IN THIS ISSUE:
WE OBJECT: FILING A CHANGE OF ZONE PROTEST PETITION 1
What Is A Protest Petition 2
Change of Zone Protest Petitions 2
Who Can Sign a Protest Petition? 3
Who Can Perform a Challenge to the Sufficiency of a Protest Petition? 4
How is the 20% Signature Requirement Calculated 5
Revocation and Timing 7
Utilizing Home Rule Law 7
Conclusion 9
From the Courts 13

WE OBJECT: FILING A CHANGE OF ZONE PROTEST PETITION

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WHAT IS A PROTEST PETITION

Towns, Villages and Cities share many common comprehensive land use and zoning provisions including Town Law § 265 (1)- Changes, Village Law § 7-708- Changes and General City Law § 83- Amendments, alterations and changes in district lines. These three State statutory provisions are commonly referred to as “Protest Petition” statutes (hereinafter referred to as “protest petition(s)").

Protest petitions apply to legislative action taken by an elected Board or Body seeking to affect changes to local laws, ordinances and district boundaries or change of zone applications. Ordinarily these actions require a simple majority vote for the change to become effective. However, if a protest petition is filed in opposition to a pending legislative change to a local law, ordinance or change of zone application, a supermajority vote of the elected Board or Body is required.

Protest petitions are predominantly utilized to oppose change of zone applications, which will be the focus of this Article. However, as discussed herein, protest petitions apply equally when challenging a local law or ordinance.

CHANGE OF ZONE PROTEST PETITIONS

With respect to change of zone applications, the legislative intent supporting the notion that more than a simple majority vote is required when considering a change of zone application finds its genesis in the principle that the impacts of a change of zone extend beyond the legal boundary of the land to be rezoned and thus can reasonably be expected to impact adjoining property owners. Imposing a supermajority vote upon the legislative Board or Body insures that the adjoining property owners will not only be heard by the elected officials, but also, it insures that their objections will require a greater consensus among the elected officials.

Although the statutory language of Town Law § 265, Village Law § 7-708 and General City Law § 83 vary in some respects, all three statutes are identical with respect to the percentage of adjacent landowners who may file a protest petition challenging a change of zone application and thereby elevating the affirmative legislative vote from a majority vote to a supermajority vote.

Town Law § 265 (1) (a)(b)(c), Village Law § 7-708 (1)(2)(3) and General City Law § 83 (2)(a)(b)(c) all require a supermajority vote of the legislative body if a protest petition if filed with the municipality by:

(a) the owners of twenty percent or more of the area of land included in such proposed change; or

(b) the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or

(c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

The question then becomes, what constitutes a supermajority vote? Pursuant to Town Law, a supermajority vote requires a vote of three-fourths of the legislative body. Pursuant to Village Law, a supermajority vote requires at least a two-thirds vote in Villages having three member boards. In Villages having upwards of three member boards, a three-fourths vote
is required. Pursuant to General City Law, a super-majority vote requires a vote of three-fourths of the legislative body.¹¹

For example, in the case of a three (3) member board, a supermajority would require an affirmative vote of two-thirds of the board members, or two (2) out of three (3) votes. A five (5) or seven (7) member board would require four (4) out of five (5) votes or six (6) out of seven (7) votes, respectively. In essence, a validly filed protest petition raises the stakes for the applicant in that a simple majority vote of the legislative body is no longer an option.¹²

WHO CAN SIGN A PROTEST PETITION?

When a Protest Petition is presented in opposition to a change of zone application, the sufficiency of the petition presents the change of zone applicant and the legislative body with an opportunity to challenge the sufficiency of the petition. The statutory language contained in Town Law § 265, Village Law § 7-708 and General City Law § 83 state only that a protest petition must be “written . . . presented to the board and signed.”¹³

In Bismark v. Bayville,¹⁴ the plaintiff filed a protest petition in opposition to the Village’s intention to reclassify sixty (60) acres of property owned by the plaintiff from a Residence “D” zoning classification where minimum lot sizes required 15,000 square feet, to a much stricter Residence “F” zoning classification, where minimum lots sizes required 40,000 square feet.¹⁵

In upholding the sufficiency of the protest petition, the Supreme Court rejected the Village’s argument that “the words ‘signed by the owners’ ” does not authorize a retained attorney to validate a protest petition, and consequently a three-fourths vote of the board was unnecessary.”¹⁶ In rejecting the Village’s argument, the court stated that:

“[l]egislation and ordinances affecting the rights of property owners are in derogation of common law and must be strictly construed against the municipality which by its mandates seeks to narrow or limit a property owner’s broad common-law rights respecting his property.”¹⁷

The Court further stated that a “technical interpretation which would deprive an owner from having her opposition considered would frustrate rather than promote the aim of the statute.”¹⁸

In Gosier v. Aubertine,¹⁹ a protest petition was submitted in opposition to the Town of Lyme’s intention to restrict wind turbine development by imposing excessive setback requirements.²⁰ Although this case does not involve a change of zone, but instead, a protest to a change in local law, the analysis remains the same. Here, the Fourth Department upheld the trial court’s decision that properties held as tenants by the entirety did not require that both tenants (husband and wife) sign the protest petition in order for a protest signature to be valid.²¹

In so holding, the Fourth Department stated that “Town Law § 265 does not define “owners,” nor is there any case law interpreting subdivision (1)(a) of the statute.”²² Consequently, the Court rejected the Town’s argument that both property owners were required to sign in order for their protest signature to be valid.²³ By invalidating those signatures where both husband and wife failed to sign, the Fourth Department opined that it would be unfair for one spouse to withhold his or her consent to the signing of the petition and thereby prevent any of the property from being included in the protest petition.”²⁴

