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CLARIFYING THE STANDARD OF JUDICIAL REVIEW IN LAND USE MATTERS: HAS THE SECOND DEPARTMENT PUSHED THE PENDULUM BACK TO THE MIDDLE?

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I. INTRODUCTION

Almost 10 years ago, the Court of Appeals announced in a trio of land use cases² that a municipality must be afforded “broad discretion” in undertaking planning activities, and that decision making by administrative boards “should be sustained upon judicial review if it has a rational basis and is supported by substantial evidence.” Indeed, commentators heralded the *Ifrab* “trio” as the beginning of an era of “extreme deference” to local land use boards.³ Practitioners queried whether the Court of Appeals had swung the pendulum to the far side of the continuum—decisively in favor of municipal land use review boards. So long as a board could point to something in the record supporting its findings, it appeared that the courts would defer to the resulting decision with little assessment of the underlying reliability of the evidence cited.⁴

In the wake of *Ifrab*, however, some courts recognized that the Court of Appeals did not hand municipal boards carte blanche, and judicial review could not serve as a mere “rubber stamp” in the land use review process.⁵ Noting that the *Ifrab* court required a rational basis supported by “substantial” evidence, these courts recognized that their role was to “carefully examine the substantiality of the evidence and to exercise a genuine judicial function.”⁶

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In the last 10 years, the interplay between the Court of Appeals' direction to ascertain a "rational basis" based upon "substantial evidence" in the record, and its simultaneous call for "broad deference," has sparked both procedural and substantive confusion for courts as well as the land use practitioner. Substantively, questions have been presented as to whether the source of the "substantial evidence" matters—e.g., is it sufficient for a board to base a denial upon the statement of a project opponent who appears at a hearing and offers critiques based upon personal opinion?⁷ Fueling such questions have been the numerous post-*Ifrac* decisions which merely cited to the "deference" standard, and affirmed municipal decision making without assessing whether the "substantial evidence" in the record was substantiated by any empirical or expert support.⁸ Procedurally, many lower courts have mistakenly concluded that the Court of Appeals' use of the "substantial evidence" standard meant that review took the form of certiorari under N.Y. CPLR 7803(4) immediately before the Appellate Division, rather than mandamus before lower courts under N.Y. CPLR 7803(3). Indeed, numerous cases continue to be transferred erroneously to the Appellate Division under such belief.⁹

Notably, the vast majority of these post-*Ifrac* questions have been raised in the Second Department, as the jurisdiction with the overwhelming

numerical lead in land use-related litigation.¹⁰ Thus, in 2005 the Second Department directly addressed these issues in *Halperin v. City of New Rochelle*,¹¹ by rearticulating the standard of review as one of mandamus under N.Y. CPLR 7804(3), which required an "objective, factual basis" to act. The *Halperin* decision recognized that the essence of *Ifrac* was rationality, which required something more than relying "entirely on subjective considerations such as general community opposition."¹² Before judicial deference is warranted, a court must survey the administrative record searching for objective factual support for the board's determination.¹³ In *Halperin*, this support was found within an Environmental Impact Statement (EIS) containing expert reports assessing, inter alia, traffic, water quality and community character impacts of the approved project. Where the record contains such empirical and expert support, a court "must" defer to the board's determination.¹⁴

The Second Department's shift to the "objective factual basis" standard appears to clarify, if not level, the playing field. Land use practitioners are well aware of the effect community pressure and subjective political trends can have upon their work. A perfectly planned project could be subjected to months of scrutiny, or even denial, at the hands of generalized community opposition. The problem for a reviewing court is determining whether this opposition is based upon "substantial evidence," or mere speculation and conjecture. The Second Department's rearticulation of the *Ifrac* standard places a premium on tangible, *verifiable* data and testimony. Although boards are still afforded broad discretion, where they act on uncorroborated personal opinion the normal judicial deference is withheld. This provides the applicant, or a project opponent, the opportunity to develop a defensible administrative record based upon expert testimony, empirical data and other particularized evidence which could be used to overturn an adverse decision through an Article 78 proceeding.

The Second Department has restored some of the teeth to judicial review of land use decision making.

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While the majority of Second Department cases post-*Halperin* still favor municipal boards, courts in that Department are now conducting a more comprehensive analysis of the record, and assessing the quality of the evidence presented. This restores some of the teeth to judicial review of land use decision making, and has decreased slightly the level of deference afforded to boards. This can be perceived—albeit cautiously—as a discrete swing of the pendulum back towards the middle of the review continuum.

