THE WESTCHESTER COUNTY BAR ASSOCIATION'S MUNICIPAL LAW SECTION PRESENTS:

Development Rights in Uncertain Economic Times

Speakers:

Daniel Richmond and Michael Zarin of Zarin and Steinmetz

Chairs of the Municipal Law Committee:

Les Maron and Carol L. Van Scoyoc

Tuesday, Sept. 13, 2011

12:30 PM-2 PM

Vintage Bar & Restaurant
171 Main Street
White Plains, NY

1 Professional Practice CLE Credit

Westchester County Bar Association
Municipal Law CLE Luncheon
Tuesday, September 13, 2011

Timed Outline

I. Development Rights In Uncertain Economic Times: Project Renewals, "Vesting" Claims, And Supplemental Environmental Review
   - Michael D. Zarin, Esq., Zarin & Steinmetz

A. Time To Satisfy Conditions/Expiration of Approvals (8 minutes)

B. Theory and Origin of "Vested Rights" (2 minutes)

C. Vested Rights Theory In New York (8 minutes)

D. Supplemental Environmental Impact Statements (SEIS) (7 minutes)

II. Establishing Defensible Criteria for Governmental Exactions and Fees
   - Daniel Richmond, Esq., Zarin & Steinmetz

A. When Do Exactions Constitute An Illegal "Taking" (5 minutes)

B. Relationship of *Nollan/Dolan* to Exactions/Fees Issues in New York (5 minutes)

C. When Do Exactions/Fees Exceed Governmental Authority (5 minutes)

D. When Are Exactions/Fees An Illegal Tax (5 minutes)

E. Returning/Deferring Excess Fees and Performance Bonds (5 minutes)

DEVELOPMENT RIGHTS IN UNCERTAIN ECONOMIC TIMES: *PROJECT RENEWALS, "VESTING" CLAIMS, AND SUPPLEMENTAL ENVIRONMENTAL REVIEW*

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I. Time To Satisfy Conditions/Expiration of Approvals:

a. New York State Town Law Section 275(5)(h):

> "Within six months of the approval of the preliminary plat the owner must submit the plat in final form. If the final plat is not submitted within six months, approval of the preliminary plat may be revoked by the planning board."

b. K.B. Associates v. Town of Wawayanda, N.Y.L.J., July 13, 1995, p. 31, col. 5 (Sup. Ct. Westchester Co. 1995).

1. Planning Board granted Preliminary Plat approval. Following public outcry, Town Board dissolves Planning Board, and assumes Planning Board duties. Town Board refuses to review final plat submission, claiming that the submission was not submitted within six (6) months of preliminary plat approval. Applicant sues, and parties enter into Settlement, whereby Applicant would make certain revisions and Town would continue reviewing plat application. Applicant made revisions, and proceeded to expend $127,000.00 on other agency approvals in reliance on Settlement, but Town again refuses to review, again alleging it is untimely.

2. Court reiterates legal principle that "'absent new information, a subsequent modification or rejection of a preliminarily approved subdivision layout is an arbitrary and capricious act subject to invalidation.'" (quoting Sun Beach Real Estate Dev. Corp. v. Anderson, 98 A.D.2d 367, 469 N.Y.S.2d 964 (2d Dept. 1983), aff'd, 62 N.Y.2d 965, 479 N.Y.S.2d 341 (1984)).

3. "Before determining that [the Applicant] had abandoned its subdivision, the Town was obligated to give [the Applicant] an opportunity to be heard on this issue."

4. "While this court is sympathetic to the environmental concerns expressed by the townspeople, the decision to rescind a previously approved plan must be grounded in a legally cognizable rationale, that is, 'an objection peculiar to the

proposed development,' and not because of 'community pressure.'" (citation omitted).

5. "The record in this case shows that the Town Board did not reject [the Applicant's] application after due consideration of the relevant issues, but dropped the project to appease those citizens who vigorously opposed the subdivision and then cast about for some excuse for its conduct. This court has no choice but to conclude that [the Town's] conduct in refusing to continue to review [the] application is arbitrary and capricious."

c. New York State Town Law Section 276(7)(c) was amended last year to allow for, essentially, the perpetual extension of the time within which an Applicant must satisfy the conditions of a final subdivision plat approval:

> "Duration of conditional approval of final plat. Conditional approval of the final plat shall expire within one hundred eighty days after the resolution granting such approval unless all requirements stated in such resolution have been certified as completed. The planning board may extend for periods of ninety days each, the time in which a conditionally approved plat must be submitted for signature *if, in the planning board's opinion, such extension is warranted by the particular circumstances.*" (emphasis added).

1. Previously, Statute established that conditional final plat approval expired after 180 days, with a maximum of two (2) additional 90 day extensions.

2. The Memorandum in Support of the recent Amendment states its justification, as follows:

> "The current economic climate, combined with the difficulty in obtaining project financing in many cases, argues for giving the planning board the discretion to extend conditional approval of the final plat. There are already significant hurdles and expenses generated in residential development which should not be compounded because of a time limitation that would effectively terminate a project."
>
> "The town has made a significant investment in reviewing the project and generating conditions required for approval of the plat. If additional time is required *with no negative consequences to the town*, the planning board should have the appropriate discretion." (emphasis added).

3. Letter to Governor in support of legislation from New York State Builders Association states:

> "It should be noted that the planning board in their review of an extension request would have the authority to determine whether the prior SEQRA review continues to be adequate or if a change in circumstances has arisen that would require additional SEQRA action."

d. But see generally Suffolk County Builders Ass'n, Inc. v. Suffolk County, 46 N.Y.2d 613, 415 N.Y.S.2d 821 (1979) (discussing the "[w]ell settled [] principle that legislative delegations of power to administrative bodies are legitimate so long as adequate standards exist to channel the exercise of that power. Nevertheless, because flexibility is sought, the required standards need only be prescribed in so much detail as is reasonably practicable in light of the complexities of the area to be regulated." (citation omitted)).

e. Putnam Country Club Assoc., LLC v. Planning Bd. of Carmel, 294 A.D.2d 507, 742 N.Y.S.2d 847 (2d Dept. 2002)

1. Court holds that Planning Board's determination that applicant had not timely satisfied conditions placed on final plat, as well as its decision to deny requests for time extensions to meet those conditions, "were not illegal, arbitrary and capricious, or abuses of discretion."

2. Lower Court notes that "unlike other administrative determinations, the enabling statute provides no factors which must or should be considered by the administrative body in forming [an opinion as to whether extension of a conditional final site plan is warranted] beyond that an extension "is warranted by the particular circumstances. Furthermore, even when said body is of the opinion that an extension is warranted it 'may' – rather than 'must' – grant the extension."

3. Lower Court concludes that "[c]learly, th[e]n this is an instance where the legislature has accorded planning boards extraordinarily wide discretion to grant or deny extensions on a wholly ad hoc basis. Such a determination should not be disturbed by the court absent a showing of fraud, coercion or undue influence, or that the decision-making process or the determination itself was infected by some other impropriety or illegality."

4. Lower Court further finds that board "had a sound basis in reason and foundation is fact" in denying extension request where the applicant "failed to submit for signature a complete conditionally approved plat during the ten years since it had been granted."

f. Aloya v. Planning Bd. of Stony Point, 93 N.Y.2d 334, 690 N.Y.S.2d 475 (1999).

1. Suggests that failure to secure final plat approval may rescind preliminary plat approval:

> "Once a final application is denied and the two-stage review process complete, the subdivision plan can no longer be approved, rendering preliminary plat approval invalid as the essential contingency - final approval - cannot arise. Thus, by operation of law denial of petitioners' final plat application itself rescinded the preliminary approval." (citation omitted).

g. New York State Town Law 265-a:

1. Prevents the application of certain revisions to local zoning requirements to duly approved and filed subdivision plats, including revisions that "establish or increase lot areas or lot dimensions" or "establish or increase side, rear or front yard or set back requirements."

2. Establishes specific exemption time periods from revised zoning requirements, including three (3) years from filing where a municipality has both a zoning code and a planning board authorized to approve subdivision plats.

h. Ellington Const. Corp. v. Z.B.A. of New Hempstead, 77 N.Y.2d 114, 564 N.Y.S.2d 1001 (1990).

1. Holds that under analogous Village Law provision, developer can secure "right to complete a subdivision in accordance with the existing zoning requirements by manifesting a commitment to the execution of the subdivision plan through completing improvements and incurring expenditures in connection therewith, during the exemption period, sufficient to constitute vesting under common-law rules."

i. Informal Opinion of Attorney General No. 90-10, 1990 N.Y. Op. Atty. Gen. (Inf.) 1014, *available at* 1990 WL 514500.

1. Opines that "section 265-a does not exempt a developer who has filed a subdivision plat from the requirements of a subsequently enacted local law governing wetlands preservation."