A 1989 informal opinion of the Office of the Attorney General of the State of New York resolved the questions of (1) whether the signature of only one joint tenant constituted a valid protest signature, (2) whether the signature of a corporation president constituted a valid protest signature and (3) whether a tenant could offer a valid protest petition signature.²⁵ In these three instances, the Attorney General’s office concluded that a single joint tenant signature was a valid protest signature, that a corporation president could, without additional proof of authority, sign on behalf of a corporation and that a tenant is not an “owner,” as “owner” is defined by its plain language, and as such, a tenant signature was not a valid protest signature.²⁶

It is essentially resolved by applicable legal author-
ity that a protest signature is sufficient so long as the signatory is a fee titled owner to the property. Challenges to signature sufficiency, in most cases, will not invalidate a signature. However, wiser practitioners would be best suited to remain wary of the 1963 Bismark v. Bayville case where an attorney signature was upheld under an agency theory. Although Bismark remains good law, the practice of land use has changed dramatically since 1963. Unless an impossible feat, secure the fee title owner signature for a protest petition.

**WHO CAN PERFORM A CHALLENGE TO THE SUFFICIENCY OF A PROTEST PETITION?**

A protest petition may be submitted at any time after the municipal board begins consideration of a change in the zoning ordinance up to the time when a vote is taken. If a challenge to the protest petition arises, further questions arise as to how the hearing will be conducted and who will conduct the sufficiency challenge.

Town Law and the Attorney General have opined that the mechanics of a sufficiency inquiry will differ from case to case depending on the type of information presented. However, an examination of case law does answer the question of who may conduct a sufficiency analysis. In Glen Cove Shopping Center, Inc. v. Stozzi, the City Attorney was designated to make such a determination. In Brown v. Waryas, the Corporation Counsel was first charged with undertaking this task, but was later sought to be replaced with a committee of city council members. In Iannarone v. Caso, a civil engineer employed by the Engineering Department of the Department of Public Works for the Town of Hempstead presented a map on behalf of the Town and in Mattocks v. Town Board of the Town of Amherst, the Town Assessor made the determination.

It appears that similar to the broad range of acceptable signatories to a protest petition, the Courts have accepted a broad range of possible interested parties that may conduct a protest petition sufficiency analysis. Despite this liberal analysis, in Brown v. Waryas, the Court specifically declined to address the question of whether a City Council could refer a protest petition sufficiency question to a committee and stated only that plaintiffs could not demonstrate that they were entitled to the relief requested. The ultimate question of referral was never addressed.

Despite the Courts seemingly generous findings with respect to who can conduct a protest petition sufficiency analysis, counsel would be well advised to present their own evidence at any sufficiency hearing. For example, in Jalowiec v. Reile, a protest petition was presented in opposition to a zoning change. A dispute arose as to whether the petition contained the requisite 20% property owner signature requirement and following a majority vote by the Village Board approving the change of zone, the Town Clerk noted in the minutes that “the motion was not carried, since a 4/5 vote of the Board was required.”

An Article 78 proceeding was commenced and in rejecting the Town Clerk’s entry in the minutes that the motion was not carried, the Court stated that “[t]here is no evidence before the Court to sustain this conclusion.” The Court ordered that a hearing be held whereby the Village would be charged with proving that the 20% petition signature requirement had been met thereby necessitating a supermajority vote. Absent such proof, the Court declared that the Town Clerk enter a favorable change of zone vote in the minutes books based on the majority vote.

Jalowiec provides an excellent example of the necessity by all parties to provide proof of the sufficiency of a protest petition or suffer the fact finding consequences in an unwelcome litigation.

As an aside, Jalowiec, also provides a further interesting example of the politics that so often arise in land use matters. In Jalowiec, two competing resolutions were offered to the Village Board for consideration. One resolution stated that the 20% signature threshold had not been met; as such, only a majority vote was required. The competing resolution stated that the 20% signature threshold had been met, as such, a supermajority vote was required. The Town Clerk adopted the latter resolution, and without proof in the
record of the sufficiency of the protest petition, the Clerk determined that a supermajority vote was required over the majority approval vote that was taken.\textsuperscript{44} Jalowiec may serve as a cautionary tale to all that when presenting a protest petition, all parties must be prepared to defend their positions with regard to the sufficiency of the petition, or as stated above, a question of fact arises necessitating unwelcome litigation.

**HOW IS THE 20% SIGNATURE REQUIREMENT CALCULATED**

Once a protest petition is submitted and a challenge to the 20% signature requirement arises, a calculation must be made to determine if the number of signatures is sufficient to trigger supermajority voting requirements.\textsuperscript{48} Although the actual sufficiency analysis as discussed above is without formal guidance, the determination of what constitutes the 20% signature requirement is the subject of numerous case decisions.\textsuperscript{46}

Town Law § 265, Village Law § 7-708 and General City Law § 83 all require a supermajority vote of the legislative body if a protest petition is filed with the municipality by:

(a) the owners of twenty percent or more of the area of land included in such proposed change; or

(b) the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or

(c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.\textsuperscript{47}

Subsection (a) is self-explanatory and generally applies to those instances where local laws or ordinances, as opposed to change of zone applications, are had. Here, as was the case in Gosier, supra, when legislative action affects a large tract of land, or in fact, affects the entirety of the Town, Village or City, twenty percent (20\%) of the property owners affected by the change must provide their signature for a valid protest petition to be had.

In Gosier, the legislative act at hand was an intent to adopt a local law that would restrict the use of wind turbines throughout the Town.\textsuperscript{48} Since the entire town’s population would be affected, and upon the filing of a protest petition, the Town Office of Assessment determined that the Town consisted of 35,920 acres and a sufficient petition would require signatures by 20\% of the property owners.\textsuperscript{49} This type of calculation is generally simple and is rarely fraught with problems.

However, as respects Subsection (b) which requires signatures from 20\% of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or Subsection (c) which requires signatures from 20\% of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land, objections to proper calculations have arisen.