II. PROCEDURAL MISUNDERSTANDINGS EXACERBATED BY *IFRAH*

An unintended consequence of the *Ifrab* “trio” has been confusion between the “substantial evidence” standard for determining whether a municipality has acted in an arbitrary and capricious manner under N.Y. CPLR 7803(3), and the “substantial evidence” question presented pursuant to N.Y. CPLR 7803(4) when reviewing quasi-judicial hearings. The key procedural distinction between the two is that the former is brought before the Supreme Court in the first instance, and the latter is brought directly to the Appellate Division.

Under N.Y. CPLR 7803(4), a party to an administrative hearing where “evidence is taken” may challenge the hearing officer’s decision as not being “supported by substantial evidence.”¹⁵ This section applies only to quasi-judicial proceedings involving sworn testimony, cross-examination and other formal, trial-like fact finding procedures.¹⁶ Section 7803(4) reflects the writ of certiorari, and operates in a similar manner as the preponderance of evidence or reasonable doubt standards of review for civil and criminal proceedings.¹⁷ As a petition for certiorari, such a proceeding is properly commenced in the Appellate Division.¹⁸

In contrast, a proceeding brought under N.Y. CPLR 7803(3) challenges the determination of an administrative agency as a result of unlawful procedure, an error of law and/or “arbitrary and capricious” decision making.¹⁹ Litigation commenced pursuant to this subsection takes the form of a writ of mandamus to review, which is commenced in the Supreme Court.²⁰ Administrative hearings

falling under this category are “quasi-legislative, quasi-administrative”; they are “informational in nature and do not involve the receipt of sworn testimony” or other adversarial formalities.²¹ This includes the determinations of all land use boards, including zoning²² and planning boards.²³

To this day, many challenges to land use boards are erroneously transferred to the Appellate Division upon filing.²⁴ While most of these cases are retained by the Appellate Division “in the interests of judicial economy,”²⁵ astute practitioners (municipal and private) should make note of the proper venue in their Article 78 petitions in order to avoid undue delay, and to guide the lower courts accordingly.

III. THE SECOND DEPARTMENT’S SOLUTION: REARTICULATING THE STANDARD OF REVIEW

The *Halperin* case is one of the many examples of Article 78 proceedings against a land use board improperly transferred to the Appellate Division upon filing. There, residents challenged the City of New Rochelle Zoning Board of Appeals’ issuance of several variances in connection with the construction of a synagogue. The proposal was the subject of numerous public meetings, expert analyses, and the preparation of an EIS pursuant to SEQRA. Petitioners challenged the variances under the theory that the record was devoid of “substantial evidence” to support the Board’s determination.²⁶

Despite accepting the matter in the interest of judicial economy, prior to reaching the merits of the case the Second Department engaged in a lengthy discussion of why the matter was not properly before it. The court noted that challenges to land use boards are subject to the “arbitrary and capricious” standard, and do not present questions of “substantial evidence” within the meaning of § 7803(4).²⁷ It further highlighted the confusion created by the reference in *Ifrab* to “substantial evidence.” Thus, the court restated the standard as requiring deference to a board where its decision is “rational and not *arbitrary and capricious*.”²⁸ Of most significance, the Second Department explained that under this standard of review, a determination is rational “if it

has some objective factual basis, as opposed to resting entirely on subjective considerations such as generalized community opposition.”²⁹

Turning to the merits, the court relied upon the comprehensive SEQRA review process, which resulted in an EIS that “fully analyzed, among other things, parking, traffic and transportation impacts, groundwater usage and water quality impacts ... neighborhood change and aesthetic impacts ... alternatives to the proposed project, and mitigation measures.”³⁰ Holding that such a clear and verifiable record constituted an objective factual basis upon which to act, the court found deference was warranted.³¹

The Second Department’s trend is to defer to a board only after the record reveals detailed, tangible support for the board’s action.

Since *Halperin*, the Second Department has repeatedly pronounced that the “substantial evidence standard of review is inapplicable” in an Article 78 challenge to land use decision making.³² A survey of recent Second Department cases reveals that the court consistently replaces the *Ifrab* court’s reference to “substantial evidence” with the *Halperin* court’s “rational basis ... not arbitrary and capricious” phrasing.³³ The Second Department’s post-*Halperin* trend is to defer to a board only after the record reveals detailed, tangible support for the board’s action, often referred to specifically as an “objective factual basis.”³⁴ Indeed, several lower courts have now expressly recognized the Second Department’s shift away from the so-called “substantial evidence” standard under *Ifrab*.³⁵

IV. WHAT CONSTITUTES AN OBJECTIVE FACTUAL BASIS?

Of course, the majority of applicants will not be required to prepare an EIS in support of their projects. Thus, the question for the practitioner is this: Short of compiling significant data, preparing voluminous expert studies, and conducting

numerous public hearings, all to be summarized in an EIS, what constitutes a sufficient “objective factual basis” to justify an agency’s decision to approve or deny a project? Several trends provide valuable guidance.

