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TOWN LAW SECTION 280-A: REQUIREMENTS AND REMEDIES

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Section 280-a of the Town Law of the State of New York is an important—yet frequently misunderstood—section within Article 16 of the Town Law [Zoning and Planning]. The section is titled "Permits for buildings not on improved mapped streets," and attempts to tie together, insofar as roadways are concerned, the jurisdiction of the building inspector (no building permits may be issued unless the requirements of the section are satisfied), the town board (possessed of the authority to establish town road and private road specifications) and the planning board (charged[2] with ensuring that roads within subdivisions are adequate to accommodate prospective traffic).

Unfortunately, §280-a is a cumbersome and difficult section of law. Its restrictive terms address only the issuance of building permits, yet the section has great importance in the context of subdivision and site plan review as well. Section 280-a announces that its requirements must be met before a building permit may be issued. However, it also provides two potential forms of relief—a *variance* under §280-a(3), and creation of an *open development area* under §280-a(4)—when those requirements are not met, or cannot be met. The variance relief provision pulls in the zoning board, and the open development area provision pulls in both the planning board and town board.

Some planning boards routinely send every applicant proposing a private road in his or her subdivision to the zoning board of appeals, in order to obtain a "280-a variance" due to the private road nature of the application. Is this what §280-a requires? If not, when is such a variance required? To answer this question—indeed, to understand §280-a at all—it makes sense to begin with the spectrum-like concepts of public roads, private roads, easements and rights-of-way.

PUBLIC V. PRIVATE ROADWAY

There is no requirement in the Town Law of the State of New York that roadways in subdivisions be town highways. The phrase *town highway* means a roadway offered for dedication to the town and,

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after acceptance, controlled and maintained by the town as a town road. Section 277(2)(a) of the Town Law does, however, direct that a planning board require that "the streets and highways [in a subdivision] be of sufficient width and suitable grade and shall be suitably located to accommodate the prospective traffic, to afford adequate light and air, to facilitate fire protection, and to provide access of fire fighting equipment to buildings."

Most local zoning codes or ordinances echo the approach taken by §277, providing that roads *may* be offered for dedication as town roads, but not requiring such dedication. A zoning law *requiring* dedication of roadways is not authorized by §277 and likely accomplishes a taking of property under the Fifth Amendment to the United States Constitution.[3] Consistent with this approach, many towns promulgate a hierarchy of road specifications, often providing a less onerous specification for (presumptively less used) private roads. As an example, the zoning chapter in the Town of Monroe (Orange County) code provides that "[i]n the event that any roads are not offered for dedication or are not accepted by the town, suitable legal agreements satisfactory to the Town Board shall be required," and further provides two tiers for right-of-way widths: 30 feet "for any street not dedicated to the Town of Monroe," and 50 feet for "[a]ny street dedicated to the Town of Monroe."

What then is a private road? The term is not defined (or even mentioned) in §280-a. A private road is, however, generally understood to be a roadway shown as a road or street on a filed map, providing access to lots within a subdivision, which road or street will not be owned or controlled by a municipality. Typically, the owners of properties abutting a private road own to the centerline of that road. A defined strip of that privately owned land, at a width sufficient to provide a travelled-way, then straddles that line. Within this strip, the roadway itself is constructed. As more fully explained below, utilization of a private road as just described does not itself require relief under §280-a of the Town Law, either under the variance provisions of §280-a(3) or under the open development area provisions of §280-a(4).

EASEMENTS AND RIGHTS-OF-WAY

Easements, in the most generic sense, are rights granted to someone to use land that they do not own. A common easement is an access easement, often called a right-of-way.[4] The important concept here is that one having rights under an easement is permitted to use someone else's land for his own purpose. This is, of course, also true of a private road. However, there is an important distinction between a private road and a generic access easement, of which a private road is a subclass. While easement rights are recorded, private easements are not generally shown as streets or roads on subdivision maps filed with the county clerk. Private roads are. Thus, a right-of-way is quite different from a private or public road, one of the essential characteristics of which is depiction as a roadway on a filed map.