In \textit{Eadie v. Town Board of Town of North Greenbush},\textsuperscript{50} the question arose as to whether the existence of a “buffer” parcel could defeat a protest petition by an adjacent landowner. In \textit{Eadie}, a protest petition was filed by property owners that lived outside of the adjacent one hundred (100) foot extension from the parcel of land that was the subject of the change of zone. Despite their distant location, the property owners submitted a protest petition arguing that a parcel of land that existed between the proposed zone change parcel and their homes created an obstructionist buffer parcel. As a result the property owners argued that the Court should disregard the “buffer” parcel and extend the boundary line beyond the statutory one hundred feet.\textsuperscript{51}

The trial court accepted the property owners’ argument holding that although the protest petitioners lived more than 100 feet away from the rezoning parcel boundary line, the trial court stated that “there is the ring of abutting landowners who are seriously affected by the rezoning and vehemently oppose [it].”\textsuperscript{52} Further, the trial court held that Town Law § 265 is unclear as it relates to buffer zones and that the statute’s “100 foot limit was not intended to disenfranchise property owners outside the 100 foot border.”\textsuperscript{53}

On appeal, the Third Department reversed and on
further appeal to the Court of Appeals, by decision dated July 5, 2006, the Court of Appeals affirmed the Third Department stating:

Under Town Law § 265(1), zoning regulations may be amended “by a simple majority vote of the town board, except that any such amendment shall require the approval of at least three-fourths of the members of the town board” in certain circumstances. Petitioners here rely on Town Law § 265(1)(b), which requires a supermajority vote where the zoning change is the subject of a written protest presented to the Town Board and signed by “the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom.”

We conclude, as did the Appellate Division, that the “one hundred feet” must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part. The language of the statute, on its face, points to that result: “land included in such proposed change” can hardly be read to refer to land to which the proposed zoning change is inapplicable.

Fairness and predictability point in the same direction. The interpretation we adopt is fair, because it makes the power to require a supermajority vote dependent on the distance of one’s property from land that will actually be affected by the change. Petitioners complain that this allows landowners who obtain rezoning to insulate themselves against protest petitions by “buffer zoning”—i.e., leaving the zoning of a strip of property unchanged, as occurred with the Galloglys’ property here. But we see nothing wrong with this. The whole point of the “one hundred feet” requirement is that, where a buffer of that distance or more exists, neighbors beyond the buffer zone are not entitled to force a supermajority vote. If we adopted petitioners’ interpretation, such a vote could be compelled by property owners within 100 feet of the boundary of even a very large parcel—though these owners might be far away from any land that would be rezoned.

The interpretation we adopt also makes the operation of the statute more predictable. We see no reason why the right to compel a supermajority vote should change when the boundaries between parcels change—i.e., when parcels are merged or subdivided. Indeed, in this case, petitioners accuse the Galloglys of deeding property to themselves in order to create two parcels and invalidate the protest petition. Whether that was their original intention or not, the Galloglys now argue, and we agree, that such a reconfiguration of property lines, whether done in good faith or bad faith, should have no impact on the Town Law § 265(1)(b) issue.


In Ryan Homes Inc., v. Mendon, the Court addressed § (c) of the statutory authority by answering the question of whether a thruway, which separates the property to be zoned from the property directly opposite can preclude a protest petition because the directly opposite property owner lies outside the 100 foot boundary line due to the intervening thruway. In holding that that the thruway was an intervening area and thus precluded a protest petition by the directly opposite property owner located more than one hundred feet away, the Court relied upon Justice Rosen-bloom’s conclusion in Webster Associates v. Town of Webster, that “[d]irectly opposite means immediately across from without anything intervening.” A protestor’s property cannot be considered “directly opposite” the land to be rezoned for purposes if an intervening area exists.

The conclusion here is that when a protest petition is presented for sufficiency and the basis of the sufficiency turns on the statutory language set forth in Town Law § 265, Village Law § 7-708 and General City Law § 83, courts are not willing to step away from the strict construction of the statutory language. One hundred foot away means just that. Intervening buffers, even if self-created to defeat a protest petition will be upheld. As the Court of Appeals stated in Eadie, “whether [buffering is] done in good faith or bad faith, should have no impact on the Town Law § 265(1)(b) issue.
REVOCATION AND TIMING

Interesting cases also exist with regard to (1) revocation of a protest petition signature and (2) the timing of a decision regarding the sufficiency of a protest petition.62

In Maione v. Clarkstown,63 plaintiffs filed two protest petitions in opposition to a proposed change of zone.64 Following a public hearing, eight (8) property owners revoked their signatures resulting in a protest petition signature count at less than the required 20%.65 An Article 78 ensued.

The trial court concluded that the eight (8) property owners could not validly revoke their signatures and therefore without a supermajority vote, the change of zone grant was ineffective.66 The second department disagreed holding that:

Nothing in this State’s statutory or case law suggests that a signature on a protest such as the one at bar may not be revoked either before or after the public hearing. Indeed, the rule for which plaintiffs contend would run contrary to important considerations of public policy. Section 264 of the Town Law provides that, before an amendment to a zoning law may be enacted, a public hearing must be held so that “parties in interest and citizens shall have an opportunity to be heard.” The public hearing is the vehicle through which opposing views can be aired, providing individuals with the opportunity to persuade the town board and fellow citizens of the merit or lack of merit of a proposed change in the zoning ordinance. That purpose would be entirely frustrated by a rule which prohibited a party from changing his position after the close of the hearing. Accordingly, it has been said that one may add his signature to a protest after a public hearing and, indeed, at any time prior to the town board’s vote (see 1 Anderson, New York Zoning Law and Practice [2d ed], § 4.31; 20 Opns St Comp, 1964, pp. 277-278). In our view, if one may add his signature to a protest after a public hearing, it is equally reasonable that an individual may abandon a protest by revoking his signature therefrom based upon the arguments advanced at such a hearing.67

The law is clear that revocation of a protest petition signature may be had post hearing and prior to the legislative decision.

