while that appeal was pending, Kreiger issued a second notice alleging various violations of the Town's zoning ordinance. Petitioner appealed that notice of violation as well, and the appeals were consolidated for purposes of the public hearing conducted by the ****538** ZBA in August 2011. [3] At the conclusion of that hearing, the ZBA issued a detailed decision sustaining the notices of violation and dismissing petitioner's appeals.

Petitioner thereafter commenced this combined CPLR article 78 proceeding and action for declaratory judgment seeking,

among other things, to annul the ZBA's determination and a declaration that the "Schools and Cemeteries" designation as depicted on the Town's zoning map was unconstitutionally vague. Following interim motions not at issue here, respondents answered and counterclaimed to permanently enjoin petitioner's operations. Petitioner then moved for, among other things, summary judgment on its declaratory judgment claims and dismissal of respondents' counterclaim, and respondents cross-moved for, among other things, summary judgment and dismissal of the petition/complaint. Supreme Court denied petitioner's motion, granted respondents' cross motion and dismissed the petition/complaint. This appeal by petitioner ensued.

[1] [2] [3] We affirm. Initially, we reject petitioner's assertion that respondents are estopped from prohibiting it from conducting ***1069** grinding and mulching operations on the subject parcels. The crux of petitioner's argument on this point is that respondents not only were well aware that petitioner had expanded its operations to the 43– and 26–acre parcels but, more to the point, actively encouraged petitioner to do so. It is well settled, however, that estoppel cannot be invoked against a municipality to either (1) prevent it from discharging its statutory duties, (2) ratify administrative errors, or (3) preclude it from enforcing its zoning laws (*see Matter of Parkview Assoc. v. City of New York,* 71 N.Y.2d 274, 282, 525 N.Y.S.2d 176, 519 N.E.2d 1372 [1988]; *Matter of Village of Fleischmanns [Delaware Natl. Bank of Delhi],* 77 A.D.3d 1146, 1148, 909 N.Y.S.2d 564 [2010]; *Van Kleeck v. Hammond,* 25 A.D.3d 941, 942, 811 N.Y.S.2d 452 [2006]). Although an estoppel defense may lie where the municipality engages in "fraud, misrepresentation, deception, or similar affirmative conduct" upon which there is "reasonable reliance" (*Town of Copake v. 13 Lackawanna Props., LLC,* 99 A.D.3d 1061, 1064, 952 N.Y.S.2d 780 [2012] [internal quotation marks and citations omitted], *lv. denied* 20 N.Y.3d 857, 959 N.Y.S.2d 692, 983 N.E.2d 771 [Jan. 15, 2013]; *accord Matter of County of Orange [Al Turi Landfill, Inc.],* 75 A.D.3d 224, 238, 903 N.Y.S.2d 60 [2010]; *see Matter of Village of Fleischmanns [Delaware Natl. Bank of Delhi],* 77 A.D.3d at 1148, 909 N.Y.S.2d 564), the conduct alleged here, in our view, does not rise to that level.[4] Accordingly, ****539** Supreme Court properly rejected petitioner's estoppel claim.

[4] [5] We reach a similar conclusion with respect to respondents' asserted violation of the Open Meetings Law (*see* Public Officers Law art. 7). Upon determining that a public body has failed to comply with the provisions of the Open Meetings Law, a "court shall have the power, in its discretion, upon good cause shown, to declare ... the action taken in relation to such violation void, in whole or in part" (Public Officers Law § 107[1]; *see New Yorkers for Constitutional Freedoms v. New York State Senate,* 98 A.D.3d 285, 296, 948 N.Y.S.2d 787 [2012], *lv. denied* 19 N.Y.3d 814, 955 N.Y.S.2d 552, 979 N.E.2d 813 [2012]; *Matter of Ireland v. Town of Queensbury Zoning Bd. of Appeals,* 169 A.D.2d 73, 76, 571 N.Y.S.2d 834 [1991]). Thus, even assuming that the ZBA violated the Open Meetings Law by, among other things, going into executive session during its December 5, 2011 meeting without stating—with sufficient particularity—a valid reason for doing so (*see* Public Officers Law § 105), its actions with respect ***1070** to petitioner's appeals are "not void but, rather, voidable" (*Matter of Ireland v. Town of Queensbury Zoning Bd. of Appeals,* 169 A.D.2d at 76, 571 N.Y.S.2d 834) upon good cause shown (*see* Public Officers Law § 107[1]). In light of the substantial public input at the August 2011 hearing and the parties' extensive documentary submissions, and in the corresponding absence of any indication that the ZBA intentionally violated the Open Meetings Law, we find that petitioner failed to establish good cause warranting the exercise of our discretionary power to invalidate the ZBA's determination (*see generally New Yorkers for Constitutional Freedoms v. New York State Senate,* 98 A.D.3d at 296–297, 948 N.Y.S.2d 787; *McGovern v. Tatten,* 213 A.D.2d 778, 780–781, 623 N.Y.S.2d 370 [1995]; *Matter of Malone Parachute Club v. Town of Malone,* 197 A.D.2d 120, 124, 610 N.Y.S.2d 686 [1994]; *compare Matter of Gordon v. Village of Monticello,* 207 A.D.2d 55, 59, 620 N.Y.S.2d 573 [1994], *revd. on other grounds* 87 N.Y.2d 124, 637 N.Y.S.2d 961, 661 N.E.2d 691 [1995]).