Enough background. Now to the issues. What is a 280-a variance? What is an open development area? When is a 280-a variance required? When can one be granted? When is 280-a variance relief unavailable? Under what circumstances must an open development area be created before a lot may receive a building permit?

TOWN LAW §280-A ACCESS

Town Law §280-a is, as noted already, a cumbersome and difficult section of law. The section prohibits issuance of a permit for the erection of a building on any lot in a town unless two requirements are met. First, the street or highway giving access to such proposed building [§280-a(1)]:

- must be a street duly placed on the official map or plan of the town, *or if the town has no official plan or map:*
  - unless such street or highway is an existing state, county or town highway, or
- must be a street shown upon a plat approved by the planning board as provided in sections two hundred seventy-six and two hundred seventy-seven of [the Town Law], as in effect at the time such plat was approved, or
- must be a street shown on a plat duly filed and recorded in the office of the county clerk or register prior to the appointment of such planning board and the grant to such board of the power to approve plats.

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Section 280-a further requires, before a building permit may be issued, that the road providing access shall either be improved to a road specification established by the town board, or (should the applicant appeal from the requirement that he satisfy this standard) to an extent—in the judgment of the zoning board of appeals—sufficient "to allow the ingress and egress of fire trucks, ambulances, police cars and other emergency vehicles."[5] Such a request for relief to a zoning board of appeals is in the nature of an application for an area variance. While it is difficult to fit the review of an application for a §280-a(3) variance into the five-factor area variance analysis of Town Law Section 267-b(3), it is clear that a §280-a(3) variance is an area variance subject to that section[6] and, presumably, that the zoning board must articulate an appropriate five-factor balancing analysis supporting its decision.

STATUS OF ROADWAY

What does all that mean? As noted, before a building permit may be issued, two requirements must be satisfied: (1) it must be demonstrated that the road providing access to the lot upon which construction is proposed is possessed of a certain formal status, and (2) the roadway must be *suitably* improved.[7] *Both* requirements must be satisfied before a building permit may be issued. It is irrelevant whether the street providing access has been dedicated, or whether any such offer has been accepted by the town.[8] Nor is it necessary that the applicant own[9] the roadbed in question. Indeed, this will rarely be the case, for the intent of §280-a is to grant the town the authority to command improvements on property not owned[10] by the applicant.

This is not to say that demonstration of a right of access across the roadbed is not an issue. Clearly it is. However, where a property owner takes title to property by reference to a lot shown on a filed map and that that lot abuts a street shown on that map, the law gives to that lot owner (indeed, to each such lot owner) the right to utilize that street for the purpose of ingress and egress to his property.[11]

SUITABLY IMPROVED

The second requirement is that the street in question be *suitably* improved. This requirement is satisfied, as noted above, in one of two ways: either by improving the road to a specification set by the town board [§280-a(2)] or, at the permit-seeker's election, by appealing to the zoning board of appeals [§280-a(3)] for an area variance allowing construction at a lesser standard, governed solely by a test of adequacy of emergency vehicle access [§280-a(5)].

ROADWAY PROVIDING ACCESS

It is important to note that the "roadway providing access" in both requirements outlined above must be the roadway that will actually provide access; §280-a focuses on the status and adequacy of the access proposed to actually be used, not merely on the roadway onto which the property fronts. Therefore, a property that has frontage on a fully improved, well-maintained town road must still satisfy the requirements of §280-a (or obtain a variance modifying the suitability of improvement requirement) if the access which the owner of that property intends to use is through another roadway of qualifying status but unsuitable condition.[12]

It should now be obvious that whenever a roadway is shown on a filed map, or is an existing state, county or town highway, the first requirement of §280-a is automatically satisfied. If that roadway is also improved to the appropriate road specification (i.e., the town road specification for a town road and the private road specification for a private road), then both requirements of §280-a are satisfied, and a building permit may be issued. If the roadway, although satisfying the status requirement, does not meet the appropriate road specification requirement, a §280-a variance will then be required. As noted, the suitability-of-improvement determination to be made by the zoning board is governed solely by a test of adequacy of emergency vehicle access under §280-a(5).