Another interesting line of cases has developed as a result of a municipality’s refusal to determine the sufficiency of a protest petition before the vote is had. In Brown v. Waryas,68 a protest petition was filed; however, the sufficiency of the petition was never determined. Despite this fact, the legislative body moved forward and obtained a majority vote. Upon review by the Court, it was held that “[u]ntil the protest petition is determined to be in accordance with Section 83 of the General City Law, a stalemate exists as to the status of the zoning amendment.”69

The Brown court relied upon a prior decision in Glen Cove Shopping Center, Inc. v. Suozzi,70 wherein a legislative vote was had prior to a determination on the sufficiency of a protest petition. However, unlike the facts in Brown, the Glen Cove facts indicate that the vote was entered in the minutes as tentative, and subject to the outcome of the sufficiency analysis with respect to the protest petition.71

Courts will not condone any attempt by a municipality to circumvent the protest petition protections by delaying a determination with respect to the sufficiency of the petition.

UTILIZING HOME RULE LAW

There have been various attempts to utilize municipal home rule powers to alter voting requirements on zoning resolutions. In some instances, municipalities have sought to require supermajority votes even if not required by New York State law; in other instances, attempts have been made to eliminate the need for supermajority votes even in instances where they are required by State statutes.

One of the earliest reported cases on this issue is Nardone v. Ryan.72 In Nardone, the Incorporated Village of Hempstead enacted an ordinance which required that, in instances where twenty (20%) percent or more of the property owners in an area affected by a change of zone filed a written protest, the vote of the Village Board of Trustees had to be unanimous in order for the zoning change to be approved.73

The plaintiff applied for a change of zone, which was duly noticed for hearing and heard by the Village Board. At the hearing, a written protest which fulfilled
the requirements of the ordinance was presented. The vote on the plaintiff’s application to amend the zoning on the subject parcel was four (4) in favor and one (1) against. Due to the aforesaid provisions of the ordinance, the mayor declared that the change of zone was not effective for lack of a unanimous vote.\textsuperscript{74}

The plaintiff sought a judgment, in part, declaring that their application had, in fact, been granted by virtue of the 4-1 vote of the Village Board.\textsuperscript{75} The legal basis for this cause of action was plaintiffs’ claim that the provisions of the ordinance which required a unanimous vote were impermissibly in conflict with the Village Law of the State of New York.\textsuperscript{76} The Village argued that there was in fact no conflict, since compliance with the provisions of the ordinance by necessity required compliance with the applicable section of the Village Law.\textsuperscript{77}

The court granted summary judgment to the plaintiffs on that issue. While recognizing that this particular controversy was one of first impression, the court reviewed the then existing case law precedent holding that “... in instances where a municipal ordinance permitted approval by a vote smaller than that prescribed in the basic statute, ... the statutory requirement must prevail.”\textsuperscript{78} The court also stated that, because the enabling legislation must be strictly construed, the powers granted by such legislation can only be exercised subject to the limitations contained therein. It concluded that “... the power of a municipal body may not be impaired by any self-denying resolution.”\textsuperscript{79} In addition, the court performed an analysis of holdings in courts of other jurisdictions as well as an Opinion of the Attorney General to support its conclusion.\textsuperscript{80}

Twenty (20) years later, the Appellate Division, Second Department reached a contrary result, based in part on provisions of the Municipal Home Rule Law which were amended in 1976. In \textit{North Bay Associates v. Hope},\textsuperscript{81} the petitioners challenged two (2) local laws enacted by the Town Board of the Town of East Hampton, one of which provided that the Town Board could adopt any land use or zoning application by a simple majority vote, notwithstanding the filing of a protest petition.\textsuperscript{82} The Supreme Court, Suffolk County granted summary judgment to the defendants and held that the plaintiffs were not entitled to a declaratory judgment declaring the local laws to be invalid. Plaintiffs appealed, and the Appellate Division modified the judgment by adding a provision declaring the local laws valid, and affirmed as so modified.

The plaintiffs in \textit{North Bay Associates} argued that the local law providing that any land use or zoning application could be granted via simple majority vote was invalid because it was in conflict with the provisions of Town Law § 265. Both the Trial Court and the Appellate Division disagreed with this reasoning.

The Appellate Division began its analysis by reciting certain provisions of Municipal Home Rule Law § 10, which granted local governments, including towns, the power to adopt and amend local laws not inconsistent with any general law.\textsuperscript{83} The Court reasoned that towns have the power to adopt, amend, and repeal zoning regulations as provided by the Town Law and the Municipal Home Rule Law.\textsuperscript{84} In addition, the Court found that there was a Legislative intent as evidenced by other enactments of the Legislature permitted towns to supersede provisions of the Town law with respect to zoning matters.\textsuperscript{85} Accordingly, it held that East Hampton’s local law was valid.

It should be noted that while the decision in \textit{North Bay Associates} appears to give municipalities broad powers with respect to voting requirements on matters involving zoning and land use, at least one (1) court has placed limits on such powers.