The Second Department’s direction to discern the factual basis for an expert opinion has clarified how to resolve a “battle of the experts.”

A. EXPERT OPINION

The use of experts in land use review has long been approved—if not encouraged—in New York State.³⁶ Courts will generally defer to a board’s reliance on its expert’s reasoned opinion to render a decision, even in the face of conflicting expert testimony.³⁷ Naturally, the Second Department has held that reliance on expert testimony constitutes an objective factual basis for agency decision making.³⁸

Halperin’s direction to discern the factual basis underpinning an expert’s opinion, however, has clarified to some extent how best to resolve an apparent “battle of the experts.” In the *Moy*³⁹ case, for example, an applicant sought a wetland permit from the Town Board. The board denied the application, citing the opinion of the Local Waterfront Revitalization Program (LWRP) coordinator, the County Department of Health, and the Town’s Conservation Advisory Council.⁴⁰ In support of the application, the applicant presented a detailed expert report which “provided several bases for [the expert’s] determination that any environmental impact would be de minimis.”⁴¹ Rather than simply deferring to the board’s decision to accept the testimony of its experts over the applicant’s expert, the court looked past the “titles” of the witnesses, and assessed the underlying reliability of their testimony. Finding that the record revealed (1) the LWRP coordinator was “not qualified”; (2) the Department of Health did not address the technical issues before the Town Board; and (3) the Conservation Council’s “vague ‘concerns’ were devoid of scientific

data or analysis,” the court annulled the Town’s denial, and directed that the permit be issued.⁴²

The *Moy* holding seemingly reveals the discrete backswing of the review pendulum. Whereas the “substantial evidence” standard previously could be interpreted to require near-blind deference to a board’s determination in the face of an apparent battle of the experts, the “objective factual basis” test implores a court to assess the underlying reliability and rationality of the expert opinion. As a result, boards and municipal officials should not ignore the opinion of the applicant’s or opposition’s expert in favor of its own; instead the credibility and accuracy of all witnesses must be carefully scrutinized in order to arrive at a rational determination. Clearly, if a board is going to reject the testimony of an applicant’s expert, it must articulate a comprehensive and sound basis for doing so.

B. EMPIRICAL DATA ILLUSTRATING PATTERNS OF DEVELOPMENT

Often a critical factor in evaluating the merits of a proposed project is assessing whether it will comport with the municipality’s overall planning and development goals. Thus, it is essential to establish consistency with the “character” of the neighborhood in the vicinity of the project site.⁴³ A successful strategy to establish the neighborhood “character” has been entering into the record surveys or aerial photographs illustrating the pattern of development in the area. Such evidence quantifies the distinguishing attributes of a neighborhood beyond the potentially subjective beliefs of residents and board members. Such verifiable data permits the fact finder to judge objectively whether the proposed development is harmonious with the identified pattern.

This technique is employed successfully in area variance cases. Where, for example, tax maps or similar neighborhood surveys establish that the majority of the properties within a given neighborhood possess dimensions below the required size of the zoning district, proposals to create similar nonconforming lots have been held not to “alter[] the character of the neighborhood.”⁴⁴ Similar evidence has prevailed for applicants seeking relief

from natural resource setback regulations,⁴⁵ as well as special permit applicants able to establish that there are similar uses within close proximity to the project site.⁴⁶ Where the record contains empirical data establishing that a project shares the characteristics of other properties or uses in the neighborhood, it appears that boards may not rely solely on uncorroborated personal opinion that the project would result in an undesirable change to the community character.⁴⁷

Conversely, where a board utilizes empirical data to support its decision, such as evidence that the proposed development is larger than any other in the neighborhood, judicial deference is warranted.⁴⁸ In addition, *Halperin* does not necessarily undermine the Court of Appeals’ indication in *Ifrac* that surveys establishing consistency with the area’s pattern of development will not always carry the day where there is evidence of other adverse community effects such as “particularized evidence of traffic flow, parking and safety impacts.”⁴⁹

Meaningful testimony as to neighborhood conditions must be distinguished from personal opinion based upon mere speculation and conjecture.