2. Rationale is that "Section 265-a of the Town Law grants developers who have filed the approved subdivision plats an exception from subsequent changes in zoning ordinances. A town's wetland regulation, which derives from the Environmental Conservation Law, is different in origin and nature from zoning ordinances enacted pursuant to article 16 of the Town Law."

j. Village of Croton-on-Hudson Code Section 230-137:

1. "Unless the developer shall have shown substantial evidence of progress in the carrying out of the approved plans within three years from the date of approval, such approval may, at the option of the Planning Board, be revoked without notice to the developer."

k. United Water New Rochelle, Inc. v. King, 18 A.D.3d 763, 795 N.Y.S.2d 692 (2d Dept.), leave to appeal denied, 5 N.Y.3d 74, 804 N.Y.S.2d 35 (2005).

1. Following challenge to municipality's handling of applicant's Site Plan application, Court grants Site Plan approval. Municipality appeals.

2. Shortly after denial of leave by Court of Appeals, applicant alleges it sought to commence processing a Building Permit application.

3. Applicant alleges, and the Court apparently found, that its engineering consultant firm tried several times to schedule a pre-submission meeting with the Building Inspector, to no avail. Applicant further claims that other municipal personnel would not return calls, would not agree to set a time to meet, and claimed they needed more time to review project files before discussing the Building Permit.

4. Municipality then asserts that Site Plan approval has expired pursuant to local code provision, establishing that such approval would automatically expire if substantial construction is not accomplished within a year or a building permit has not been obtained in six (6) months.

5. Court holds that "[t]he Town may be estopped from asserting that the application was untimely filed 'when its improper conduct induced reliance by a party who changed [its] position to [its] detriment or prejudice.'" (citation omitted).

6. Court holds that Town cannot claim application was untimely under the circumstances.

l. Village of Irvington Code Section 224-72(E):

1. Establishes, as part of the Site Development Plan approval process, that "[a] phased schedule for construction and completion of each particular site development plan approved, which schedule shall not exceed three years from the date of the record of Planning Board approval to the date of final phase review, shall be included in any Planning Board approval, said phased schedule to be completed prior to the issuance of a final certificate of occupancy."

2. Allows the Planning Board to extend the completion period for up to a year "for good cause."

3. "Should the time period for obtaining the final certificate of occupancy be exceeded, the site development plan approval shall be considered null and void and any building permits or temporary certificates of occupancy or particle certificates of occupancy shall be revoked without prejudice to the right of the applicant or his successors to reapply for site development plan approval."

m. Project Renewals:

1. New York State Administrative Procedure Act Section 401(2):

> "When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court, provided that this subdivision shall not affect any valid agency action then in effect summarily suspending such license."

n. 6 N.Y.C.R.R. Section 621.11(h):

1. Establishes that the New York State Department of Environmental Conservation ("DEC") "may determine that any application for renewal or modification will be treated as a new application for a permit" for reasons including:

- "the application involves a material change in existing permit conditions or in the scope of the permitted actions;"

- "there is newly discovered material information or there has been a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit;"

- "an opportunity for public comment or hearing or both is required by law or is deemed necessary by the department;" or

- "the renewal application is not timely or sufficient."

o. 6 N.Y.C.R.R. Section 617.5(c)(26):

1. Establishes that "license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities" are Type II Actions, which are exempt from review under the State Environmental Quality Review Act ("SEQRA").

p. Stephentown Concerned Citizens v. Herrick, 223 A.D.2d 862, 636 N.Y.S.2d 470 (3d Dept. 1996).

1. Challenge by citizens' group to continuing operation of gravel pit which had not submitted "timely and sufficient" renewal application.

2. Court notes that DEC has discretion with respect to how it may handle untimely applications, but holds that "[t]here is no authority for the proposition that an applicant making [] an untimely request may continue its operations in the interim."

3. Affirms injunction against gravel pit until valid permit is issued.

q. Stephentown Concerned Citizens v. Herrick, 280 A.D.2d 801, 720 N.Y.S.2d 597 (3d Dept. 2001).

1. Following prior ruling, gravel pit applicant submits belated renewal application, which DEC treated as a renewal (including as Type II SEQRA Action), and granted. Citizen's group challenges renewal grant.

2. Court confirms that DEC had discretion to treat untimely renewal application as a renewal application (including as a Type II Action under SEQRA).

3. Court holds that under the circumstance of the case, including that request was submitted less than two (2) months past the deadline, the Court "cannot say that DEC abused its discretion in treating the application as a renewal application."

r. Atlantic Cement Co., Inc. v. Williams, 129 A.D.2d 84, 516 N.Y.S.2d 523 (3d Dept. 1987).

1. Challenge to determination by the New York State Department of Environmental Conservation not to renew mining permit.

2. Court holds that "[g]enerally, in the absence of a material change to conditions or evidence of a violation of the terms of the permit, a renewal should be granted without unduly burdening the applicant."

3. Court opines that, particularly with respect to the mining industry, "[t]o require burdensome information at each renewal, which occurs every one or three

years, would create destabilizing uncertainty and additional expense upon the mining industry."

4. Court holds that statutory provisions pertaining to mining did not allow DEC to ask for substantial new information on renewal application.

5. Court further holds that mining activities at issue, which were originally approved prior to the enactment of SEQRA, continue to benefit from its "grandfathering" provisions because there had been no material change in the subject activities.

6. Court holds that the grounds relied on by DEC were erroneous, but remands the matter to DEC because "the record is not clear as to whether other grounds remain over which DEC may exercise its discretion."

s. Twin County Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 665 N.Y.S.2d 627 (1997)

1. Challenge to decision by Town Board to renew Special Permit for asphalt recycling plant.

2. Plant had been operating in area zoned for industrial use pursuant to 10-year Special Permit, which had been granted following the issuance of a SEQRA Negative Declaration.

3. In support of its renewal application, the Applicant provided expert testimony on areas including asphalt recycling, traffic, and land use values. Applicant also submitted proof from the Environmental Protection Agency that the plant complied with applicable governmental regulations.

4. Opposition to renewal application came mainly from residents of bordering neighborhoods.

5. Court holds that "[w]hile the Town Board still retains some discretion to evaluate each application for a special use permit, to determine whether applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence."

6. Court annuls non-renewal, holding that "[g]iven the present record established by petitioner, it is evident that the application was denied not because it failed to meet the applicable criteria but because of general community pressure."

t. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

1. Challenge to decision by Village Board not to renew Special Permit to operate transfer facility.

2. Court of Appeals found "overwhelming proof" that facility operator "repeatedly and intentionally violated the conditions of [its special] permit."

3. Court rejects argument that Board was required to show substantial evidence of violations that actually harmed or endangered the health or the environment, holding that "[a]lthough inconsequential violations would not justify nonrenewal, the many violations here, and their willful nature, sufficiently support the Board's decision."

4. Court affirms that Special Permit renewal are subject to principle that expert opinion may not be disregarded in favor of generalized community objections, but that a board's denial may be affirmed where "there are other grounds in the record."

5. "This is not to say that [initial] denials and nonrenewals may always be based on identical grounds. Where a facility is already in operation and its owner has made an investment, the board should take those facts into account. That said, the board's decision remains a discretionary one that will not be overturned if it has a proper basis."

6. Court holds that it was enough in this case "that the Board found the violations potentially harmful."

7. "[E]ven if no single violation was dangerous in itself, the Board was entitled to conclude that the history of repeated, willful violations created an unacceptable threat of future injury to health or the environment."

8. Court acknowledges that there may be "instances in which an applicant's violation is so trifling or de minimis that denying renewal would be arbitrary and capricious," but holds that "[h]ere, the quantity and character of [the applicant's] violations would have constituted sufficient grounds to deny [its] renewal application on their own, with or without expert testimony."

u. New Rochelle City Code Section 331-116(c):

> "On written application, a special permit approved with a time limitation may be renewed by the Building Official upon notice to the approving agency which authorized the issuance of the special permit, provided that no such renewal shall be made by the Building Official unless there

has been compliance with all applicable codes, ordinances, regulations and conditions of the special permit. The Building Official shall notify, in writing, the approving agency which authorized the issuance of the special permit at least 45 days prior to the effective date of such renewal. No such renewal shall be made by the Building Official if there is objection by a majority vote of the approving agency . . . ."

v. Town of Yorktown Code Section 270-12(B):

1. Establishes that "[a]pplications for [tree-cutting] permit renewals may be submitted to the Town Engineer no less than 30 calendar days prior to the date of expiration."

w. Considerations on Renewal Applications:

1. Did municipality change the applicable special use criteria?

2. Does Applicant's use still meet the applicable objective special use criteria?

3. Is there substantial evidence showing that use does not meet existing regulatory criteria?

4. Is there substantial evidence showing that use poses a new and substantial threat(s) to the public health, safety, or general welfare?

5. What was the Applicant's initial investment, and to what extent has the investment been amortized?

II. Theory and Origin of "Vested Rights"

The doctrine of "vested rights" has its roots in the initial implementation of zoning, which rendered certain pre-existing uses "non-conforming" to the new zoning requirements. One of the initial issues planners and courts had to face with respect to zoning was what protection was afforded to these pre-existing "non-conforming" uses.

a. Retroactive Zoning Ordinances, 39 YALE L. J. 735, 735, 736 & 740 (1930).

1. "Property restriction by means of zoning being still in its formative stage, its limitations are as yet undefined. The problem is practically confined to use regulation, which may be subdivided into two phases – the prohibition of future non-conforming uses and the discontinuance of existing ones. It is the latter which at present causes the greater difficulty."