In \textit{Benderson Development Co. v. City of Utica},\textsuperscript{86} a challenge was brought to a local law which required a three-fourths vote to pass an amendment to the zoning ordinance when the planning board issued an adverse recommendation with respect to the proposed amendment. The plaintiffs-petitioners brought a hybrid proceeding seeking a declaration that the local law was null and void since it was inconsistent with General City Law § 83, which only required a simple majority vote to approve the amendment absent the filing of a protest petition.\textsuperscript{87}

While initially noting that the protest petition scenario did not apply in that case, the Supreme Court
held that since 1927 the Legislature of the State of New York had clearly stated that the only time a three-fourths vote was required to amend a city’s zoning ordinance was when a protest petition has been filed by a percentage of certain property owners. As such, the court concluded that the Legislature had evidenced its intention to preclude local regulations in such matters.88

Lastly, case law reveals that an astute practitioner should always review the language of any local law which purports to amend or supersede the provisions of Town Law § 265. Such examination proved fruitful in Hanson v. Town Bd. of Town of Nassau.89 In Hanson, the Town Board enacted a local law which required the signatures on a protest petition to be acknowledged, a requirement not present in Town Law § 265.90 The Town Board thereafter proposed and held a public hearing on a certain amendment to its zoning ordinance. The petitioners presented a protest petition which was rejected by the Town Board because none of the signatures thereon were acknowledged in accordance with the local law. As a result, it determined that a supermajority vote was not required, and the 3-2 vote approving the amendment was sufficient.91

The petitioners challenged this determination on several grounds. The Supreme Court examined the language of the subject local law and applied the relevant provision of the Municipal Home Rule Law in finding the local law invalid. Specifically, the court found that the language utilized in the local law did not specifically state that it was amending or superseding the provisions of Town Law § 265, the Town did not comply with the provisions of Municipal Home Rule Law § 22, which required such a declaration. Accordingly, the court held that the acknowledgement was invalid.92

CONCLUSION

The above is intended to provide an introduction to protest petitions and the governing statutory and case law. As with any body of law, pitfalls and exceptions can arise. When handling a protest petition practitioners must be well versed in the statutory language, the governing body of law as discussed herein and, in particular, whether a Town, Village of City may have successfully superseded the protest petition requirements creating additional procedural or substantive criteria that must be met.

ENDNOTES:

8See Town Law § 265 (1)- Changes: 1. Such regulations, restrictions and boundaries may from time to time be amended. Such amendment shall be effected by a simple majority vote of the town board, except that any such amendment shall require the approval of at least three-fourths of the members of the town board in the event such amendment is the subject of a written protest, presented to the town board and signed by:

(a) the owners of twenty percent or more of the area of land included in such proposed change; or
(b) the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or
(c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

9See Village Law7-708- Changes: Such regulations, restrictions and boundaries may from time to time be amended. An amendment shall be effected by a simple majority vote of the board of trustees, except that an amendment shall require the approval of at least two-thirds of the members of the board of trustees in villages having three members on such board, and three-fourths of the members of the board of trustees in all the other villages in the event such amendment is the subject of a written protest, presented to the board and signed by:

1. the owners of twenty percent or more of the area of land included in such proposed change; or
2. the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or
3. the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.; This provision is formerly known as Village Law § 179, repealed and replaced by Village Law § 7-708 in 1972.

See General City Law § 83- Amendments, alterations and changes in district lines 1. The common council may from time to time on its own motion or on petition, after public notice and hearing, which hearing may be held by the council or by a committee of the council or by the planning board, amend the regulations and districts established under any ordinance or local law adopted pursuant to paragraphs twenty-four
and twenty-five of section twenty of this chapter. Wherever the owners of fifty per centum or more of the frontage in any district or part thereof shall present a petition duly signed and acknowledged, to the common council, requesting an amendment, supplement, change or repeal of the regulations prescribed for such district or part thereof, it shall be the duty of the council to vote upon said petition within ninety days after the filing of the same by the petitioners with the secretary of the council.

2. An amendment shall be effected by a simple majority vote of the council, except that an amendment shall require the approval of at least three-fourths of the members of the council in the event such amendment is the subject of a written protest, presented to the council and signed by:

(a) the owners of twenty percent or more of the area of land included in such proposed change; or

(b) the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or

(c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

See Town Law § 265 (1), Village Law § 7-708 and General City Law § 83.

Id.

See note 19, infra.

See Ryan Homes, Inc. v. Town Bd. of Town of Mendon, 7 Misc. 3d 709, 791 N.Y.S.2d 355 (Sup 2005) “[t]he purpose of [the] greater than majority vote is to provide additional protection to those property owners who would be most affected by a zoning change” citing Webster Associates v. Town of Webster, 119 Misc. 2d 533, 462 N.Y.S.2d 796 (Sup 1983); See http://www.lilanduseandzoning.com/2013/07/01/brookhaven-towns-change-of-zone-voting-requirements-big-news-or-old-news/.

Id.

See id., notes 1, 2, 3; General City Law § 83 (1) also mandates that the city council to determine a proposed change of zone application within ninety (90) days “wherever the owners of fifty per centum or more of the frontage in any district or party shall present a petition duly signed an acknowledged, to the common council.” Id. Although these petitions are subject to a protest petition in the same manner as Town and Village change of zone applications, the Town and Village laws do not contain this provision.

Id.

See, notes 1, 2, 3.

Id.

See, notes 1, 2, 3.
husband and his wife each of whom is seized of the whole and not of any undivided portion of the estate” such that “both and each own the entire fee” (id.; see generally Matter of Violi, 65 N.Y.2d 392, 395, 492 N.Y.S.2d 550, 482 N.E.2d 29; Stelz v. Shreck, 128 N.Y. 263, 266, 28 N.E. 510).” Id. at 79, 891 N.Y.S.2d 790.

20Id. at 77, 891 N.Y.S.2d 789.
21Id.
22Id. at 79, 891 N.Y.S.2d 790.
23Id.
24Id.
26Id.
27See, note 25, supra. 1989 Attorney General opinion specifically declining to address whether a wife may sign in behalf of tenant by the entirety husband. Here, the Attorney General’s office declined to answer this question based on its determination that only one property owner signature is required to present a valid protest signature for the property as a whole.
30Glen Cove Shopping Center, Inc. v. Suozzi, 8 Misc. 2d 247, 166 N.Y.S.2d 917 (Sup 1957).
34Id. at 79, 255 N.Y.S.2d at 727.
36Id. at 79, 255 N.Y.S.2d at 727.
38Id. at 911, 307 N.Y.2d at 249.
39Id.
40Id.
41Id. at 910, 307 N.Y.2d at 249.
42Id. at 910, 307 N.Y.2d at 249.
43Id. at 910, 307 N.Y.2d at 249.
44Id. at 911, 307 N.Y.2d at 249.
45See, notes 46-61, infra.