C. DETAILED OBSERVATIONS OF NEIGHBORHOOD CONDITIONS; EYEWITNESS ACCOUNTS

Another situation where it is critical for a board to include detailed reasoning in a resolution occurs where it relies upon eyewitness accounts regarding specific neighborhood conditions. Although “generalized community opposition” is not a proper basis upon which to act,⁵⁰ relying on residents’ and/or board members’ “specific, detailed testimony” of area conditions “based upon personal knowledge” may constitute a rational basis upon which to reach a determination.⁵¹ Meaningful testimony must be distinguished from personal opinion based upon mere speculation and conjecture. A board may not simply surmise that adverse conditions exist, relying only on “personal knowledge” or the general objections of the community,

particularly where there is empirical data and/or expert opinion to the contrary.⁵² In such situations, reliance on personal opinion without citing a demonstrable source is “generally insufficient for a [municipal] board to base its decision.”⁵³

Hence, a zoning board decision to deny a special exemption based upon detailed “eyewitness testimony of actual conditions at the premises” establishing, for example, “extreme traffic congestion” in the neighborhood, will be upheld.⁵⁴ Similarly, where a planning board is able to provide seven “clear findings of deleterious changes that adversely affect the adjoining area ... contrary to the public welfare,” such as unsafe driveway grades requiring 90-degree turns, unsuitable ingress points for emergency vehicles, and the lack of safe pedestrian access, courts will defer to the “common-sense judgment that the [applicant’s] site plan was not suitable to the topography of the area and the character of the neighborhood.”⁵⁵ The key factor in these cases is that the eyewitnesses’ anecdotal observations articulate area conditions with “specificity,” thereby distinguishing their testimony from improper “generalized community opposition.”⁵⁶

Although the vast majority of opinions calling for detailed findings based on specific testimony arise out of the Second Department, several other Departments appear to have followed suit. The Fourth Department, for example, has upheld a board’s “point by point analysis of the project and comparison to other buildings in the area” to conclude the proposal was out of character with the neighborhood.⁵⁷ The Fourth Department cited the *Halperin* “arbitrary and capricious” standard to reach this conclusion.⁵⁸ Similarly, the Third Department, not using the term “substantial evidence,” but citing to *Retail Property Trust*,⁵⁹ has found that neighbors’ “detailed observations” regarding reoccurring drainage and flooding problems in the vicinity of a project, which were corroborated by the Village Engineer’s findings, constituted a rational basis to act.⁶⁰

While courts continue to defer to the planning determinations of local officials and observations of residents who possess specific knowledge of the particular conditions affecting a project, the

methodology of identifying these conditions must be reliable. Placing a premium on testimony that specifies actual conditions, which can be corroborated or countered by the most basic of technical analyses if there is a question as to its accuracy (e.g., traffic counts, accident reports, photos), prevents municipal decision making based upon personal opinion or political pressure, rather than actual environmental conditions.

Courts will “peel the onion,” weighing the reliability of the record evidence before granting deference to zoning administrative boards.

V. PRACTICAL LESSONS TEN YEARS LATER

These observations are not offered to suggest that the pendulum has swung completely in favor of applicants. Almost 10 years later, the *Ifrab* deference standard appears relatively intact. The Court of Appeals’ declaration that a court should not substitute its view for the “commonsense judgments” of local officials still controls judicial review of land use decision making.⁶¹ Practitioners must remain keenly aware of the political and subjective forces which influence the manner in which an application is reviewed, analyzed and adjudicated. The land use review process is still emblematic of the complex intersection of public policy, science, public relations and politics. The key to any successful land use review remains creating a strong administrative record. So long as the record contains tangible, objective evidence supporting the decision reached, a reviewing court will likely find a board acted rationally, and defer to the determination reached.

Therefore, what apparently has evolved is that courts will “peel the onion,” weighing the reliability of the record evidence before granting such deference. It is clear that in light of the discrete rearticulation of the review standard as one requiring an “objective, factual basis,” practitioners on all sides of a project must gather and develop detailed data to support their claims, hire

experts to corroborate them, and provide testimony as to specific site and/or area conditions. Municipal decision making based on a record devoid of such evidence is subject to annulment, and potentially reversal by a reviewing court.

Presumably, this represents a small, yet beneficial, swing of the pendulum away from the era of “extreme deference” that the *Ifrab* trio seemed to have ushered in to our jurisprudence. Make no mistake, one must prove the merits of his or her case through verifiable means. An applicant seeking to convince a board that a project will comport with the municipality’s planning goals must present reliable proof—in the form of empirical data, expert opinion or similar specific testimony—to substantiate these claims. Similarly, a board member who believes a project will result in unacceptable impacts must carefully identify and articulate the actual conditions which have led to this belief. In both instances, the parties are given a fair shake at proving up their case.

Land use boards must abide by the teachings of the courts and engage in a careful legal and factual review, conduct a thorough analysis of the empirical data presented, and adopt well-crafted resolutions explaining the bases for the conclusions reached. If that occurs, such rational basis should ensure that no one gets hit as the review pendulum swings by.