2. "[W]hen municipalities attempt to revoke building permits issued before the enactment of a zoning ordinance, the courts will sustain the revocation provided there has been no 'material' action in reliance on the permit."

3. "In holding ordinances invalid because of the extent of the diminution in value caused by their application, the courts speak of the operation of the ordinance as impairing the property owner's vested rights or as constituting a taking which would require compensation."

b. Constitutional Law – Vested Rights – Effect Of Change in Zoning Ordinance, 41 HARV. L. REV. 667, 667 (1928).

1. "The fact that there is an interference with established user, or that expenditures have been made in reliance on previous action by the municipality may well serve to make the subsequent [zoning] action unreasonable."

2. "Comprehensive zoning ordinances are now established as legitimate exercises of the police power. But though the plan as a whole may be valid, it may operate unreasonably in particular cases."

c. People v. Miller, 304 N.Y. 105, 108-9, 106 N.E.2d 34 (1952) (discussing derivation of New York's vested rights from a non-conforming use theory).

1. "'[V]ested right' in [a] particular use . . . is but another way of saying that the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision."

III. Vested Rights Theory In New York

a. Vesting Pre-approval

1. New York "Special Facts" Exception

- Ordinarily under New York law, a developer cannot obtain vested rights pre-approval. (See Orangetown v. Magee below).

- Generally, where zoning laws are amended after the submission of a land use application, courts will apply the law as amended unless the matter falls within the Special Facts Exception.

- Special Facts Exception may apply where "arbitrary and dilatory tactics of an administrative body delay[] a property owner's application pursuant to which that owner was entitled to a permit as a matter of right, in order to thereafter change a zoning ordinance and defeat the property owner's rights and nullify

the application." Preble Aggregate Inc. v. Town of Preble, 694 N.Y.S.2d 788, 792 (3d Dept. 1999) (citations omitted).

2. Preble Aggregate Inc. v. Town of Preble, 263 A.D.2d 849, 694 N.Y.S.2d 788 (3d Dept. 1999).

- Plaintiff applied for special use permit to mine on property that was partially below the watertable. The Town zoning allowed mining by special use permit, but prohibited mining below the watertable.

- Plaintiff challenged the Town's law prohibiting mining below the watertable as being superseded by State law.

- While the suit was pending, the Town adopted a local law prohibiting mining entirely on land encompassing Plaintiff's property.

- Plaintiff challenged the rezoning alleging, *inter alia*, the special facts exception.

- Court held that the exception did not apply where the Town "at all times fought plaintiff's application with 'unrelenting determination', as it was entitled to do. The Town's action in invoking the legal rights of its residents in order to contest plaintiff's application, however, was not the product of malice, oppression, manipulation or corruption."

- The Court also noted that the Plaintiff was not otherwise entitled to the special use permit as it existed in the previous zoning as of right. Rather, the Town had discretionary approval authority.

3. Cleary v. Bibbo, 241 A.D.2d 887, 660 N.Y.S.2d 230 (3d Dept. 1997).

- Court holds that one-and-a-half year delay, which culminated in a Board's determination that it was without jurisdiction over a project, "was somewhat lengthy, [but] it was not extraordinary."

- Court is persuaded that Special Facts Exception does not apply because petition "fails to allege that Board's actions were 'the product of malice, oppression, manipulation or corruption.'" (citation omitted).

- Court holds that Board's procedural efforts and its filing a notice of appeal of a court decision recognizing the error did not warrant an inference of impropriety or bad faith.

4. Morgan v. Town of West Bloomfield, 295 A.D.2d 902, 744 N.Y.S.2d 274 (4th Dept. 2002).

- Challenge to application of zoning amendment, which altered the special use permit requirements for manufactured home parks.

- Court holds that the special facts doctrine is not applicable here because "'[e]ntitlement to a special use permit is not a matter of right.'" (citation omitted).

5. Pokiok v. Silsdorf, 40 N.Y.2d 769, 390 N.Y.S.2d 49 (1976).

- Petitioner applied for a building permit to expand his four-bedroom residence in September 1972, which was denied, ostensibly because he had improperly rented rooms out. Petitioner thereafter submitted a revised building permit application, which was not acted upon. Petitioner prevailed on motion to compel building inspector to act on the application in December 1973, which was denied in March 1974. Petitioner appealed building inspector's determination to Village ZBA.

- While Petitioner's appeal to the ZBA was pending, Village enacted law limiting single family homes to four bedrooms. ZBA thereafter denied Petitioner's appeal in August 1974.

- Court of Appeals holds that Special Facts Exception to the ordinary principle that a case must be decided upon the law as it exists at the time of the decision, "so that the zoning ordinance, as amended, does not apply and the arbitrary actions of the board may not prevail" (i.e., Petitioner's application must be considered under the Village law prior to its amendment).

- Court holds that "'[t]his administrative procrastination, calculated to deny a property owner his right to use this land in a currently lawful manner, is supportable neither by law nor by sound and ethical practice.'" (citation omitted).

- Court finds that Petitioner "demonstrated that he was entitled to the permit as a matter of right by full compliance with the requirements at the time of the application and that *proper action upon the permit would have given him time to acquire a vested right.*" (emphasis added).

- Court notes that has the Village taken action "within a reasonable time," Petitioner would have had a year to begin construction before the enactment of the amendment.

- Court finds that Petitioner "was denied this right by the unjustifiable actions of the village officials and by an abuse of administrative procedures."

6. Figgie Int'l, Inc. v. Town of Huntington, 203 A.D.2d 416, 610 N.Y.S.2d 563 (2d Dept. 1994).

- Planning Director refused to accept site plan for review, ostensibly because it did not comply with Town zoning ordinances.

- Court notes that "[g]enerally, 'courts must apply a local government's zoning ordinance as it exists at the time of judicial review, unless there is proof of 'special facts' which indicate that the local government acted in bad faith in delaying a landowner's application for a building permit while the zoning law was changed.'" (citation omitted).

- "The landowner must demonstrate, however, that he was 'entitled to the permit as a matter of right by full compliance with the requirements at the time of the application and that proper action upon the permit would have given him time to acquire a vested right.'" (citing Pokoik).

- Court holds that "Town's failure to act on site plan was designed to prevent the plaintiff from developing his property prior to the effective date of rezoning."

- Court notes that "had the site plan been acted upon in a timely manner and a building permit ultimately granted, the plaintiff could have commenced substantial work prior to" the effective date of the rezoning.

- Court held that "under those circumstances the plaintiff would have acquired a vested right" in the pre-existing zoning.

7. Our Lady of Good Counsel, Roman Catholic Church and School v. Ball, 45 A.D.2d 66, 356 N.Y.S.2d 641 (2d Dept. 1974), aff'd 38 N.Y.2d 780, 381 N.Y.S.2d 866 (1975).

- Court held "that where a [commercial bingo] license would have been granted under the law as it existed at the time the application for the license should have been passed upon, the application will not be subject to the onerous strictures of an amendment of the pertinent statute or regulation, or of a new statute or regulation, and that it matters not whether the application was *innocently or deliberately* filed and forgotten." (emphasis added).

b. Vesting Post-Approval

1. Valid Permit, Substantial Construction And Substantial Expenditure

- New York follows the majority of states regarding post-approval vesting in that a developer can secure vested rights to existing zoning by obtaining a valid

permit and implementing "substantial construction and substantial expenditures."

2. Orangetown v. Magee, 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996).

- "In New York, a vested right can be acquired when, [1] pursuant to a legally issued permit, [2] 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."

- Making the permitted improvements on the land (land clearing, footings, and foundation of 34-acre industrial park) and placing a temporary building for use during the construction process constituted "substantial changes."

- Incurring costs in excess of $4 million constituted "substantial expenses," where the estimated project cost was $3 million.

- Court emphasized that "[t]he 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."

3. Glacial Aggregates, LLC. v. Town of Yorkshire, 14 N.Y.3d 127, 897 N.Y.S.2d 677 (2010).

- Court held mining company acquired vested rights due to lack of zoning in place at time of initial filing and substantial expenditures and construction.

- Court considered municipality's lack of zoning "unqualified" permission from Town to utilize land as mining site.

- $500,000 spent in obtaining DEC permit constituted substantial expenditures; the court noted these soft costs "represent a significant portion of the investment necessary for a landowner to devote real property to quarrying."

- "Substantial construction" comprised of removing and testing 400 tons of sand and gravel; removing timber on property; staking and surveying property; drilling test holes; and preparing for necessary bridge. Substantiality was viewed in light of the fact that "little needed to be built for mining to take place at the property."

4. Showers v. Town of Poestenkill Zoning Bd. of App., 176 A.D.2d 1157, 575 N.Y.S.2d 600 (3d Dept 1991), app. denied, 79 N.Y.2d 754, 581 N.Y.S.2d 655 (1992).

- Plaintiff built one of two phases in project, zoning was changed, and plaintiff sought vested rights to build the second phase.

- Road and utilities used for the first 18 homes of a 30-lot subdivision did not constitute "extensive improvements," viewed in light of the entire project.

- The amount spent on the first phase was not a "substantial expenditure" when viewed in light of the cost of the entire project.