46Id.
47See, notes 1, 2, 3, supra.
48See, Gosier, note 19, supra.
49Id.
50Eadie v. Town Bd. of Town of North Greenbush, 22 A.D.3d 1025, 803 N.Y.S.2d 262 (3d Dep’t 2005), affd. 7 N.Y.3d 306, 854 N.E.2d 464 (2006); prior to the decision in Eadie, the State of New York had not definitively declared that buffers were permissible vehicles to defeat a protest petition. See Ryan Homes Inc. v. Mendon, “[e]lsewhere in the country, the overwhelming rule is that creation of a buffer zone between that portion of a property to be rezoned and the lands of adjacent property owners is a valid method of not triggering a statutorily required greater than majority vote to rezone (see e.g. Pfaff v. City of Lakewood, 712 P.2d 1041, 1043 [Colo.App.1985]; Midway Protective League v. City of Dallas, 552 S.W.2d 170, 174 [Tex.Civ.App.1977]; St. Bede’s Episcopal Church v. City of Santa Fe, 85 N.M. 109, 509 P.2d 876, 877 [1973]; Rodgers v. Village of Menomonee Falls, 55 Wis.2d 563, 201 N.W.2d 29, 33 [1972]; Heaton v. City of Charlotte, 277 N.C. 506, 178 S.E.2d 352, 364-66 [1971]). As stated by the Arizona Court of Appeals, in upholding a 160 foot buffer zone where the statute required a super majority vote where protest petitions are filed by owners of 20% of land immediately adjacent and 150 feet from a parcel to be rezoned, “The legislature drew the line 150 feet from the subject property. It must have believed that property owners beyond that line would be adequately protected by the normal process in which a simple majority vote is required” (Schwarz v. City of Glendale, 190 Ariz. 508, 511, 950 P.2d 167 [Ariz.App. Div.1 1997]).” Id. at 713.
53Id. at 1028, 803 N.Y.S.2d 266.
54Eadie v. Town Bd. of Town of North Greenbush, 7 N.Y.3d 306, 313-15, 821 N.Y.S.2d 142, 854 N.E.2d 464 (2006), see also discussion distinguishing this case, “Petitioners rely on Herrington v. County of Peoria, 11 Ill.App.3d 7, 295 N.E.2d 729 (1973), but that case is distinguishable; it did not involve a statute that required measurement of a distance from the land included in the proposed zoning change. *316 The statute in Herrington provided for a protest petition by “the owners of twenty percent of the frontage directly opposite the frontage proposed to be altered” (11 Ill.App.3d at 9, 295 N.E.2d at 730; cf. Town Law § 265[1][c] ). The holding of Herrington is that the
purpose of such a statute cannot be avoided by refraining from rezoning a few feet or inches next to the frontage of the rezoned parcel. The Herrington court distinguished Heaton, the North Carolina case we cited above, saying that the statute in Heaton (which resembles Town Law § 265 [1] [b]) “appears to have been considered by the court as a legislative declaration, that ‘one hundred feet’ was a legally sanctioned buffer or barrier insulating the property from the claims of protesters” (11 Ill.App.3d at 13, 295 N.E.2d at 733). We think that the Illinois court correctly characterized the North Carolina’s court’s interpretation of its statute, and we interpret our statute in the same way.”

55Ryan Homes, Inc. v. Town Bd. of Town of Mendon, 7 Misc. 3d 709, 791 N.Y.S.2d 355 (Sup 2005).
56Id.
57Webster Associates v. Town of Webster, 119 Misc. 2d 533, 462 N.Y.S.2d 796 (Sup 1983).
58Id. at 536, 462 N.Y.S.2d 796.
59Id.
60See, notes 50-59, supra.
61See, note 51, Eadie at 315.
62See notes 63-71, infra.
64Id. at 716, 462 N.Y.S.2d at 249.
65Id.
66Id. “The primary argument advanced by the plaintiffs is that the eight property owners could not validly revoke their signatures after the conclusion of the public hearing and that, therefore, the resolution amending the zoning ordinance could not have been adopted without the favorable vote of three-fourths of the members of the town board. Since the resolution did not receive that vote, plaintiffs contend that the amendment to the zoning ordinance is null and void.”
67Id. at 716, 462 N.Y.S.2d at 249.
69Id. at 79, 255 N.Y.S.2d 727 citing Glen Cove Shopping Center, Inc. v. Suozzi, 8 Misc. 2d 247, 166 N.Y.S.2d 917 (Sup 1957); B.R.M. Realty Corp. v. Flynn, 20 A.D.2d 798, 248 N.Y.S.2d 456 (2d Dep’t 1964).
70Glen Cove Shopping Center, Inc. v. Suozzi, 8 Misc. 2d 247, 166 N.Y.S.2d 917 (Sup 1957).
71Id. at 248, 166 N.Y.S.2d 919.
72Nardone v. Ryan, 49 Misc. 2d 93, 266 N.Y.S.2d 847 (Sup 1966).
73Id. at 93, 266 N.Y.S.2d at 848.
74Id.
75Id. arguing “section 2004 of the Building Zone Ordinance is inconsistent with the Village Law, it is invalid, and since the resolution was adopted as provided in the Village Law, it is effective.”
76Id.
77Id.
78Id. at 95, 266 N.Y.S.2d at 850.
79Id.
82Id.
83Id. at 705, 497 N.Y.S.2d at 759.
84Id.
85Id. stating “[t]he legislative intent to permit towns to supersede Town Law sections relating to zoning is illustrated by a recent amendment to subdivision 1 of section 267 of the Town Law, which altered that statute by authorizing town boards, which had previously increased the number of board of appeals members to seven, to reduce their number to five. Section 2 of the amendatory legislation (see L 1981, ch 92) provides that the amendment to section 267 of the Town Law thus enacted ‘shall not be deemed or construed to affect that authority of a town board to amend section two hundred sixty-seven of the town law pursuant to authority conferred in section ten of the municipal home rule law.’ Since the Legislature has thus told us that the number of board of appeals members can be reduced by a local law which supersedes or amends section 267 of the Town Law, it is manifest that the zoning article of the Town Law can be superseded by local law.”
86Id.
87Benderson Development Co., Inc. v. City of Utica, 5 Misc. 3d 467, 781 N.Y.S.2d 880 (Sup 2004).
88Id.
89Id. as cited in Salkin, 3 New York Zoning Law and Practice §§ 39:01, 29:02 [4th Ed. 2001]).
90Hanson v. Town Bd. of Town of Nassau, 16 Misc. 3d 1137(A), 851 N.Y.S.2d 58 (Sup 2007) (unreported decision).
92See, note 89, supra.
FROM THE COURTS