NOTES

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2. See *Ifrab v. Utschig*, 98 N.Y.2d 304, 746 N.Y.S.2d 667, 669, 774 N.E.2d 732 (2002). See also *Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 746 N.Y.S.2d 662, 774 N.E.2d 727 (2002) (applying standard to special use permits); *P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals of Village of Pleasantville*, 98 N.Y.2d 683, 746 N.Y.S.2d 440, 774 N.E.2d 204 (2002) (applying standard to ZBA’s interpretation of whether property owner discontinued a pre-existing non-conforming use).
3. John M. Armentano, *A Land Use Trilogy: Cases Show Court Is Increasingly Siding with Municipal Boards*, 7/24/2002 N.Y.L.J. 5 (col. 2); see also Stewart E. Sterk, *Court of Appeals Offers Guidance and a New Approach to Zoning Questions*, 11 N.Y. Real Est. L. Rep. 1 (Sept. 2002) (concluding that post-*Ifrab*, “[d]ecisions by local zoning boards generally should be entitled to great deference, and second guessing of those decisions should be kept to a minimum”); John R. Nolon, *Local Authority: Communities Have Means of Influencing Land Use*, 6/18/2003 N.Y.L.J. 5 (col. 2).
4. See Armentano, *supra* n. 3; see also Sterk, *supra* n. 3; Nolon, *supra* n. 3.
5. See, e.g., *Daniels v. Vill. of Montebello*, 5/14/2003 N.Y.L.J. (col. 2) (Sup. Ct. Rockland Cty).
6. See *Daniels*, *supra* n. 5; see also *Oyster Bay Assocs. Ltd. P’ship v. Town Bd. of Oyster Bay*, 7/16/2002 N.Y.L.J. 26 (col. 5) (Sup. Ct. Suffolk Co.) (noting that the “substantial evidence” standard requires courts to assess whether the record reveals that the reviewing board took a “hard look” at the evidence before it; “to do otherwise would render the Court’s obligations under Article 78 toothless, as the [municipality] would enjoy a blanket immunity from judicial review”).
7. See Armentano, *supra* n. 3; Nolon, *supra* n. 3.
8. While there are multiple examples of these cases, two particularly good illustrations are: *Westervelt v. Zoning Bd. of Appeals of the Town of Woodbury*, 7 A.D.3d 964, 776 N.Y.S.2d 487, 488 (2d Dep’t 2004) (Crane, J., dissenting; noting majority’s two-paragraph affirmation of ZBA’s variance denial failed to look “behind the wording of [the ZBA’s] determination” and improperly deferred to the ZBA’s “apparent capitulation to community opposition” based solely upon “conjecture and speculation” without any evidentiary support); and *Homeyer v. Town of Skaneateles Zoning Bd. of Appeals*, 302 A.D.2d 941, 754 N.Y.S.2d 611 (4th Dep’t 2003) (warning practitioners that “[a] reviewing court may not substitute its judgment for that of the zoning board, even if there is substantial evidence supporting a contrary determination”).
9. See e.g., *Little v. Town of Fabius Zoning Bd. of Appeals*, 87 A.D.3d 1363, 930 N.Y.S.2d 345 (4th Dep’t 2011); *Raymond Hadley Corp. v. New York State Dept. of State*, 86 A.D.3d 899, 928 N.Y.S.2d 111 (3d Dep’t 2011) (noting improper transfer by order of Broome County Supreme Court to Appellate Division); *Sass v. Town of Brookhaven*, 73 A.D.3d 785, 900 N.Y.S.2d 383 (2d Dep’t 2010); *Bout v. Zoning Bd. of Appeals of Town of Oyster Bay*, 71 A.D.3d 1014, 897 N.Y.S.2d 205 (2d Dep’t 2010); *1491 Richmond Road, LLC v. New York City Bd. of Standards and Appeals*, 35 A.D.3d 614, 824 N.Y.S.2d 745 (2d Dep’t 2006).
10. A recent survey of the Appellate Division’s land use jurisprudence post-*Ifrab* reveals that out of 195 cases interpreting *Ifrab*, 165 of them were written by the Second