[6] [7] Nor are we persuaded that the ZBA's interpretation of the "Schools and Cemeteries" designation as depicted on the Town's zoning map is irrational or that such designation is unconstitutionally vague. As to the constitutional claim, "there is no requirement that every term in a statute [or zoning ordinance] be precisely defined; rather, a statute [or ordinance] will pass constitutional muster so long as it provides persons of ordinary intellect reasonable notice of the proscribed conduct" (*Matter of Flow v. Mark IV Constr. Co.,* 288 A.D.2d 779, 780, 733 N.Y.S.2d 751 [2001] [internal quotation marks and citation omitted]; *see Matter of Griffiss Local Dev. Corp. v. State of N.Y. Auth. Budget Off.,* 85 A.D.3d 1402, 1403, 925 N.Y.S.2d 712 [2011], *lv. denied* 17 N.Y.3d 714, 2011 WL 5041564 [2011]; *Matter of Morrissey v. Apostol,* 75 A.D.3d 993, 996, 906 N.Y.S.2d 639 [2010]). Here, we are satisfied that the average person is able to grasp

the meaning of the designation "Schools and Cemeteries" as depicted on the Town's zoning map without resorting to guesswork and, further, that the common understanding of those words is not so expansive as to lead to arbitrary enforcement (*see Matter of Flow v. Mark IV Constr. Co.*, 288 A.D.2d at 780, 733 N.Y.S.2d 751; *Matter of Griffiss Local Dev. Corp. v. State of N.Y. Auth. Budget Off.*, 85 A.D.3d at 1404, 925 N.Y.S.2d 712; *Matter of Morrissey v. Apostol*, 75 A.D.3d at 996, 906 N.Y.S.2d 639). Accordingly, petitioner's constitutional claim must fail.

Petitioner's related assertion—that the ZBA impermissibly created a use restriction ****540** with respect to the 43–acre parcel that does not otherwise exist in the Town's zoning ordinance—is equally unpersuasive. Section 2 of the Town of Brunswick Zoning Ordinance divides the Town into 10 enumerated zoning districts; "Schools and Cemeteries"—the zone within which the 43–acre parcel lies—is not listed as one of those districts. Similarly, the accompanying Schedule of Regulations, which is ***1071** expressly incorporated into and made a part of the zoning ordinance (*see* Town of Brunswick Zoning Ordinance § 6 [1958]), makes no mention of the permitted uses within the " Schools and Cemeteries" zone. However, section 3 of the ordinance states that the zoning districts "are bounded and defined as indicated on [the Town's zoning] map ... which accompanies and which, with all explanatory matter thereon, is hereby made a part of this ordinance" (Town of Brunswick Zoning Ordinance § 3 [1958]). [5]