Court of Appeals Holds Local Governments Have Authority to Regulate Hydrofracking Through Zoning

In a 5-2 ruling, the Court of Appeals held that local governments have the power to regulate hydrofracking under their authority to enact zoning ordinances. While this case centered on the towns of Dryden and Middlefield, they were just two of the 150 municipalities who enacted bans on gas drilling and associated activities within their jurisdictions. The plaintiffs claimed that a supersession clause in the State Oil, Gas, and Solution Mining Law (OGSML) preempted local authority. After reviewing the plain language of the OGSML, the statutory scheme, and its legislative history, the court concluded that the legislature did not expressly or by implication preempt the power of localities in New York to regulate land use. Preempted, under the OGSML, in the court’s view, was the power to regulate the details, procedures or operations of the oil and gas industry, not matters normally associated with land use regulation.

Writing for the majority, Judge Graffe wrote a clear explanation of local home rule authority, “Article IX, the “home rule” provision of the New York Constitution, states that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law” (NY Const, art IX, § 2 [c] [ii]). To implement this constitutional mandate, the State Legislature enacted the Municipal Home Rule Law, which empowers local governments to pass laws both for the “protection and enhancement of [their] physical and visual environment” (Municipal Home Rule Law § 10 [1] [ii] [a] [11]) and for the “government, protection, order, conduct, safety, health and well-being of persons or property therein” (Municipal Home Rule Law § 10 [1] [ii] [a] [12]). The Legislature likewise authorized towns to enact zoning laws for the purpose of fostering “the health, safety, morals, or the general welfare of the community” (Town Law § 261; see also Statute of Local Governments § 10 [6] [granting towns “the power to adopt, amend and repeal zoning regulations”]). As a fundamental precept, the Legislature has recognized that the local regulation of land use is “among the most significant powers and duties granted . . . to a town government” (Town Law § 272-a [1] [b]). We, too, have designated the regulation of land use through the adoption of zoning ordinances as one of the core powers of local governance (see DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91, 96, 725 N.Y.S.2d 622, 749 N.E.2d 186 (2001)). Without question, municipalities may “enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community]” (Trustees of Union College in Town of Schenectady in State of N.Y. v. Members of Schenectady City Council, 91 N.Y.2d 161, 165, 667 N.Y.S.2d 978, 690 N.E.2d 862, 123 Ed. Law Rep. 1247 (1997) [internal quotation marks and citation omitted]). And we have repeatedly highlighted the breadth of a municipality’s zoning powers to “provide for the development of a balanced, cohesive community” in consideration of “regional needs and requirements” (Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 683, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996); see also Udell v. Haas, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 235 N.E.2d 897 (1968) [“Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence.”]).

The Court further stated, “We do not examine the preemptive sweep of this supersession clause on a blank slate. The scope of § 23-0303 (2) must be construed in light of our decision in Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126 [1987]), which articulated the analytical framework to determine whether a supersession clause expressly preempts a local zoning law. There, we held that this question may be answered by considering three factors: (1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history.” In applying the three-part test, examining legislative intent and considering the home rule law and town law in New York, the Court concluded that state law did not preempt local zoning regulations that seek to ban the use of land for fracking.

Second Department holds that substantial improvements and expenditures alone do not constitute a vested right

In December 2000, the petitioners/plaintiffs, Exeter Building Corp. and 17K Newburgh, LLC, became the owners of a parcel of approximately 29 acres of real property in the Town of Newburgh. The property was within the Town’s R-3 zoning district, which permits multifamily housing. In 2002 the plaintiffs applied to the Town of Newburgh Planning Board for approval of a site plan for a proposed project to be known as Madison Green that was to consist of 34 residential buildings, each containing four single-family units, for a total of 136 units. Review of the site plan for Madison Green proceeded, but on March 6, 2006, the Town Board enacted its comprehensive plan as Local Law No. 3 (2006) of Town of Newburgh, and the plaintiffs’ property was rezoned from R-3 to R-1. The plaintiffs commenced legal proceedings against the Town, its Planning Board, and the Town’s Building Inspector, seeking invalidation of Local Law No. 3 (2006) of Town of Newburgh, and the plaintiffs’ property was rezoned from R-3 to R-1. The plaintiffs commenced legal proceedings against the Town, its Planning Board, and the Town’s Building Inspector, seeking invalidation of Local Law No. 3 and a declaration that they have vested rights, under both statute and common law, to develop Madison Green under the R-3 zoning regulations. In November 2006, the trial court issued an order invalidating Local Law 3, but also declaring that the plaintiffs did not have vested rights to develop Madison Green under the R-3 zoning regulations.