- Department. Similar trends are apparent with citations to *Retail Property Trust* (9 out of a total 14), and *PMS Assets* (21 out of a total 33).
11. *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 809 N.Y.S.2d 98 (2d Dep't 2005).
 12. *Halperin*, supra n. 11, 809 N.Y.S.2d at 105.
 13. *Halperin*, supra n. 11, 809 N.Y.S.2d at 105.
 14. *Halperin*, supra n. 11, 809 N.Y.S.2d at 105.
 15. N.Y. CPLR 7803(4).
 16. See *Halperin*, supra n. 11, 809 N.Y.S.2d at 103-04 (citations omitted). Examples of quasi-judicial administrative hearings provided by the Second Department included discriminatory practices hearings before the Commissioner of the New York State Division of Human Rights (see, e.g., 300 Gramatan Ave. Associates v. State Division of Human Rights, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, 96 A.L.R.3d 488 (1978)), and rent increase disputes before the New York City Rent Administrator (see, e.g., *Colton v. Berman*, 21 N.Y.2d 322, 287 N.Y.S.2d 647, 234 N.E.2d 679, 680 (1967)).
 17. See generally Vincent C. Alexander, Practice Commentaries, N.Y. CPLR 7803, at 9-11 (McKinney's 2011); *Ridge Road Fire Dist. v. Schiano*, 16 N.Y.3d 494, 922 N.Y.S.2d 249, 252, 947 N.E.2d 140 (2011) (defining the standard as "less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt").
 18. See N.Y. CPLR 7804(g).
 19. N.Y. CPLR 7803(3).
 20. See Alexander, supra n. 17, at 15.
 21. *Halperin*, supra n. 11, 809 N.Y.S.2d at 103-04 (citations omitted).
 22. *Halperin*, supra n. 11, 809 N.Y.S.2d at 103-04 (applying standard to zoning board). While the jurisdiction of a zoning board to interpret zoning codes and review administrative decision making is defined as "quasi-judicial," the "informal" procedures used to create the record basis to carry out this function have long been distinguished from the trial-like procedures employed by other administrative tribunals. See generally Patricia E. Salkin, *New York Zoning Law and Practice* §28:02. The similarity between a zoning board's informal procedure, and the procedures employed by its other land use board counterparts, is the apparent basis for the holding in *Halperin* that the "arbitrary and capricious" standard should be applied to zoning board decision making despite a zoning board's "quasi-judicial" jurisdiction. *Halperin*, 809 N.Y.S.2d at 103-04.
 23. *Wal-Mart Stores Inc. v. Planning Bd. of Town of North Elba*, 238 A.D.2d 93, 668 N.Y.S.2d 774, 776 (3d Dep't 1998) (applying standard to planning board).
 24. See *Westervelt*, supra n. 8, 776 N.Y.S.2d at 488; and *Homeyer*, supra n. 8.
 25. See *Westervelt*, supra n. 8, 776 N.Y.S.2d at 488; and *Homeyer*, supra n. 8.
 26. *Halperin*, supra n. 11, 809 N.Y.S.2d at 103-06.
 27. *Halperin*, supra n. 11, 809 N.Y.S.2d at 103-06.
 28. *Halperin*, supra n. 11, 809 N.Y.S.2d at 105; citing *Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259, 657 N.E.2d 254 (1995) (emphasis added).
 29. *Halperin*, supra n. 11, 809 N.Y.S.2d at 105.
 30. *Halperin*, supra n. 11, 809 N.Y.S.2d at 108.
 31. *Halperin*, supra n. 11, 809 N.Y.S.2d at 106.