FAILURE TO SATISFY THE STATUS REQUIREMENT

If, however, the roadway in question is not shown on any filed map (or is not an existing state, county or town highway), the first requirement of §280-a is not satisfied. And, while the zoning board may give relief from the second requirement (by fixing the suitable level of improvement of the roadway), it has no power to vary the first requirement of roadway status.[13] Thus, when the accessway to property is not shown on any filed map as a road or street (or is not an existing state, county or town highway), no building permit may be issued for any building on that property. Is any relief available to the property owner in such circumstances?

OPEN DEVELOPMENT AREAS

The creation of an open development area[14] under §280-a(4) allows issuance of building permits for homes on lots that obtain their access by an easement or right-of-way not shown on a filed map, rather than by means of a road of the status required by §280-a(1). Absent creation of an open development area, the owner of a lot obtaining access by means of a non-qualifying accessway could not (as noted already) obtain a building permit, because the first requirement of §280-a is not satisfied.

It is important to understand this essential difference between §280-a(3) (issuance of a variance on condition that a roadway be suitability improved) and §280-a(4) (open development area authorization). The issue is not public versus private[15] roadways. Instead, the issue is roadways of the requisite status versus easements or rights-of-way that fail to satisfy that roadway status requirement.

What then are the procedural requirements for creation of an open development area? Section 280-a(4), which allows the creation of open development areas, requires that the town board seek the *advice* of the planning board before establishing an open development area. The section sets no time period for the planning board to give such advice, other than "a reasonable time to report." Here is the full subparagraph:

> 4. The town board may, by resolution, establish an open development area or areas within the town, wherein permits may be issued for the erection of structures to which access is given by right of way or easement, upon such conditions and subject to such limitations as may be prescribed by general or special rule of the planning board, if one exists, or of the town board if a planning board does not exist. If a planning board exists in such town, the town board, before establishing any such open development area or areas, shall refer the matter to such planning board for its advice and shall allow such planning board a reasonable time to report.

What should be the content of the planning board's advisory report? The statute provides no particulars. However, because the purpose of §280-a is to insure that provision is made for suitable access to land before a building permit is issued, suitability of access will often be the primary focus of the planning board's report. How many lots will be served? Is the easement access proposed of sufficient width and suitable grade? Can it accommodate the traffic anticipated to use it? Can emergency services personnel obtain access to the building or buildings to be constructed? How many lots can the roadway serve? The planning board may also look to the town's comprehensive development plan to see if it offers any guidance.

The planning board is additionally given the authority, under authority of §280-a(4), to promulgate "general or special rule[s]" setting "conditions" and "limitations" on the creation and design of open development areas within the town. These rules may presumably be promulgated in advance in the generic sense ("general" rules), or upon the specific application referred to the planning board ("special" rules) for that particular open development area.

The planning board is bound by §280-a(4) to provide the town board with its advice upon referral; deliver of its "advice" is not optional. Because some of these issues touch upon an examination of the land in question and the nature of the easement itself, the planning board may wish to have the assistance of an engineer or planner in formulating its report. The town board may follow the recommendation of its planning board, or decline to follow that recommendation; the town board alone has the authority to create an open development area.

SEQRA CONCERNS

How does the New York State Environmental Quality Review Act (SEQRA) apply to the advisory report of the planning board? SEQRA was enacted to formalize the method by which the environmental impacts of a project are evaluated. Importantly, it requires that environmental impacts be evaluated first and through to completion before any action is taken by an agency having approval authority. SEQRA is a statute, but it is within the regulations promulgated under its authority that the real *meat* of the law will be found.