- The court found most of the improvements were useful under the new zoning.

5. Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 382 N.Y.S.2d 538 (2d Dept. 1976).

- Developer completed two phases of a four phase subdivision project. The remaining phases were determined to have vested rights under the zoning that existed at the time of approval.

- The remaining two phases were completely undeveloped at the time. Court held, however, that the rights were vested under the "single integrated project theory." The project, although in phases, was viewed as a whole.

- A successor in interest filed new subdivision plats based on the original zoning. The Town rejected the plats, stating they needed to be in compliance with the new zoning.

- Court held that the rights could be divested where:

  - the expenses were recouped;
  - rights were abandoned by the plaintiff or its predecessor in interest, or
  - if "considerations of public health, safety and welfare override petitioner's . . . interest in development of the tract" with the original zoning.

- Whether lack of sewage facilities for the latter half of the project, a failed water source, and overburdened storm drains were considerations of public health, safety and welfare, which would override petitioner's interest in development, were matters of fact to be determined on remand.

c. Potential For Municipalities To Draft Local Vesting Provisions As A Development Incentive

1. In New York, the authority to adopt a vested rights zoning amendment may be found within the statutory and constitutional scheme permitting municipalities to adopt and amend zoning regulations.

2. Section 10 of the New York Municipal Home Rule Law ("MHRL") authorizes local governments to adopt and amend local laws with respect to their "property, affairs or government," as well as in fourteen other

enumerated instances, so long as those laws are not inconsistent with the Constitution or any general law of the State. N.Y. Mun. Home Rule Law §§ 10(1)(i) & (ii); see also N.Y. Const. Art IX, § 2(c).

3. One of the enumerated powers under the MHRL authorizes a city, town or village to adopt local laws to exercise the "powers granted to it in the statute of local governments." N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(14).

4. One example of a local vesting provision: Town of Dover, New York § 145-16(I):

> "Vested rights. For 15 years following the approval of master development plan by the Town Board, an applicant, or its successor(s) in interest, shall obtain vested rights to complete the development shown on said master development plan. All Town local laws, ordinances, and enactments, and all other Town zoning, planning, environmental rules, requirements or regulations, which are in effect at the time of the Town Board approval of a master development plan, shall remain applicable to said master development plan for 15 years, absent clear and convincing evidence of a necessity directly relating to the public health, safety or general welfare."

IV. Supplemental Environmental Impact Statements (SEIS)

a. When Is Supplementation Required?

In general, "[a]n agency must prepare a SEIS if environmentally significant modifications are made after issuance of an FEIS." Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 313 (1986), citing Glen Head-Glenwood Landing Civ. Council v. Town of Oyster Bay, 88 A.D.2d 484, 494, 453 N.Y.S.2d 732 (2d Dept. 1982).

1. 6 N.Y.C.R.R. Section 617.9(a)(7):

- Establishes that "[t]he lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from:
  - changes proposed for the project; or
  - newly discovered information; or
  - a change in circumstances related to the project.

- "The decision to require preparation of a supplemental EIS, in the case of newly discovered information, must be based upon the following criteria:"

- the importance and relevance of the information; and
- the present state of the information in the EIS.

• If a supplement is required, it will be subject to the full procedures set forth in the SEQRA regulations.

2. Glen Head-Glenwood Landing Civ. Council v. Town of Oyster Bay, 88 A.D.2d 484, 494, 453 N.Y.S.2d 732 (2d Dept. 1982).

• Challenge to rezoning of property to allow more intense residential development. Sewage disposal was key area of environmental concern.

• The SEQRA process was premised, in significant part, on applicant's representation that it had approval to connect property to municipal sewer system. Prior to adoption of rezoning, however, lead agency is advised that municipal connection is unavailable.

• Court holds that as the result of the lead agency's "failure to communicate [to other agencies with respect to] 'the vital issue of sewerage was passed over as having been fully satisfied and the attention of the concerned agencies [was] diverted elsewhere.'" (citation to lower Court decision omitted).

• Court holds that the "new material" pertaining to the unavailability of the municipal sewage connection "was not only accurate and highly relevant, it was at the heart of environmental objections to the project."

• Accordingly, the Court holds that a supplemental impact statement "should have been circulated and reviewed in the same manner as the original statement."

3. Jackson v. New York State Urban Development Corporation, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 313 (1986).

• Developer requested an increase in hotel rooms to portion of redevelopment project, which eliminated 100,000 square feet of office space, and added up to 60,000 square feet of retail, 25 additional parking spaces, and a cinema. UDC found the FEIS "adequately and fully describes the environmental impacts of the Project after giving effect to such changes" and no SEIS was required.

• Court stated that "[w]hether a modification is significant is generally a determination to be made by the agency after taking a 'hard look'".

- Court concludes that the record reflected that UDC took the requisite hard look, its determination was not arbitrary or capricious, and the determination not to require a SEIS was upheld.

- Court rejects argument that data relied on had become stale.

- "[T]he mere passage of time rarely warrants an order to update the information to be considered by an agency" (citation omitted).

- "The EIS process necessarily ages data. A requirement of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives."

4. Doremus v. Town of Oyster Bay, 274 A.D.2d 390, 711 N.Y.S.2d 443 (2d Dept. 2000).

   - SEQRA process originally conducted in 1985 on rezoning proposal to allow for a total of 342 units led to conclusion that "the proposed development would over-intensify the use of the property which had many natural amenities." Accordingly, Town Board denies the rezoning application.

   - Developer sues, and the municipality and the developer enter into a settlement in 1996 to allow for a 270 unit development. Consent Order asserts that original SEQRA review contained "sufficient information" on revised rezoning proposal.

   - Court holds that Consent Order is subject to SEQRA review.

   - Court recognizes that "the passage of time standing alone, does not warrant the preparation of a SEIS," the circumstances of this case warranted one, including:

> The record reveals that potential environmental impacts, particularly regarding water use and quality and the loss of open space, have changed in the more than 10 years since the FEIS submitted in connection with the prior rezoning application was considered. In 1987, the subject property was designated as part of the Long Island Special Groundwater Protection Area (*see,* ECL 55-0113[1][b]), and the property was included in the 1992 Long Island Comprehensive Special Groundwater Protection Area Plan. ECL 8-0109(9) requires an EIS for any action with a significant impact on a special groundwater protection area. In 1995, the New York State Open Space Conservation

Plan included the property on its list of unique open space resources, which protected the Long Island ground water aquifer system.

- Court holds that "[u]nder the circumstances, the Town Board could not have met its obligation under SEQRA without requiring a SEIS to analyze the proposed rezoning in light of the change in circumstances since 1985."

5. Riverkeeper Inc. v. Town of Southeast, 9 N.Y.3d 219, 851 N.Y.S.2d 76 (2007).

   - Town Planning Board adopted SEQRA findings for a residential subdivision on February 25, 1991. Preliminary subdivision approval was granted on August 10, 1998 and conditional final approval was granted on June 10, 2002. Petitioners challenged Town Board's failure to determine whether supplemental environmental review was required in connection with the conditional final approval, and prevailed before the Supreme Court, which remitted the matter to the Planning Board to determine if a SEIS was necessary in light of, inter alia, the expansion of United Stated Army Corps of Engineers ("ACOE") delineation of wetlands on the project site, tightened regulations for projects located in the New York City Watershed, additional traffic concerns, and an increase in stormwater basins on the site.

   - On remand, the Planning Board determined that a SEIS was not required, and issued a detailed Resolution to that effect. Petitioners commenced a second action.

   - Court concludes that Planning Board's Resolution reflected that the "hard look" and "reasoned elaboration" required by SEQRA.

   - Court notes that "[t]he Board's requirement of a technologically advanced sewage treatment facility in its 1991 findings statement actually anticipated the regulatory changes that occurred years later."

   - Court finds Planning Board reasonably determined that other project changes resulted in reduced environmental impacts.

6. In re Application of Amenia Sand & Gravel Inc., DEC Project No. 3-1320-0030/1, 1997 WL 1879249, at *14-15 (N.Y.S. D.E.C. A.L.J Rulings June 16, 1997) aff'd Deputy Comm'rs Interim Decision, Aug. 12, 1997.

   - While the mere passage of time does not warrant the updating of information via a SEIS, where there are significant changes that undercut the reliability of that information, updating is warranted.

- Applicant relied upon seven (7) year old traffic data where "a variety of social and development changes ha[d] occurred" in the area in the interim that would warrant the need for updated traffic data via a SEIS.

7. N.Y.S. D.E.C., The SEQR Handbook, (3d ed. 2010).

   - "The information [that may prompt a SEIS] must be relevant to the discussion of significant adverse environmental impacts. The information should be genuinely new, that is, the lead agency would have had no reasonable means of knowing the information sooner."

   - "A change of circumstances [that may prompt a SEIS] means any change in the physical setting or, or regulatory standards applicable to, the proposed project. For example, if nearby land uses have change since the original site assessment was conducted, or the municipality has enacted new land use rules, and these changes are relevant to significant adverse environmental impacts, then a supplemental EIS may be warranted."