[8] **[9]** **[10]** To be sure, the Town's zoning ordinance could have been drafted with greater clarity and, as the interpretation thereof presents a purely legal question, we agree with petitioner that no deference to the ZBA's determination is required (*see Matter of Subdivisions, Inc. v. Town of Sullivan*, 92 A.D.3d 1184, 1185, 938 N.Y.S.2d 682 [2012], *lv. denied* 19 N.Y.3d 811, 2012 WL 3931116 [2012]; *Matter of Shannon v. Village of Rouses Point Zoning Bd. of Appeals*, 72 A.D.3d 1175, 1177, 903 N.Y.S.2d 539 [2010]). In reviewing the ordinance, however, we must "read[ ] all of its parts together," construe any unambiguous language contained therein in such a fashion as to "give effect to its plain meaning" and avoid a construction that "render[s] any of [the] language [employed] superfluous" (*Matter of Erin Estates, Inc. v. McCracken*, 84 A.D.3d 1487, 1489, 921 N.Y.S.2d 730 [2011] [internal quotation marks and citation omitted]). Although petitioner argues that, in the absence of an express list of permitted or prohibited uses, the ordinance "does not impose *any* land use restrictions on property in a 'Schools and Cemeteries' zone," such an interpretation would render the inclusion of the "Schools and Cemeteries" zone on the Town's zoning map meaningless and would ignore what we already have determined to be the commonly understood meaning of those words. For these reasons, the ZBA rationally and properly concluded that petitioner's commercial mulching operation is not a permitted use on the 43–acre parcel lying within the "Schools and Cemeteries" zone.

[11] We reach a similar conclusion regarding the ZBA's determination that petitioner's use of the 26–acre parcel for the production, storage and distribution of mulch/topsoil is not permitted within the agricultural district in which that parcel lies. [6] Pursuant to the Town's Schedule of Regulations, permitted uses within an agricultural district include, insofar as is relevant here, "[f]arms" and "[f]orestry and [n]ursery operations." ***1072** Without repeating the reasoned analysis undertaken by the ZBA, we are satisfied—upon reviewing the definition of the terms "farm" (*see* Town of Brunswick Zoning Ordinance § 1 [1958]), "farm product" (*see* Agriculture and Markets Law § 2[5]), "farm operation" (*see* Agriculture and Markets Law § 301[11]), "forestry" (*see* http://www.merriam-webster.com/ dictionary/forestry) and "nursery" (*see* http://www. merriam- ****541** webster. com/ dictionary/nursery)—that petitioner's commercial mulching operation is not encompassed by any of those terms and, as such, is not a permitted use within an agricultural district. In short, as the ZBA's determination on this point is rational, it will not be disturbed.

Petitioner's remaining contentions do not warrant extended discussion. Contrary to petitioner's assertion, the Planning Board's failure to render a decision on petitioner's October 2008 amended site plan application did not result in a default approval thereof as there is nothing in the record to suggest that petitioner ever tendered a "completed application" (Town of Brunswick Site Plan Review Act § 4[D]) (*see* note 2, *supra*). Petitioner's related assertion—that the ZBA erred in sustaining the underlying notices of violation—is unpersuasive. The ZBA's conclusion that petitioner violated the Town's Site Plan Review Act by conducting operations on the 43– and 26–acre parcels without the required approvals and exceeding the scope of the 2002 site plan approval issued with respect to the five-acre parcel finds ample support in the record, [7] as does—for the reasons already discussed—the ZBA's resolution of the underlying zoning violations.

[12] Finally, petitioner takes issue with the ZBA's determination that petitioner's use of an existing private road, which extends over the five- and 43–acre parcels, to access the 26–acre parcel violates the Town's zoning ordinance. "Generally, [u]se of land in one zoning district for an access road to another zoning district is prohibited where the road would provide access to uses that would themselves be barred if they had been located in the first zoning district" (*Matter of BBJ Assoc., LLC v. Zoning Bd. of Appeals of Town of Kent,* 65 A.D.3d 154, 162, 881 N.Y.S.2d 496 [2009] [internal quotation marks and citations omitted]). Stated another way, the use to which the access road leads must be permitted in the zoning district(s) over which it extends (*see e.g. City of Yonkers v. Rentways, Inc.,* 304 N.Y. 499, 503–504, 109 N.E.2d 597 [1952]; ***1073** *Korcz v. Elhage,* 1 A.D.3d 903, 904–905, 767 N.Y.S.2d 737 [2003]; *Matter of Partition St. Corp. v. Zoning Bd. of Appeals of City of Rensselaer,* 302 A.D.2d 65, 67, 752 N.Y.S.2d 749 [2002], *lv. denied* 99 N.Y.2d 511, 760 N.Y.S.2d 102, 790 N.E.2d 276 [2003]). As noted previously, the five-acre parcel is zoned for industrial use, the 43–acre parcel is zoned "Schools and Cemeteries" and the 26–acre parcel is zoned for agricultural use. Inasmuch as farming is not a permitted use in either an industrial or a "Schools and Cemeteries" zone, the ZBA rationally concluded that petitioner's use of the private road across the five- and 43–acre parcels to access its "farming" operations on the 26–acre parcel violates the Town's zoning ordinance. Petitioner's remaining contentions, including its assertion that Supreme Court erred in granting respondents summary judgment on their counterclaim, have been examined and found to be lacking in merit.