 32. *Campbell v. Town of Mount Pleasant Zoning Bd. of Appeals*, 84 A.D.3d 1230, 923 N.Y.S.2d 699, 700 (2d Dep't 2011) (rejecting ZBA's argument that it possessed substantial evidence to deny variance request), citing *Matejko v. Board of Zoning Appeals of Town of Brookhaven*, 77 A.D.3d 949, 910 N.Y.S.2d 123, 125 (2d Dep't 2010); see also *Kearney v. Kita*, 62 A.D.3d 1000, 879 N.Y.S.2d 584, 585 (2d Dep't 2009), leave to appeal denied, 13 N.Y.3d 716, 895 N.Y.S.2d 315, 922 N.E.2d 904 (2010) ("When reviewing the determination of a local planning board, 'courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the board'") citing *Halperin*, supra n. 11; *Moy v. Board of Town Trustees of Town of Southold*, 61 A.D.3d 763, 877 N.Y.S.2d 186, 187 (2d Dep't 2009) ("Initially we note that the substantial evidence standard of review does not apply to" a wetland permit application).
 33. See, e.g., *Cacsire v. City of White Plains Zoning Bd. of Appeals*, 87 A.D.3d 1135, 930 N.Y.S.2d 54 (2d Dep't 2011); *Campbell*, supra n. 32, 923 N.Y.S.2d at 700; *Fairway Manor, Inc. v. Bertinelli*, 81 A.D.3d 821, 916 N.Y.S.2d 630, 632 (2d Dep't 2011); *JSB Enterprises, LLC v. Wright*, 81 A.D.3d 955, 917 N.Y.S.2d 302, 304 (2d Dep't 2011).
 34. See, e.g., *Cacsire*, supra n. 33, 930 N.Y.S.2d at 54 (noting "conclusory findings of fact" are insufficient to sustain determination; an "objective factual basis" is required); *JBS Enterprises*, supra n. 33, 917 N.Y.S.2d at 303 ("A determination is rational if it has some objective factual basis") (citations omitted); *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 68 A.D.3d 62, 886 N.Y.S.2d 442, 454 (2d Dep't 2009), leave to appeal denied, 13 N.Y.3d 716, 895 N.Y.S.2d 316, 922 N.E.2d 905 (2010) (upholding ZBA action due to objective factual support in the record); *DiPaolo v. Zoning Bd. of Appeals of Town/Village of Harrison*, 62 A.D.3d 792, 879 N.Y.S.2d 507, 509 (2d Dep't 2009) (relying on the "objective and factual documentary evidence" in the record to affirm ZBA's action); *G & P Investing Co. v. Foley*, 61 A.D.3d 684, 877 N.Y.S.2d 143, 144 (2d Dep't 2009) (annulling town board's denial of special permit as arbitrary and capricious because it was "unsupported by factual data and empirical evidence presented at the hearing"); *Richter v. Delmond*, 33 A.D.3d 1008, 824 N.Y.S.2d 327, 328 (2d Dep't 2006) (overturning condition placed on site plan by Planning Board because it lacked an "objective factual basis in the record").
 35. See *Gold v. Zoning Bd. of Appeals of Town of Oyster Bay*, 28 Misc. 3d 1219(A), 2010 WL 3118281 (N.Y. Sup 2010) ("In this Department a decision of a land use agency must be confirmed if it was rational and not arbitrary and capricious. A determination will be deemed rational if it has some objective factual basis."); *Glacial Aggregates, LLC v. Town of Yorkshire Zoning Bd. of Appeals*, 19 Misc. 3d 1125(A), 862 N.Y.S.2d 814 (Sup 2008) (noting "the Second Department specifically rejects the 'substantial evidence' test in zoning cases").
 36. See, e.g., N.Y. Town Law §§267(2) (authorizing zoning boards to retain paid experts); 271(2) authorizing planning boards to retain experts; N.Y. Village Law §§7-712(2), 7-718(2) (corresponding provisions for village zoning and planning boards).