8. Matter of Muir v. Town of Newburgh, 49 A.D.3d 744, 854 N.Y.S.2d 727 (2d Dept. 2008).

   - Developer proposed a 141 acre office/warehouse/distribution center to be developed in phases. FEIS was accepted and adopted by the Planning Board in 1987, and SEQRA Findings were issued the same year. The SEQRA Findings Statement was amended during development of the project in 1992, 1994, and 1999.

   - In 2005, another developer purchased part of the 141 acre parcel to develop a hotel and restaurant. The Town Board determined that the current proposal was within the scope of the previous SEQRA Findings Statements, that there were no new significant adverse environmental impact which had not been previously addressed, and, as such, a SEIS was not warranted.

   - Town experts found that traffic from the change would be less than what was anticipated in the 1987 FEIS; they also found that the drainage plans from 1987 complied with current NYSDEC regulations.

9. Develop Don't Destroy (Brooklyn), Inc. v. Empire State Dev. Corp., 927 N.Y.S.2d 571 (Sup. Ct. N.Y. Co. July 13, 2011).

   - Prior Court Order remands to agency for findings on reasonableness of continuing reliance on 10-year build date for major public-private partnership, and whether a SEIS is required in relation to build date that

is further out. Agency prepares Technical Analysis, finding that 10-year build date was still appropriate and that, in any event, a SEIS was not required.

- Court notes that, in general, "a mere inaccuracy in the build date will not invalidate the basic data used in the agency's environmental assessment."

- The Court finds, however, that in this case that the agency's continuing use of a 10-year build date "was not merely inaccurate [but] lacked a rationale basis given the major change in deadlines reflected [in various development agreements]."

- Court faults Technical Analysis prepared by agency, which, without "any technical studies on the effects of significantly prolonged construction on various areas of environmental concern," apparently took "the position that it is a matter of common sense that less intense construction will result in lower impacts for conditions such as traffic, noise, and air quality."

- Court notes that "the duration of construction activities is a factor that is required to be taken into account in assessing the impacts on both environmental conditions such as traffic, noise, and air quality, which are amenable to quantitative analysis, and conditions such as neighborhood character, open space, and socioeconomic conditions, which are largely subject to qualitative analysis."

- Court finds Technical Analysis flawed because it "focuses on intensity of construction, and does not address the impacts of a construction period that could extend not merely for a decade for 25 years."

- Court notes, for example, that the "Technical Analysis is silent as to the impacts on neighborhood character and socioeconomic conditions on vacant lots, above-ground arena parking, and construction staging which may persist not merely for a decade but, as petitioners aptly put it, for a generation."

- Court also faults Technical Analysis for reliance on mitigation measures developed for 10-year build date without "consider[ing] the adequacy of these mitigation measures for a significantly prolonged construction period."

- Court mandates preparation of SEIS.

10. Vill. of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991) citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374, 109 S.Ct. 1851, (1989).

> "When confronting a design change in a project that has already been the subject of an EIS, the sponsoring agency must consider whether the change will affect the quality of the human environment in a significant manner or to a significant extent not already considered in previous studies."

11. Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996).

- Court orders supplementation where there were "substantial changes from the previously-discussed alternatives, not mere modifications 'within the spectrum' of those prior alternatives."

12. Preservation Coalition of Erie County v. Fed. Transit Admin., 129 F.Supp. 2d 551 (W.D.N.Y. 2000).

- "An agency need not supplement an EIS every time new information comes to light. Such a requirement would make completion of any project that potentially impacted on any aspect of the environment a virtual impossibility. Even if the information suggests an impact on the environment that was not addressed in the EIS, a SEIS is not necessarily required. A SEIS is required only when new information shows that the project will affect the environment in a significant manner, or to a significant extent, that was not addressed in the EIS."

- Court holds that discovery of new information or subsequent developments, such as historically significant archeological ruins, mandates supplemental EIS.

13. 233 East 69th Street Owners Corp. v. Lahood, 2011 WL 2436889 (S.D.N.Y. June 6, 2011).

- Challenge to failure to prepare an SEIS in connection with final design of ancillary ventilation facility for Second Avenue Subway.

- Court finds that agency's reliance on study area that was six times the minimum size recommenced by the *City Environmental Quality Review Technical Manual* was neither arbitrary or capricious, holding that:

> "Agencies should be given wide latitude in determining the appropriate size of a study area, particularly when evaluating the impacts on a 'neighborhood.' The term

'neighborhood' encompasses a diverse range of sizes and shapes not amenable to precise delineation. In determining whether the [ventilation] Facility Study Area was arbitrary and capricious, the Court must assess whether the Study Area is so large as to arbitrarily dilute the environmental impacts of the proposed action. This is not the case here."

- Court states that it was "struck . . . by the profound difference between the FEIS's original conceptual 'residential' facility design and the final 'institutional' one. Any reasonable person reading the FEIS might be left with the impression that the Facility would be designed to appear as a residential building."

- Nevertheless, the Court holds that the agency's failure to require a SEIS was not arbitrary and capricious.

- "[T]he fact that a building is different does not render it inconsistent with the character of a neighborhood that already contains a diverse array of building types and materials. Of course, a building may be so starkly different from the surrounding neighborhood that an agency determination of 'consistency' is arbitrary and capricious. But that tipping point has not been reached here."

14. Northwest Ecosystem Alliance v. Rey, 380 F.Supp.2d 1175 (W.D Wash. 2005).

- "NEPA requires the EIS to contain high quality information and accurate scientific analysis. The EIS must disclose if information is incomplete or unavailable. Relying on outdated data or not acknowledging the limitations in a methodology are grounds for setting aside an EIS." (citations omitted).

- "[A]n agency preparing a SEIS cannot simply rest on the previous EIS or SEIS if there is new information that may alter the environmental analysis. 'The agency must be alert to new information that may alter the results of its original environmental analysis'" (citation omitted).

- Court holds that SEIS was improper because, inter alia, literature discussing problems with a methodology relied on in the SEIS had came out since its publication, such that "the Agencies should have disclosed these problems with their methodology."

- Also, Court holds that agencies should have discussed why they relied on data from a particular decade regarding the frequency of wildfires rather than more recent data.

b. Potential For Municipalities To Draft Local Provisions Pertaining To Supplementation:

1. Town of Dover Code §145-16(E)(1)(c) ("Site Plan Approval/Amendments" in the Mixed-Use Institutional Overlay District)

• Establishes that "[a] site plan...shall not require supplemental review under SEQRA, if such site plan or site plan amendment meets the following criteria as compared to the adopted master development plan:

- Does not increase traffic volumes generated by the approved site plan as calculated pursuant to the most recent edition of the Institute of Transportation Engineer's Trip Generation manual by more than 10%;

- Does no increase the number of school children generated by the approved site plan by more than 10%;

- Does not alter the aggregate gross residential density or nonresidential floor area in the approved site plan by more than 10%, provided that under no circumstances shall more residential units be allowed than are permitted under the master development plan approved by the Town Board as it related solely for the purposes of implementing. A change in product or use mix shall not in itself constitute a substantial change;
- Does not increase impervious surfaces in the approved site plan by more than 10%;
- Does not increase the amount of sewage effluent or water consumption by more than 10%;
- Conforms or substantially conforms with any design guidelines or other conditions adopted in connection with the approved site plan; and
- Does no increase by more than 10% any encroachment on:
  - Wetlands under the jurisdiction of the NYSDEC or the ACOE;
  - Slopes exceeding 15%; or
  - Any environmentally sensitive area specifically designated by the Town Board in connection with its approval of the original Master Development Plan."

Establishing Defensible Criteria for Governmental Exactions and Fees

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A. When Do Exactions Constitute An Illegal "Taking"

a. Nollan v. California Coastal Commission, 483 U.S. 835, 107 S.Ct 3141 (1987).

i. California Coastal Commission conditions issuance of development permit on applicant's grant of easement to allow public to cross their beachfront to go between two public beaches that were separated by the site, based on finding that new house would contribute to visual barrier of the ocean.

ii. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (citation omitted).

iii. Supreme Court agrees "that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."

iv. "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."

v. There must be an "essential nexus" between the condition and the underlying land use restriction at issue.

vi. "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not valid regulation of land use but an 'out-and-out plan of extortion.'"

b. Dolan v. City of Tigard, 512 U.S. 374,114 S.Ct 2309 (1994).

i. City Planning Commission requires applicant for commercial development to dedicate:

1. property within 100-year floodplain as a public greenway for improvement of storm drainage system, based on findings that increase in impervious surfaces created "anticipated increased storm water flow" from site; and

2. an additional 15-foot strip as a pedestrian/bicycle pathway, based on findings that future site users "could utilize the pathway."

ii. Supreme Court cites "the well-settled doctrine of "unconstitutional conditions," [under which] the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."

iii. "In evaluating petitioner's claim, we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."

iv. "If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development."

v. Stated differently, "[t]he second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the *required relationship* to the projected impact of petitioner's proposed development." (emphasis added).

vi. "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment."

vii. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

viii. Supreme Court holds that city failed to justify "why a public greenway, as opposed to a private one, was required in the interest of flood control"

ix. The city also "has not met its burden of demonstrating that the additional number of vehicles and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."

x. "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."

c. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 125 S.Ct 2074 (2005).

i. Discusses various categories of Takings:

1. Direct government appropriation or physical invasion of private property.

2. *Per se* Regulatory Takings:

a. Where government requires an owner to suffer a permanent physical invasion (e.g., requiring the installation of cable facilities on apartment buildings).

b. Where regulation deprives an owner of all economically beneficial use of property.