In New York, a vested right can be acquired when the landowner has demonstrated a commitment to the purpose the permit was granted by effecting substantial changes and incurring substantial expenses for the development. Furthermore, neither the issuance of a permit nor the landowner’s substantial improvements and expenditures by themselves can establish that right. The landowner’s actions relying on a valid permit must be so substantial that the municipal action results in serious loss to the extent of rendering the improvements essentially valueless. In this case, the court determined that none of the permits acquired by the petitioners either singly or aggregately amounted to the Town’s approval of Madison Green. Accord-

ingly the court held that the Supreme Court should have declared that the plaintiffs do not have a vested right to develop the property under the R-3 zoning regulations. Exeter Bldg. Corp. v. Town of Newburgh, 114 A.D.3d 774, 980 N.Y.S.2d 154 (2d Dep’t 2014).

Second Department holds Not-for-Profit Corporation Law does not preempt field of cemetery regulation

Oakwood Cemetery is a not-for-profit cemetery corporation and sought to begin offering cremation services in addition to the burial services it offered. Oakwood submitted its first application for a building permit for the crematorium in 2008, but the application was denied. In February 2011, Oakwood reapplied for a building permit but was advised that the application would not be considered because the village was considering a proposed amendment to the village code that would affect Oakwood’s application. In June 2011, the village adopted a new definition of “cemetery” which expressly stated that “cemetery” did not include “facilities for cremation.” Oakwood then brought an Article 78 proceeding claiming that the new definition of cemetery was unconstitutional because it was “preempted by Not-For-Profit Corporation Law article 15, also known as the “cemetery law.” Additionally, Oakwood contended that the “operation of a crematory [was] included within its prior, nonconforming use of its property as a cemetery.” The trial court found that the not-for-profit law did not preempt the local regulation of cemeteries. On appeal, the court found that although the not-for-profit law governed the corporations that own and manage cemeteries, the law “does not expressly preempt zoning ordinances relating to the land use by cemeteries.” Thus, the appellate court found that the trial court correctly concluded that there was no conflict between the laws because the not-for-profit law concerned the management of cemetery corporations, whereas the zoning ordinance concerned the land use aspect of cemeteries. The court found that the new zoning law was valid and not preempted by the not-for-profit law. The court also found that because Oakwood did not exhaust its administrative remedies with regard to its claim that the crematorium was included as a prior nonconforming use and that the lower court properly dismissed the claim. Oakwood
Third Department Upholds Determination that Owner of Exotic Animals Was Operating an Illegal Home Occupation

Following notification by the Town code enforcement officer to Salton that he was operating an unauthorized home occupation as he was keeping exotic animals (including 3 tigers and 2 leopards) on his property under government licenses that required the exhibition of the large cats and allegedly collecting viewing fees from the public, he appealed to the ZBA who upheld the determination of the code enforcement officer. The trial court dismissed the petition to appeal and Salton appealed again. The Town’s zoning law provides in relevant part, “[h]ome occupations are defined as businesses where the owner resides on the property and where the activities of the business are conducted inside the residence, a legally constructed accessory building, or at off-site locations.” At issue was whether Salton was operating a home occupation and if so, whether his actions were grandfathered in by predating the applicable zoning ordinance. The Third Department found that Salton was operating a business based on the following: he lives on the same property that contains the cat cages; despite the fact that he has no employees, does not file business taxes, has no business insurance and makes no profit as he claims to not charge people to view the animals, he did list a business name on one of his licenses, and he has a business card listing him as the owner and he lists prices for adults and children to see the animals. Further, the court found that the cages were a legally constructed accessory building since the language in the applicable zoning ordinance says that the word “building” also includes a “structure,” and the court said, “a cage that is built into the ground—like the cages apparently are—can be considered a structure, and the cages are on the same lot as and incidental to the use of petitioner’s residence.” The Court said that the code enforcement officer did not assert that the cages were not legally constructed. Therefore, since Salton was “carrying on business activities in a legally construed accessory structure, he is operating a home occupation.” Finally, Salton was not carrying on a legal use prior to the enactment of the zoning ordinance as was demonstrated by the dates his licenses to legally operate were issued. Salton v. Town of Mayfield Zoning Bd. of Appeals, 116 A.D.3d 1113, 983 N.Y.S.2d 656 (3d Dep’t 2014).

Fourth Department Reverses Trial Court and Upholds ZBA’s Denial of Use Variance to Authorize the Paving of an Existing Turf Runway at an Airport

Respondent Town of Newstead Zoning Board of Appeals (ZBA) appeals from a judgment in a special proceeding pursuant to CPLR article 78, which annulled the ZBA’s determination denying petitioner’s request for a use variance authorizing the paving of an alternate runway at the Akron Airport, and granted the requested use variance. In determining whether there was an undue hardship the court first looked at whether the petitioner could use the land for other means. The petitioner failed to establish that the subject land could not be successfully used for agricultural purposes, that the requested variance would have alleviated the airport’s preexisting financial problems, or even that it would have to stop using the land for airport purposes if its request to pave the alternate runway were denied. Additionally, the deeds proffered by the ZBA demonstrate that petitioner did not acquire portions of the subject property from the former owners until nearly a decade after enactment of the ordinance. The court therefore concluded that the alleged hardship was self-created, and as a result the petitioner failed to establish the fourth component of unnecessary hardship. Finally, the record was silent regarding the paving variance allegedly granted in 2008, and it is unclear from the record whether the 2004 and 2005 variances pertained to the specific property where the alternate runway is located. Therefore, the court reversed the holding and denied the use of the variance. Christian Airmen, Inc. v. Town of Newstead Zoning Bd. of Appeals, 115 A.D.3d 1319, 983 N.Y.S.2d 173 (4th Dep’t 2014).

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