ARTHUR J. GIACALONE
Attorney At Law
140KnoxRoad
P.O. Box 63
East Aurora, New York 14052
Fax: (716)687-1903 Telephone: (716)687-1902 E-mail: ajglaw@verizon.net

ZONING CHALLENGES: OVERCOMING OBSTACLES

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I. The "Uneven Playing Field".

Contrary to the complaints one often hears from developers and their counsel, residents concerned about projects proposed for their communities have always faced an uneven playing field. The obstacles are political, legal, bureaucratic, financial, etc. E.g.:

A. "Sophisticated developers and compliant officials".[1]

B. Inadequate notice/time to prepare for hearings; opportunity to be heard.[2]

C. Difficulties accessing information, despite FOIL and Open Meetings Law.[3]

D. Legal principles favoring the applicant/municipality.[4]

E. Short limitations periods.[3]

F. Economic disparity.[6]

1 The 2d Dept. wisely urged "judicial vigilance" in circumstances where "sophisticated developers and compliant officials" have "learned ... to maneuver" through the requirements of the SEQRA and the zoning process. Sutton Area Community v. Board of Estimates of the City of New York. 165 AD2d 456, 568 NYS2d 35 (2d Dept. 1991), revd. on other grounds 78 NY2d 945, 573 NYS2d 638 (1991).

2 Town Law, for example, requires a mere 5-day notice for zoning variances, special use permits, site plan and subdivision review; 10-day notice for zoning changes.

3 Many municipalities disregard the mandate that, "All SEQR documents and notices... must be maintained in files that are readily accessible to the public and made available on request." 6 NYCRR 617.12(b)(3).

4 For example: Zoning amendments are presumed to be constitutional. Conifer Development, Inc. City of Syracuse, 100 AD2d 730 (4th Dept. 1984); zoning laws are to be given a strict construction because they are in derogation of common-law rights. FG & L Property Corp. v. City of Rye, 66 NY2d 111 (1985).

5 The statute of limitations for commencing a CPLR Art. 78 proceeding is four months, "unless a shorter time is provided in the law authorizing the proceeding." CPLR 217(1). Many "30-day" statutes exist, including, for example, challenges to variances, site plan and subdivision reviews, special use permits, etc.

6 As the NY Court of Appeals stated when considering standing for neighborhood and civic associations: "It should be readily apparent that a person desiring relaxation of zoning restrictions-such as a change from

II. Efforts To Further Tilt The Playing Field.

An increasingly hostile legal system, political climate and media have contributed to an environment where protection of the interests of residents becomes a more challenging task each year. Here are a number of examples:

A. The erosion of SEQRA's effectiveness:

1. The State DEC: Adoption of weakened regulations January 1996.[7]

2. The Judiciary: All-too-frequent disregard of the "Strict Compliance" Rule.[8]
   NYCA's prediction has come true: *"[T]he requirement of strict compliance and attendant spectre of de novo environmental review insure that agencies will err on the side of meticulous care in their environmental review. Anything less than strict compliance, moreover, offers an incentive to cut corners and then cure defects only after protracted litigation, all at the ultimate expense of the environment. "* King v. Saratoga Co. Bd. of Supervisors, 89 NY2d 341 (1996).

3. Lead agencies: Allowing project sponsors to draft FEIS, Findings Statement.[9]

residential to business-has little to lose and much to gain if he can prevail. He is not reluctant to spend money in retaining special counsel and real estate appraisers if it will bring him the desired result. The individual owner of developed land in the neighborhood, on the other hand, may not, at the time, realize the impact the proposed change of zoning will have on his property, or, realizing the effect, may not have the financial resources to effectively oppose the proposed change. Thus, the neighboring property owners rarely fight as hard for zoning protection as the developer or speculator does for relaxation of zoning restrictions. Against this background of economic disparity, an individual property owner, who stands only to gain (or prevent the loss of) the maintenance of the status quo as regards the value of his homestead and his peace and quiet, cannot be expected, nor should he be required, to assume by himself the burden and expense of challenging the zoning change. Even if successful, the aggrieved individual will not be able to recoup his expenditures." Douglaston Civic Associations, Inc. v. Galvin. 36 NY2d 1, 6-7 (1974).

[7] Under the guise of "streamlining, clarifying and simplifying" its regulations, the State DEC amended 6 NYCRR Part 617 on 1/1/1996 and weakened this important tool. SEQRA was enacted in 1975 because state and local agencies consistently ignored environmental factors when undertaking or approving projects or activities The same economic and political forces that caused the environment to be ignored prior to its enactment reacted with hostility and resistance to SEQRA, and successfully lobbied for changes that: reduced site-specific and project-specific review of projects; added new categories to the Type II list eliminating the need for review (without adding anything to the Type I list); decreased the information available to residents at the time of a proposed rezoning, thereby lessening their effectiveness; etc.