ORDERED that the order and judgment is affirmed, without costs.

MERCURE, J.P., STEIN and McCARTHY, JJ., concur.

All Citations

103 A.D.3d 1067, 960 N.Y.S.2d 535, 2013 N.Y. Slip Op. 01310

Footnotes

1 Prior to expanding its operations to this parcel, petitioner performed certain fill work on the property and obtained permits from the Town in 2002 and 2004 for that purpose. Although petitioner points to these permits as evidence of the Town's awareness that petitioner was using the 43–acre parcel for its landscaping/mulching business, each of the permits identifies the five-acre parcel as the location of the property/work.

2 The record does not disclose the substance of the additional information sought or requested, nor does it reflect that such information ever was tendered to the Planning Board.

3 In the interim, the Town apparently suggested that petitioner either obtain a use variance, pursue a zoning change or apply for designation as a planned development district. Petitioner initially pursued the latter option but, in October 2010, entered into a memorandum agreement with Kreiger and respondent Town of Brunswick Town Board in an effort to resolve the outstanding zoning issues between the parties. Ultimately, the agreement did not achieve its desired goals and, in June 2011, petitioner effectively terminated the agreement, withdrew certain of its site plan and rezoning applications and indicated its intent to, among other things, pursue its appeals before the ZBA.

4 The conduct cited by petitioner includes a conversation with respondent Phil Herrington, the Town Supervisor, who allegedly encouraged one of petitioner's representatives to purchase the 43–acre parcel for use in petitioner's existing operations, as well as the issuance of the relevant fill permits (*see* note 1, *supra*), a building permit and certificate of occupancy for a structure built on the five-acre parcel, resolutions supporting the inclusion of two of the parcels in a New York State Empire Zone and various inspections of petitioner's properties by Town officials.

5 A 1964 amendment to the zoning ordinance modified this provision only to the extent of reflecting the date upon which the zoning map was adopted.

6 There is some indication that petitioner is raising beef cattle on this parcel as well, the propriety of which does not appear to be in dispute at this time.

7 While petitioner's appeals were pending, the Planning Board—consistent with the requirements of section 12(C) of the Town of Brunswick Zoning Ordinance—issued an advisory opinion documenting petitioner's violations of the Town's Site Plan Review Act.

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136 A.D.3d 836
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Brian Richard WATKINS, appellant,
v.
TOWN OF NORTH EAST ZONING
BOARD OF APPEALS, et al., respondents.

Feb. 10, 2016.

Attorneys and Law Firms

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Opinion

***836** In a proceeding pursuant to CPLR article 78 to review a determination of the Town of North East Zoning Board of Appeals dated August 27, 2013, that, under the Zoning Law of the Town of North East, an "educational center" is permitted to include housing and dining facilities, the petitioner appeals from a judgment of the Supreme Court, Dutchess County (Sproat, J.), dated January 3, 2014, which denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

Generally, "a zoning board's interpretation of its zoning ordinance is entitled to great deference and will not be overturned by the courts unless unreasonable or irrational" ****522** ***837** (*Matter of Green 2009, Inc. v. Weiss,* 114 A.D.3d 788, 788, 980 N.Y.S.2d 510; *see Matter of Toys R Us v. Silva,* 89 N.Y.2d 411, 418–419, 654 N.Y.S.2d 100, 676 N.E.2d 862; *Matter of Henderson v. Zoning Bd. of Appeals,* 72 A.D.3d 684, 685, 897 N.Y.S.2d 518). " '[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used' " (*Matter of Raritan Dev. Corp. v. Silva,* 91 N.Y.2d 98, 107, 667 N.Y.S.2d 327, 689 N.E.2d 1373 [emphasis omitted], quoting *Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York,* 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338). Here, pursuant to the plain meaning of the language of sections 98–5 and 98–33 of the Zoning Law of the Town of North East, it is permissible for an "educational center" to include housing and dining facilities. Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding.

MASTRO, J.P., HALL, MALTESE and LaSALLE, JJ., concur.

All Citations

136 A.D.3d 836, 24 N.Y.S.3d 521 (Mem), 2016 N.Y. Slip Op. 00987

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