SEQRA IN GENERAL

The "fundamental policy" of SEQRA "is to inject environmental considerations directly into governmental decision making" at the earliest opportunity [ECL 8-0109(4)] and to the fullest extent possible [ECL 8-0103(6)], through strict compliance with SEQRA's mandates [ECL 8-0103(7); 6 NYCRR 617.1(d)].[16] Where a single project is comprised of several components, each requiring review and approval from a different agency, the review of the potential environmental impacts of that project must be "coordinated," and no agency may undertake, fund or approve any portion of the project until there has been compliance with the requirements of SEQRA.[17] This is so even where other agency approvals have not been applied for at the time of the original application, but will rather be applied for in the future.[18]

SEQRA requires strict compliance, and a failure to honor either its spirit or letter mandates an annulment of any agency action taken in violation of its directives.[19] While not every project requires preparation of an environmental impact statement, all projects require, at least, the preparation of an environmental assessment form [6 NYCRR §617.6(a)(2), (3)], the designation of a "lead agency" [6 NYCRR §617.6(b)], the "typing" of the action (Type I, Type II or Unlisted) [6 NYCRR §617.6(a)(1)(iv)], and—except for Type II actions—issuance of a "declaration of significance" (positive or negative declaration) by the lead agency [6 NYCRR §617.7]. A negative declaration ends environmental review [6 NYCRR §617.3(c)(1)]. A positive declaration requires preparation of an environmental impact statement [6 NYCRR §617.7(a)(1)].

COORDINATED REVIEW UNDER SEQRA

One of SEQRA's most crucial mandates is that no discrete action in regard to a project may be taken by any agency having approval authority over an aspect of a project until the lead agency has completed environmental review, either through issuance of a negative declaration or the completion of an environmental impact statement. A decision by an agency to act prior to appropriate environmental review is called impermissible *segmentation* and constitutes a violation of SEQRA.[20] The rule prohibiting impermissible segmentation is designed to prevent (among other things) a premature agency action which, "although not legally conclusive [as to other agencies]... might well [be] practically determinative."[21]

In most cases, we can assume that the town board will serve as lead agency for SEQRA purposes in the review of an application for creation of an open development area under §280-a(4). The question presented, when the town board refers the application to the planning board for a report, is whether the planning board may act before the town board, as the lead agency, concludes SEQRA review. This depends, in part, upon whether the report of the planning board is classified a Type II action under SEQRA regulations; Type II actions are exempt from complying with SEQRA.

The SEQRA regulations set forth a listing of Type II Actions. Among those listed in that category is the following [emphasis added]:

> 617.5 Type II Actions.
>
> * * *
>
> (c) The following actions are not subject to review under this Part:
>
> * * *
>
> (21) conducting concurrent environmental, engineering, economic, feasibility and other studies and *preliminary* planning and budgetary *processes necessary to the formulation of a proposal for action*, provided those activities *do not commit the agency to* commence, engage in or *approve* such action;

Thus, if the planning board's report is viewed as a preliminary process that does not commit it to approve the *project* (in this context, the subdivision application ultimately submitted for approval), then issuance of the planning board's report is likely a Type II action and it need not comply with SEQRA. If, on the other hand, its report is viewed as more than preliminary and does, in effect, commit it to later grant subdivision approval, then the planning board may not issue its report until there has been full compliance with SEQRA.

The level of approval that is *held at bay* until there has been SEQRA compliance is not always easy to discern. The Appellate Division, Second Department, recently upheld the grant of "sketch" approval by a lead-agency planning board prior to completing SEQRA review, on the grounds that the local code provision authorizing sketch review and approval specifically recited that sketch approval "shall in no way imply immediate or eventual approval status," but was rather "merely intended to convey to the applicant the relative assurance that the development ... is basically conforming to the Master Plan ... and its implementing land use regulations."[22] Similarly, the same court has ruled that a town board's cluster subdivision authorization under Town Law §288 constitutes a preliminary step in the approval process.[23] There is a strong argument, however, that a favorable planning board report on creation of an open development area would, practically speaking, commit it to approving the subdivision application ultimately submitted to it. Moreover, the planning board may benefit greatly (in the case where a positive declaration is issued) in the data and analysis that flows from the environmental review process under SEQRA.

When it appears that no development can take place on an applicant's property unless an open development area is created, denial of the application seeking creation of an open development area may constitute a taking of property entitling the owner to just compensation.