[8] NY's appellate courts held for years that "strict compliance with the prescribed procedures in SEQRA is required," and the courts enforced the rule. E.g., Jackson v. NYS Urban Dev. Corp, 67 NY2d 400 (1986). In 1992, the 4th Dept. carved out a narrow exception to the "strict compliance" rule in Golden Triangle Associates v. Town Bd. of Town of Amherst, 185 AD2d 617 (AD4 1992). Intentionally or not, that case helped to create a crack in the "strict compliance" rule that has grown and grown over the years.

[9] The most significant part of the final EIS is "the lead agency's responses to all substantive comments" to the draft EIS. Pursuant to the SEQR regulations, "the lead agency is responsible for the adequacy and accuracy of the final EIS, regardless of who prepares it." 6 NYCRR 617.9(b)(8). At a minimum, the spirit, if not the letter, of SEQRA is violated where "the governmental entity responsible for the final policy decision to proceed with a project ... is insulated from consideration of environmental factors," see Coca-Cola Bottling Co. of New York, 72 NY2d 674, 679-682 (1988), or a lead agency fails to "exercise its critical judgment on all issues presented in the DEIS." See Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board, 253 AD2d 342, 350, 688 NYS2d 848, 853-854 (4th Dept. 1999).

B. Transformation of Art. 78s: No longer Expedited/Streamlined Resolution of Disputes.

1. Courts: Expanding Who is a "Necessary Party".

Some recent court decisions interpreting CPLR 1001's "necessary party" requirement in the context of land use litigation have insisted on the naming of the landowner as a respondent/defendant.[10] Our State's highest court has even warned in a footnote that "omitting the landowner from the litigation may be fatal".[1'] The disastrous nature of such an omission stems from the short periods of limitations applicable to most land use cases.[12]

Requiring petitioners in an Article 78 proceeding to name as respondents all property owners "who might be inequitably affected by a judgment" (even when they are not the applicant) is certainly an effective way to reduce the number of cases where a court must reach a decision on the merits. But the approach disregards both the streamlined nature of Article 78 proceedings, and the mechanism set forth at CPLR § 7802(d) for dealing with "other interested persons": "The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene."

Attorneys for petitioners/plaintiffs in land use cases need to take a cautious approach when deciding who will be included as respondents/defendants given how difficult, if not impossible, rectifying the error may be if a court rules that a "necessary party" has been omitted. However, where significant numbers of property owners may, arguably, be "necessary parties", but including them as respondents is impractical, consider commencing the Art. 78 proceeding by Order to Show Cause, and asking the Court to order publication of a notice to potential "interested parties" in the municipality's official newspaper. Where possible, have the notice published prior to the expiration of the statute of limitations.

2. Respondents' Counsel: Increasing the Burden on Petitioners.

Many attorneys for government agencies and developers have "forgotten" that Article 78 proceedings were meant to provide a vehicle for expedited and streamlined resolution of disputes. Multiple requests for adjournments, meritless motions to dismiss, "boilerplate" affirmative defenses, and "boxes" of records (at times, "unedited") have needlessly increased the cost of litigation for petitioners and decreased the likelihood of a prompt and fair determination.

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[10] For example, Spence v. Cahill, 300 AD2d 992, 752 NYS2d 511 (AD4 2002); Manupella v. Troy City ZBA. 272 AD2d 761, 707 NYS2d 707 (ADS 2000); Karmel v. White Plains Common Council. 284 AD2d 464, 726 NYS2d 692 (AD2 2001).

" See Red Hook/ Gowanus Chamber of Commerce v. NYC Board of Standards & Appeals. 5 N.Y.3d 452. 839 N.E.2d 878, 805 N.Y.S.2d 525 (2005).

[12] Not only are statutes of limitations short for Art. 78 proceedings, pursuant to CPLR § 306-b, "service shall be made not later than 15 days after the date on which the applicable statute of limitations expires" unless the court "upon good cause shown or in the interest of justice" extends the time for service.

C. **The Creation of an Atmosphere of Intimidation.**

1. Developers v. Government Officials: Increased Threats to Sue for Damages.

It seems that developers and property owners are frequently threatening to sue municipalities and/or government officials for money damages if their proposed projects are denied. They claim "regulatory takings", violations of "vested rights", due process violations, etc. Such threats are intended to have a "chilling effect" on local officials, and often do.