3. Other Regulatory Takings claims, which are subject to the balancing analysis set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978).

a. In conducting *Penn Central* analysis, Court must consider:

i. "[t]he economic impact of the regulation on the claimant and particularly the extent to which the regulation has interfered with distinct investment-backed expectations"; and

ii. "the character of the governmental action-for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits of the economic life to promote the common good."

4. Treats Nollan/Dolan distinctly.

a. Court writes that Nollan and Dollan "involve a special application of the 'doctrine of 'unconstitutional conditions,'' which provides that 'the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'"

b. Notes that "an inquiry [into a regulation's underlying validity] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."

c. States that "if a government action is found to be impermissible – for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action."

B. Relationship of *Nollan/Dolan* to Exactions/Fees Issues in New York

a. Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131 (1998).

i. Plurality (four (O'Connor, Rehnquist, Scalia, Thomas) out of nine Justices) holds that Congressional Act that imposes retroactive liability on former coal mine operator effectuated an unconstitutional Taking.

ii. Plurality holds that when legislative remedy singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause."

iii. Justice Kennedy, concurring, holds that Takings Clause is inapplicable because no real property interest at stake.

1. "The difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending regulatory takings doctrine to cases lacking this specificity."

2. "The plurality opinion would throw one of the most difficult and litigated areas of law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts. The existing category of cases involving specific property interests ought not to be obliterated by extending

regulatory takings analysis to the amorphous class of cases embraced by the plurality's opinion today."

3. Holds that Act violates the Due Process Clause.

iv. Dissenting Justices (Breyer, Ginsburg, Souter, Stevens) agree that the Takings Clause does not apply.

1. "The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property."

b. Twin Lakes Development Corp. v. Town of Monroe, 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003), cert. denied, 541 U.S. 974 (2004).

i. Challenge to municipal requirements, that: (1) makes subdivision applicants pay fees in lieu of dedicating a portion of their property for recreational purposes, and (2) requires applicants to reimburse Town for consulting costs incurred in processing application.

ii. Court of Appeals finds that Town met "essential nexus requirement," including because it made "explicit findings [at the time of enacting fee requirement] that the demand for recreational facilities exceeded existing resources" and that subdivisions "would exacerbate the problem."

iii. Holds that Plaintiff "identifie[d] no proof in the record" to justify finding that the per-lot recreational fees assessment set in the municipal legislation was not "roughly proportional."

iv. Court of Appeals is "unpersuaded that Dolan precludes municipalities from establishing fixed fees to ensure that adequate recreational facilities can be provided."

v. Court also rejects challenge to municipal provision regarding the payment of fees for processing application.

1. Notes that "under the challenged provisions, the applicant is required only to reimburse the Town for fees actually expended."

2. Court also finds significant that:

II. Town pays the same rate for consulting services as it charges applicants;

III. Planning Board audits vouchers submitted by consultants and rejects excessive or unnecessary charges; and

IV. Applicants may inspect consultants' invoices upon request.

c. Smith v. Town of Mendon, 4 N.Y.3d 1, 789 N.Y.S.2d 696 (2004).

i. Planning Board condition site approval on applicant's filing a conservation easement restricting development on portions of their property that were classified as environmental protection overlay districts.

ii. Court holds that Nollan/Dolan analysis does not apply because "an exaction involves the conditioning of a land-use decision on the 'dedication of property to public use," and "[t]here is no such dedication of 'property' here."

iii. "In practice, the [Supreme] Court has identified exactions in only two real property cases, *Nollan* and *Dolan*, both of which involved the transfer of the most important 'stick' in the proverbial bundle of property rights, the right to exclude others."

iv. Explains decision in Twin Lakes Development Corporation v. Town of Monroe by stating that in that case "we also characterized a fee imposed in lieu of the physical dedication of property to public use as an exaction."

v. Holds that issue of whether conservation restriction constituted a taking should be subject to analysis applicable to instances where real property is at issue. See Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978).

d. But see Erlich v. City of Culver City, 12 Cal. 4th 854, 911 P.2d 459 (Sup. Ct. Cal. 1996), cert. denied, 519 U.S. 929, 117 S.Ct. 299 (1996).

i. City conditions approval of condominium project to replace private sports complex upon payment of $280,000.00 to be used "'for partial replacement of the lost recreational activities.'"

ii. "When such [monetary] exactions are imposed -- as in this case -- neither generally or ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered."

iii. "The essential nexus test is, in short, a 'means-ends' equation, intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners -- whether they consist of possessory dedications or the exaction of cash payments –

that, because they appear to lack any evident connection to the public impact of the proposed use, *may* conceal an illegitimate demand – may, in other words, amount to "'out-and-out . . . extortion.'"

iv. "We view the requirement that the local government demonstrate *factually* sustainable proportionality between the effects of a proposed land use and a given exaction as one which furthers the assurances implicit in the *Nollan* test that the condition at issue is more than theoretically or even plausibly related to legitimate regulatory ends."

v. "[T]he record before us in this case is devoid of any individualized findings to support the required 'fit' between the monetary exaction and the loss of a parcel zoned for commercial recreational use."

vi. The amount of fee "must be tied more closely to the actual impact of the land use change the city granted the plaintiff."

vii. Court suggests means of determining the "value or economic cost" of the Project's impacts, including requiring applicant to defray anticipated costs of rezoning other property to allow recreational use or, potentially, costs of attracting private recreational development.

e. Town of Flower Mound v. Stafford Estates Ltd. Partnership, 47 Tex. Sup.Ct. J. 497, 135 S.W.3d 620 (Sup. Ct. 2004).

i. Local law requires subdivision developers to improve abutting streets, even if improvements are not necessary because of project impacts. Developer seeks to recover costs of rebuilding road abutting subdivision.

ii. Court holds that fact that developer did not sue until after it had built road and obtained final approval did not bar claim.

iii. Rejects municipal argument that Nollan/Dolan only applied where real property dedication is at issue, and adopts Ehrlich analysis.

iv. "For the purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved."

v. "[T]he burden [on a municipality to establish "rough proportionality] is essential to protect against the government's unfairly leveraging its police power over land-use regulation to extract from landowners concessions and benefits to which it is not entitled."

vi. Refuses to limit application of Nollan/Dolan to cases where an individual, "adjudicative" condition is imposed on particular developer as part of particular land use application, and allows it to be applied to case involving "legislative" exactions.

vii. "While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others."

1. Recognizes, in effect, a temporary taking.

2. Damages would include real estate taxes, and accrued interest on purchase money mortgage.

f. Homebuilders Association of Dayton & the Miami Valley v. City of Beavercreek, 89 Ohio St.3d 121, 729 N.E.2d 349 (2000), reconsideration denied, 732 N.E.2d 1002 (2000).

i. Challenge to municipal ordinance imposing impact fees on developers to cover construction of new roadways.

ii. Court subjects ordinance to "dual rational nexus" analysis, which it says is based on Nollan/Dolan.

iii. Two-step analysis:

1. "The city must first demonstrate that there is a reasonable relationship between the city's interest in constructing new roadways and the increase in traffic generated by new development."

2. "If a reasonable relationship exists, it must then be demonstrated that there is a reasonable relationship between the impact fees imposed by [the City] and the benefits accruing to the developer from the construction of new roadways."

a. "[T]he second prong of the test requires [the City] to demonstrate a reasonable relationship between the fee imposed on a developer and the benefits accruing to the developer."

b. "This portion of the test addresses whether the developer and the city are paying their proportionate shares of the costs necessary to construct new roadways."

c. "To prove that a reasonable relationship exists, [the City] must demonstrate that the methodology used to determine the need for roadway improvements funded by the impact fee is based on generally accepted traffic engineering practices."

d. "When evaluating this prong, a court should consider the actual costs of constructing new roadways, the formula used to determine the fee, the fee paid by a particular developer, the city's contribution, road improvements made directly by developers, the length of time between the payment of the fee and new roadway construction projects, whether the roadway projects are site-specific to the new development, and any other criterion that bears on the reasonableness of the fee.