37. See *Retail Property Trust*, supra n. 2, 746 N.Y.S.2d at 666 (“[W]here there are other grounds in the record on which to base denial, such as contrary expert opinion regarding traffic conditions, deference must be given to the discretion and commonsense judgments of the board.”).
38. See, e.g., *Fairway Manor*, supra n. 33, 916 N.Y.S.2d at 632 (upholding planning board’s reliance on the “expert opinion” of its Director of Planning); *Moy*, supra n. 32, 877 N.Y.S.2d at 187 (finding “expert’s report and testimony” constituted rational basis to act); *Caspian Realty*, supra n. 34, 886 N.Y.S.2d at 454 (holding ZBA’s denial of variances were irrational as they were contrary to the reports of two traffic engineers).
39. *Moy*, supra n. 32.
40. *Moy*, supra n. 32, 877 N.Y.S.2d at 187.
41. *Moy*, supra n. 32, 877 N.Y.S.2d at 188.
42. *Moy*, supra n. 32, 877 N.Y.S.2d at 188.
43. See, e.g., N.Y. Town Law §§267-b (directing ZBA to determine whether a use variance would “alter the essential character of the neighborhood,” or whether an area variance would result in “undesirable change ... in the character of the neighborhood”); 274-a (explaining that a planning board’s site plan review seeks to “protect adjacent land uses”).
44. *Campbell*, supra n. 32, 923 N.Y.S.2d at 700 (directing ZBA to issue lot area and coverage variances because the record established through the use of a color-coded tax map that 78% of the lots in the neighborhood were substandard, and as such, “the evidence does not support the ZBA’s determination that the granting of the variances would have the effect of altering the character of the neighborhood”); *Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 834 N.Y.S.2d 295 (2d Dep’t 2007) (holding ZBA’s denial of area variances were arbitrary and capricious because aerial map established that eight lots within a 200-foot radius were substantially the same size as the subject property); *Deon v. Town of Brookhaven*, 12 Misc. 3d 1196(A), 824 N.Y.S.2d 768 (Sup 2006) (annulling a denial of petitioner’s request to subdivide a 37,000-sq. ft. parcel into one conforming and one substandard lot where 64 of the 84 surrounding lots were already substandard).
45. *Schumacher v. Town of East Hampton, New York Zoning Bd. of Appeals*, 46 A.D.3d 691, 849 N.Y.S.2d 72, 75 (2d Dep’t 2007) (directing issuance of variances and natural resource permit because the record established that “all of the surrounding lots [were] nonconforming in terms of the applicable setbacks from wetlands”).
46. *G & P Investing*, supra n. 34, 877 N.Y.S.2d at 144.
47. See, e.g., *Campbell*, supra n. 32, 923 N.Y.S.2d at 700; *Campo Grandchildren Trust*, supra n. 44; *Schumacher*, supra n. 45, 849 N.Y.S.2d at 75; *Deon*, supra n. 44.
48. *Brady v. Town of Islip Zoning Bd. of Appeals*, 65 A.D.3d 1337, 886 N.Y.S.2d 465 (2d Dep’t 2009), leave to appeal denied, 14 N.Y.3d 703, 898 N.Y.S.2d 99, 925 N.E.2d 104 (2010) (upholding ZBA’s determination that permitting an above-ground pool on small lot would be detrimental to neighborhood because record established there were no other pools on small lots within 600 feet of the subject property, and only seven in the entire 300-house community); see also *Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 781 N.Y.S.2d 234, 814 N.E.2d 404 (2004) (upholding ZBA’s denial of request to permit substandard lot because record established only four other lots in entire neighborhood were substandard, and thus, the record contained empirical support to deny variances).
49. *Ifrab*, supra n. 2, 746 N.Y.S.2d at 669.
50. See, e.g., *Marro v. Libert*, 40 A.D.3d 1100, 836 N.Y.S.2d 691, 692 (2d Dep’t 2007) (overturning ZBA’s denial of variances because the determination was based upon “generalized and unsubstantiated concerns of the neighboring owners”).
51. *Caspian Realty*, supra n. 34, 886 N.Y.S.2d at 452; *JBS Enterprises*, supra n. 33, 917 N.Y.S.2d at 303; *Fagan v. Colson*, 49 A.D.3d 877, 856 N.Y.S.2d 153, 154 (2d Dep’t 2008).
52. *Caspian Realty*, supra n. 34, 886 N.Y.S.2d at 452; see also *Campbell*, supra n. 32, 923 N.Y.S.2d at 700 (overturning ZBA’s denial of variances because “there was no evidence in the record to support the ZBA’s finding [based on their personal opinions] that granting the variances would result in a negative impact on the physical and environmental conditions in the neighborhood, increased traffic and parking problems, and the creation of safety issues”).
53. *Caspian Realty*, supra n. 34, 866 N.Y.S.2d at 452.
54. *Franklin Square Donut System, LLC v. Wright*, 63 A.D.3d 927, 881 N.Y.S.2d 163, 165 (2d Dep’t 2009), leave to appeal denied, 14 N.Y.3d 711, 903 N.Y.S.2d 769, 929 N.E.2d 1004 (2010); see also *JBS Enterprises*, supra n. 33, 917 N.Y.S.2d at 303 (upholding denial of off-street parking variance based upon “detailed testimony from area residents based upon personal knowledge” of adverse parking conditions in the neighborhood); *DiPaolo*, supra n. 34, (upholding ZBA’s denial of variances because its decision was “supported by [the] testimony of several local residents and objective and factual documentary evidence”).
55. *Valentine v. McLaughlin*, 87 A.D.3d 1155, 930 N.Y.S.2d 51 (2d Dep’t 2011) (upholding planning board’s denial of site plan application based upon neighbor testimony and board member observations of unsafe conditions).
56. See *Caspian Realty*, supra n. 34, 866 N.Y.S.2d at 452; *Franklin Square Donut System*, supra n. 54, 881 N.Y.S.2d at 165; *JBS Enterprises*, supra n. 33, 917 N.Y.S.2d at 303; *DiPaolo*, supra n. 34.
57. *Osuchowski v. City of Syracuse*, 56 A.D.3d 1189, 867 N.Y.S.2d 593, 594 (4th Dep’t 2008) (citing the *Halperin* “arbitrary and capricious” standard of review).
58. *Osuchowski*, supra n. 57, 867 N.Y.S.2d at 594.
59. *Retail Property Trust*, supra n. 2.
60. *MLB, LLC v. Schmidt*, 50 A.D.3d 1433, 856 N.Y.S.2d 296, 298 (3d Dep’t 2008).
61. *Retail Property Trust*, supra n. 2, 746 N.Y.S.2d at 731.

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

Salkin, *New York Zoning Law and Practice* §§33:17 to 33:19