The New York Court of Appeals has ruled against disgruntled developers and property owners in these retaliatory actions. For example:

- Smith v. Town of Mendon, 4 NY3d 1 (2004). Held: No "exaction" or unconstitutional taking occurred when town conditioned approval of a site plan for a single-family home upon landowners' acceptance of a conservation restriction, in perpetuity, on other environmentally sensitive portions of the property.

- Twin Lakes Development corp. v. Town of Monroe, 1 NY3d 98 (2003). Held: Town's imposition, as condition for approval of a proposed residential development, of a fixed fee of $1,500 per residential lot in lieu of parkland dedication was not a "taking" under the 5th Amendment; also, the lack of a hearing to review the reasonableness of the amount of the fee did not violate the developer's procedural due process rights.

- Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 NY2d 96 (1999). Held: Change in zoning of a 150-acre tract of land, that had been used as a golf course, from residential to solely recreational use, did not constitute a regulatory taking under the 5th and 14th amendments, where the change substantially advanced legitimate state interests and was in response to years of study and documentation.

The acquisition of a "vested right" to proceed with a project involves much more than a mere "shovel in the ground", as our State's highest court has explained:

> In New York, a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development [cites omitted]. Neither the issuance of a permit [cites omitted] nor the landowner's substantial improvements and expenditures, standing alone, will establish the right. The landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless [cite omitted].

Town of Orangetown v. Magee. 88 NY2d 41, 47-48, 643 NYS2d 21, 24-25 (1996).[13]

[J] Note: Even where an owner or developer obtains a vested right in a project, the vested rights do not extend to "new, additional or different structures and developments". See Schoonmaker Homes-John Steinberg, Inc. v. Village of Maybrook, 178 AD2d 722, 725, 576 NYS2d 954, 956 (3d Dept. 1991); also see Almor Associates v. Town of Skaneateles, 231 AD2d 863, 864, 647 NYS2d 316, 317 (4th Dept. 1996).

C. The Creation of an Atmosphere of Intimidation. (Cont.)

2. Labeling of Residents as "NIMBYs", "Un-American", "Obstructionists", etc.

Some advocates of so-called "progress", including some developers, public officials and members of the media, are engaged in a concerted effort to belittle and silence neighborhood residents who dare to speak out against a proposed project. The residents are castigated as obstructionists, labeled NIMBYs (Not In My Back Yard), and even called "Un-American". Developers are portrayed as saints, residents as villains.

But these pro-business forces are distorting the zoning process and turning it on its head:

- Nearby residents are the ones most directly affected by new development, their property values lowered, privacy invaded, and quality of life diminished by noise and traffic. They have the most to lose, and, therefore, the greatest right to speak out.
- Courts grant nearby neighbors, but not the public generally, standing to challenge the legality of land use decisions.[14]
- Zoning laws require that public hearing notices be given to residents and property owners in close proximity to a project site.[15]
- It is the adjacent and nearby property owners who have been given the power by our State Legislature to trigger a "supermajority vote" when a municipality is considering a zoning change.[16]

Given the level of hostility exhibited towards residents, it is fortunate that both the State Legislature and the courts have taken steps to protect their rights to petition their government and to express their opinions. For example:

- Anti-SLAPP[17] Suit legislation: Civil Rights Law, § 70-a et seq. (actions involving public petition and participation).

- DRT Construction Co.. Inc. v. Lenkei, 176 AD2d 1229 (4th Dept. 1991) (flyers opposing a 288-acre development, referring to the developers as "profit hungry land abusers" and depicting three men in Hitler moustaches on a bulldozer running over a deer, were not defamatory and but were constitutionally protected opinion on a subject of public controversy).

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[14] See, e.g., Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals. 69 NY2d 406, 414, 515 NYS2d 418, 422 (1987) ("[A]n allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury."); Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 NY2d 668, 642 NYS2d 164 (1996) ("The proximity alone permits an inference that the challenger possesses an interest different from other members of the community.").

[5] Note: "The fact that a person received, or would be entitled to receive, mandatory notice of an administrative hearing because it owns property adjacent to or very close to the property in issue gives rise to a presumption of standing in a zoning case." Sun-Brite. *supra*, 69 NY2d at 413-414, 515 NYS2d at 421-422.

[16] See Town Law § 265, Village Law § 7-708, General City Law § 83..

[17] "SLAPP" stands for "Strategic Lawsuit Against Public Participation".