C. When Do Exactions/Fees Exceed Governmental Authority

a. United States v. Sperry Corporation, 493 U.S. 52, 110 S.Ct. 387 (1989).

i. Challenge to statute imposing fee on awards from the Iran-United States Claims Tribunal. Statute states that it is to reimburse the government for expenses incurred in connection with the arbitration of claims.

ii. "This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services."

iii. "All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.'" (citation omitted).

iv. Court holds fees imposed by the statute at issue "are not so clearly excessive as to belie their purported character as user fees."

v. Court rejects argument that the fees mandated by the statute constitute a taking, holding that "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible."

vi. "[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services."

b. Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorp. Vill. of Roslyn Harbor, 40 N.Y.2d 158, 386 N.Y.S.2d 198 (1976).

i. Challenge to municipal ordinance that required applicants for zoning variances and special permits to pay the actual costs incurred by the board in reviewing the matter without any limitation."

ii. "[W]hen the State's jealously guarded police power is delegated to a local government or to its agencies, it must be accompanied by standards which guide and contain its use."

iii. "As a consequence, when the power to enact fees is to be implied, the limitation that the fees charged must be reasonably necessary to the accomplishment of the statutory command must also be implied."

iv. "The fees also 'should be assessed or estimated on the basis of reliable factual studies or statistics.'"

v. "Without the safeguard of a requirement that fees bear a relation to average costs, a board would be free to incur, in the individual case, not only necessary costs but also any which it, in its untrammeled discretion, might think desirable or convenient, no matter how oppressive or discouraging they might in fact be for applicants."

vi. "At stake are the terms upon which citizens may have access to a governmental function and their right to have those terms, whether or not they are in the form of fixed fees, fixed by standards which lend assurance that they are not 'unreasonable, discriminatory nor oppressive.'"

vii. "Manifestly, ready accessibility of judicial and other mandated governmental functions is too important for that accessibility and its appearance of accessibility."

c. St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988).

i. "A zoning board may, where appropriate, impose 'reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property', and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit."

ii. "[C]onditions are proper [where] they relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of the use."

iii. "[Z]oning boards may not impose conditions which are unrelated to the purposes of zoning."

iv. "[C]onditions are invalid [where] they do not seek to ameliorate the effects of the land use at issue, and are thus unrelated to the legitimate purposes of zoning."

d. MetroPCS N.Y., LLC v. City of Mount Vernon, 739 F.Supp.2d 409 (S.D.N.Y. 2010).

i. Challenge by wireless provider to municipality's denial of application includes challenge to local code provision pertaining to fees for such applications.

ii. Court finds that, under the code, "[t]here is no limitation on the amount of funds needed; in fact, the Zoning Code specifically leaves it open-ended in its provisions."

iii. Court also notes that in contrast to the $500 fee for all other Special Use applications, the municipality charges between $6,000.00 and $12,000.00 for wireless applications.

iv. Citing *Jewish Reconstructionist Synagogue*, Court holds that "[w]ithout some limitation, there is a risk that the local government will incur 'not only necessary costs but also any which it, in its untrammeled discretion, might think desirable or convenient."

v. Court finds no evidence explaining why a Special Use Permit for a wireless application would be more labor or time intensive so as to justify a fee 12 to 25 times higher than an ordinary Special Use application.

vi. Stating that the Court was particularly "troubled by the absence of any guiding standard or limitation on how much the applicant can be charged," the Court strikes down the code provisions pertaining to fees for wireless applications.

e. Cimato Brothers, Inc. v. Town of Pendleton, 270 A.D.2d 879, 705 N.Y.S.2d 468 (4th Dept. 2000), leave to appeal denied, 95 N.Y.2d 757, 713 N.Y.S.2d 1 (2000).

i. Upholding subdivision developer's challenge to a town ordinance, which fixed inspection fees at ten percent (10%), even though the Town Board had estimated that eight percent (8%) would be sufficient to cover inspection costs.

ii. Court persuaded by facts fee structure ordinance was enacted "[w]ithout the benefit of a statistical study," such that the eight percent (8%) figure was simply an estimate, and that the Town Board "added 2% to ensure that the amount generated by the fee was sufficient to cover its costs."

iii. "Evidence that refunds have been given to each contractor since enactment of the ordinance further support the conclusion that there is no reasonable basis for fixing the fee at 10% of the estimated cost."

iv. Court further finds that "the ordinance does not limit the nature or extent of services that the Town Engineer might perform in every instance nor does it set forth any guidelines regarding the charges for such services."

v. "Instead, the Town Board has the impermissible unfettered discretion to direct the Town Engineer to perform whatever services it deems appropriate and then to approve the payment of whatever charges are submitted to it by the Town Engineer."

D. When Are Exactions/Fees An Illegal Tax?

a. American Sugar Refining Co. of N.Y. v. Waterfront Comm'n of N.Y. Harbor, 55 N.Y.2d 11, 447 N.Y.S.2d 685 (1982), appeal dismissed, 458 U.S. 1101, 102 S.Ct. 3474 (1982).

i. "A license fee has for its primary purpose the regulation of restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefitted or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally."

b. Torsoe Bros. Construction Corp. v. Bd. of Trustees of Incorp. Vill. of Monroe, 49 A.D.2d 461, 375 N.Y.S.2d 612 (2d Dept. 1975).

i. Petitioner challenges imposition of $30,000 fee to tap into municipal water system.

ii. Court holds that municipality cannot use tap-in fees to defray cost of maintaining and improving water system.

iii. "It is well settled that where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement."

iv. "To the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as an unauthorized tax."

c. N.Y. Telephone Co. v. City of Amsterdam, 200 A.D.2d 315, 613 N.Y.S.2d 993 (3rd Dept. 1994).

i. Challenge to ordinance that required applicants for street excavation permits to pay $13 per square foot of excavation occurring within the paved portion of the right-of-way, sidewalk or greenbelt portion of the right-of-way.

ii. Although [the municipality] has characterized the charge as a fee, '[t]he label which is attached to an assessment is not dispositive of its true nature." (citation omitted).

iii. "Simply stated, taxes are burdens of a pecuniary nature imposed for the purpose of defraying the costs of government services generally, while fees have been characterized as the 'visitation of the costs of special services upon the one who derives a *benefit* from them.'" (citations omitted).

iv. Court finds that ordinance is an improper revenue generating measure, including because "the record reveals that the 'fee' sought to be imposed by defendant is being exacted for revenue purposes and, further, that the $13 per square foot charge clearly is disproportionate to the costs associated with issuing the excavation permit and subsequent inspections and enforcement."

v. Court finds it significant that the moneys garnered under the ordinance are deposited in the municipality's general fund.

vi. Court is also persuaded by the fact that municipal Common Council meeting minutes indicate that the ordinance is a revenue-raising measure.

vii. "As to the overall reasonableness of the charge, plaintiffs established that the costs associated with a routine excavation are dramatically less than the charges that would be imposed under defendant's ordinance."

d. American Independent Paper Mills Supply Co., Inc. v. County of Westchester, 65 A.D.3d 1173, 886 N.Y.S.2d 178 (2d Dept. 2009), leave to appeal denied, 13 N.Y.3d 716, 895 N.Y.S.2d 316 (2010).

i. Challenge to County law imposing annual fee imposed on transfer stations that process recyclables. Plaintiff alleges that fees are higher

than for companies that only handle waste, and that County does not inspect transfer stations.

ii. Court reiterates "'[t]he exceedingly strong presumption of constitutionality applies not only to enactments of the Legislature but to ordinances of municipalities as well. White the presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt." (citation omitted).

iii. Court rejects analogy between transfer station and waste haulers, and finds that transfer stations did "cause the [County] to incur additional costs."

iv. Court also finds that "[a]ny fees obtained are used only to fund oversight of the solid waste industry, and not to support the government generally. Such funding methods by both municipalities and the state have previously been deemed to be fees as opposed to taxes."

e. N.Y. Town Law Section 277(4)(c).

i. Requires that "any monies required by the planning board in lieu of land for park, playground or other recreational purposes . . . shall be deposited into a trust fund to be used by the town exclusively for park, playground or other recreational purposes, including the acquisition of property."

f. Office of the New York State Comptroller, Accounting and Reporting Manual

i. Financial accounting/reporting guide for local governments, which is intended to conform to Generally Accepted Accounting Principles ("GAAP").

ii. Establishes as one of the fundamental principles that a governmental accounting system must make its possible "to determine and demonstrate compliance with financial-related legal and contractual provisions."

iii. "Books of account should be maintained on a legal-compliance basis, but should include sufficient additional reports to permit GAPP-based reporting."

iv. Establishes various Governmental Fund accounts for governmental functions, including:

1. "General Fund," which is "for all financial resources except those required to be accounted for in another fund;" and

2. "Special Revenue Fund," which is "for the proceeds of specific revenue sources that are legally restricted to expenditures for a specific purpose."

E. Returning/Deferring Excess Fees and Performance Bonds

a. Town of Shawangunk v. Goldwil Properties Corp., 61 A.D.2d 693, 403 N.Y.S.2d 784 (3rd Dept. 1978).

i. Surety seeks to limit exposure on $242,000 performance bond, posted to secure subdivision improvements, to portion of subdivision which was actually developed.

ii. Citing State statute authorizing performance bonds to secure subdivision improvements, Court holds that it "seems to restrict expenditures to an amount "commensurate with the extent of building development that has taken place in the subdivision."

iii. "In our view, these words of limitation were purposely inserted in the statute as a means to assure that subdivision residents would be supplied with necessary services without insisting on the completion of an entire project as a matter of course in every case."

iv. "[T]he language would call for the payment of the face amount of the bond to the Town so that it could complete improvements reasonably justified by that part of the subdivision which had been developed followed by a refund of any amount not needed to complete that portion of the work."

v. Holding that where only a portion of a subdivision was built, the performance bond could be used by the municipality to install improvements for that portion only, with the remainder to be refunded to the developer since there would be no need for improvements on the undeveloped portion of the approved plat.

b. Matter of Wildlife Assoc. v. Town Board of Southampton, 141 A.D.2d 651, 529 N.Y.S.2d 548 (2d Dept. 1988).

i. Applicant who was charged $57,000 engineering review in connection with subdivision application seeks refund after learning that only $8,700 was spent on its application.

ii. Court affirms applicant's demand for audit.

c. River Vale Planning Board v. E & R Office Interiors, Inc., 241 N.J. Super. 391, 575 A.2d 55 (Superior Ct. N.J. 1990).

i. Municipality seeks to enforce terms of approval and development agreement, notwithstanding that project had been abandoned.

ii. Court affirms lower Court determination that "the installation of the improvements contemplated by the Developer's Agreement as a condition of site plan approval was subject to an implied or constructive condition that those improvements were required only if the developer proceeded with the project contemplated by the application and approval."

iii. Affirms order that bond be released.

d. Clare v. Town of Hudson, 160 N.H. 378, 999 A.2d 348 (2010).

i. Applicant seeks refund of $81,705.00 performance bond posted to fund improvements to specific traffic intersection, arguing that the funds were not used for its intended purpose.

ii. State regulation requires that impact fees be segregated from municipality's general fund and be used solely for the capital improvements for which they were collected.

iii. Court finds that only $75,437.05 "was actually attributable to the work for which the impact fee was collected."

e. Westchester Fire Insurance Co. v. City of Brooksville, 731 F.Supp.2d 1298 (M.D. Fla. July 30, 2010).

i. Municipality attempts to recover $5.3 million from surety ostensibly to install infrastructure for an abandoned, single-family housing development.

ii. Court holds that "the [performance] bonds and the ordinance [requiring bonding to ensure construction of improvements for subdivision] construed together impose a condition that construction of the development proceed before the City may collect."

iii. Court notes that "the City ordinance requires the bonds to ensure that no resident purchases a home without access to the City's utility services."

iv. "Because no home has been built that requires the City's utility service and because no home will be built for at least several years, the implied condition fails."

v. Court further finds that "[b]ecause no home exists in Phase Two that requires the City's utility services, requiring the City to install improvements on undeveloped land (and requiring [the surety] to reimburse the City's cost to install the improvements) imposes an unreasonable forfeiture against [the surety] and promotes an unreasonable windfall for the City."

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Curriculum Vitae

Mr. Zarin has extensive experience representing municipalities and private interests in the areas of land use and environmental law, including, general land use litigation, urban renewal and public-private redevelopment, multi-party environmental litigation, site remediation, and all aspects of environmental due diligence, counseling and general administrative law. He is currently a member of the Executive Committee of the New York State Bar Association's Environmental Section, and Co-Chair of the Land Use Committee. He has taught courses at the New York University Real Estate Institute, and has been a guest lecturer at the Pace University School of Law Environmental Master's Program. Mr. Zarin also assisted the Ninth Judicial District in the formation of a Special Environmental Part for the District. Michael also serves on a number of private and non-profit Board of Directors.

Mr. Zarin received his *Juris Doctor* from Hofstra University School of Law in 1985, where he served as Articles Editor for the *Hofstra Law Review*. He also received a Bachelor of Arts from the University of Wisconsin at Madison in 1976. Prior to forming Zarin & Steinmetz in 1997, he was a partner at Sive, Paget & Riesel, one of the most prominent environmental and land use law firms in the country, and manager of its White Plains office (1990-1997). He began his legal career as an associate at Weil, Gotshal & Manges in its Business Reorganization Department (1985-1987). Mr. Zarin also served as an urban and community development consultant and organizer for a Washington D.C. firm, the Center for Community Change, and as a consultant for the Wisconsin Governor's Manpower Planning Office, forming the first statewide Youth Employment and Training network/coalition. He was recently chosen as one of the Top 25 Best Attorneys in Westchester.

Speaking Experience (Partial List)

- *Panelist*, Issues Facing Planning Board and Zoning Board Members, New York State Conference of Mayors, July 13, 2011.

- *Speaker*, "Using Vesting Strategies to Protect Approvals," ALI-ABA Teleconference Seminar, June 14, 2011.

- *Speaker*, "Practical Issues and Strategies Regarding Public/Private Partnerships," Lorman Education Services, September 22, 2010.

- *Moderator*, "Planning Smart Communities," Sustainable Breakfast Series, March 18, 2010.

- *Panelist*, SEQRA: Practical Issues and Strategies, Lorman Educational Services, February 2009

- *Panelist*, SEQRA and Public-Private Partnerships, Lorman Educational Services, February 2005-2008.

- *Panelist*, Eminent Domain, Legal Update, National Business Institute, July 19, 2006.

- *Panelist*, Eminent Domain, Lorman Educational Services, June 30, 2006.

- *Panelist*, The Many Faces of SEQRA, Lorman Educational Services, February 2006.

- *Speaker*, Considering Environmental/Land Use Factors, Westchester Municipal Planning Federation, Land Use Training Institute, March 22, 2006

- *Speaker*, Environmental Issues for Residential Real Estate Attorneys, Westchester County Bar Association, June 2004.

- *Panelist*, The Use of Eminent Domain in Public-Private Development Partnerships, Lorman Educational Services, November 2003.

- *Speaker*, Common Concerns in Commercial Real Estate, Pace Center For Continuing Legal Education, September 2002

- *Panelist,* SEQRA and Border Wars, Albany Law School Institute of Legal Studies, SEQRA 25th Anniversary Conference, Albany, New York 2001

- *Speaker,* Condemnation and Urban Renewal: The Public Purpose, Westchester County Bar Association, White Plains, New York 2000

- *Speaker*, New York Environmental Law Practical Skills, New York State Bar Association, New York, New York 1999

- *Panelist,* Debate: Taking and The New York City Watershed Regulations, New York City Bar Association Environmental Committee, New York, New York 1999

Publications (Partial List)

- Vested Rights and Public-Private Redevelopment Projects, *New York Zoning Law and Practice Report*, September/October 2009

- "The 'Public Purpose' Test Becomes Reality in New York: What Does This Mean For Public-Private Economic Development Partnerships in New York?", Spring 2009

- "Border Wars and SEQRA," *Environmental Law in New York*, May 2006

- "The Use of Eminent Domain in Public-Private Development Partnerships," *Environmental Law in New York*, February 2004

- "Border Wars: A Case of Economic Disparity, Not A Flaw In SEQRA," *SEQRA 25th Anniversary Conference and Training Institute*, March 2001

- "Public Purpose Doctrine In Public/Private Eminent Domain Transactions, *Westchester County Bar Association Municipal Law Section,* June 2000

- "Dealing With The A Word/A Primer on Asbestos Removal," *Construction News,* Summer 1994.

- "Who Pays to Clean Up the Property?/Managing the Risk with Insurance," *New York Law Journal,* June 6, 1994.

- "Land Use Conflict between City and Watershed Area Heats Up," *New York Law Journal,* June 14, 1993.

- "Reporting Ancient Spills," *Real Estate Reporter*, 1992

- "Protecting Environmental Claims in Bankruptcy Proceedings," *Practicing Law Institute,* Summer 1991.

- "Environmental Action Program Model," *12 Cardozo Law Review,* April 1991.

Admissions
New York (1985)
United States District Court, Southern District of New York (1986)
United States District Court, Eastern District of New York (1986)

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Curriculum Vitae

Mr. Richmond has over 15 years of experience as an environmental, land use, and real estate attorney. He is also a Leadership in Energy and Environmental Design (LEED) Accredited Professional. Mr. Richmond counsels private and municipal clients on a wide variety of land use matters, including the environmental review of complex projects under the New York State Environmental Quality Review Act (SEQRA) and other applicable local, State, and federal law.

Mr. Richmond received his Juris Doctor, cum laude, in 1994 from Vermont Law School, where he served as Editor-in-Chief of the *Vermont Law Review*. He also received a Bachelor of Arts in History from Williams College in 1989. Mr. Richmond was formerly an Assistant Corporation Counsel at the New York City Law Department, and an associate at Rivkin, Radler & Kremer in Uniondale, New York. Mr. Richmond also taught English in Japan following his graduation from College.

Speaking Experience (Partial List)

- *Speaker*, "Challenging and Reducing Governmental Exactions and Fees," ALI-ABA Teleconference Seminar, June 14, 2011.
- *Speaker*, "SEQRA and Greenhouse Gas Emissions and Renewable Energy Sources," Lorman Educational Services, December 7, 2010.
- *Panelist*, "Implementing Energy Projects," Sustainable Breakfast Series, April 22, 2010.
- *Moderator*, "Navigating Local 'Green' Regulation & Implementation of Practical Green Building," Sustainable Breakfast Series, February 18, 2010.
- *Speaker*, "Emerging Fields in Environmental Review: Renewable Energy Sources, and Incorporating Developing Technologies and Strategies in the Planning Process," Lorman Educational Services, February 3, 2009.
- *Speaker*, "Practical Tips for Prosecuting and Defending Article 78 SEQRA Actions," Lorman Educational Services, February 7, 2008.

Admissions
New York (1995)
United States District Court, Southern and Eastern Districts of New York (1997)

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WESTCHESTER COUNTY BAR ASSOCIATION

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WESTCHESTER COUNTY BAR ASSOCIATION

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