"TAKINGS" BACKDROP

One final matter. When it appears that *no* development can take place on an applicant's property unless an open development area is created—and this may often be the context in which an application for open development area relief is made—the planning board should be mindful (and the town board even more so) of the possibility that denial of the application seeking creation of an open development area *may* constitute a taking of property entitling the owner to just compensation under the Fifth Amendment to the United States Constitution. This is so because the United States Supreme Court has ruled that a regulation or administrative action that denies *all* economically viable use of property constitutes a taking of property that entitles that property's owner to just compensation.[24] The ins-and-outs of when a taking occurs are rather complicated and go beyond the scope of this article. However, while it used to be a complete defense to a regulatory taking claim that the challenger acquired the property after the regulatory scheme was enacted (here, §280-a itself), that is no longer the law.

The Supreme Court ruled, in 2001, that entry into title subsequent to enactment of a governmental regulation is no longer an absolute bar to a claim that application of the regulation to that titleholder constitutes a taking.[25] Instead, the courts must determine if application of the regulation constitutes a taking by examining its economic impact on the landowner, and the extent to which application of the regulation interferes with the distinct and reasonable investment-backed expectations of that landowner in the context of the character of the governmental action.[26]

Despite cumbersome draftsmanship and nearly-hidden intent, §280-a is an important, necessary and fair statute that attempts to balance the community's need for safety and order in development with a property owner's desire to tailor a town's zoning rules to his unique circumstances and, in some cases, to provide a safety valve (akin to the use variance) necessary to insure that application of the section does not completely deny a property owner viable use of his land. If only the legislature had packaged this section with a neater bow!

NOTES

1. Michael Donnelly is a partner with the Goshen, NY law firm of Dickover, Donnelly, Donovan & Biagi. His areas of practice include litigation, land use law and general municipal law.
2. Town Law §277(2)(a).
3. The Court of Appeals, in finding the grant of authority to compel the dedication of parkland under Town Law §281 unconstitutional, noted in passing that §277 similarly does not authorize a "town to compel uncompensated grants from the developer." Kamhi v. Planning Bd. of Town of Yorktown, 59 N.Y.2d 385, 391, 465 N.Y.S.2d 865, 452 N.E.2d 1193 (1983).
4. Causing great confusion is the fact that the portion of land over which a (public or private) road may be built is also called the right-of-way.
5. Town Law §280-a(5).
6. Lund v. Town Bd. of Town of Philipstown, 162 A.D.2d 798, 557 N.Y.S.2d 712 (3d Dep't 1990).
7. Section 280-a, of course, also makes provision for bonding to insure future completion of the roadway improvements in order to allow more convenient and efficient construction sequencing.
8. Green Acres Bldg. Corp. v. Board of Zoning Appeals of Town of Irondequoit, 22 Misc. 2d 877, 197 N.Y.S.2d 565 (Sup 1959).
9. Ownership issues, particularly in cases involving ancient subdivisions, are often troublesome. The "paper streets" shown on the plat are often owned either by the original subdivider (who often cannot be found) or—it is sometimes argued—by each individual lot owner abutting the road to the center line thereof, under authority of Sullivan v. Markowitz, 239 A.D.2d 404, 658 N.Y.S.2d 634 (2d Dep't 1997) ("It is well settled that when an owner of property sells lots with reference to a map, and those lots abut upon a street as shown on the map, the grantor has presumptively conveyed the fee to the center of the street on which the lots abut, subject to the rights of other lot owners and their invitees to use the entire area of the street for highway purposes."). Such ownership issues, while often fascinating, are usually irrelevant to a §280-a variance application.
10. Indeed, "the only statutory authorization for requiring the petitioners to improve streets outside their proposed subdivision is that contained in section 280-a of the Town Law, which authorizes the town to require improvements of such streets as are located outside a subdivision map before a building permit may be issued." Pearson Kent Corp. v. Bear, 35 A.D.2d 211, 212, 315 N.Y.S.2d 226 (2d Dep't 1970), order rev'd on other grounds, 28 N.Y.2d 396, 322 N.Y.S.2d 235, 271 N.E.2d 218 (1971).
11. Fischer v. Liebman, 137 A.D.2d 485, 524 N.Y.S.2d 720 (2d Dep't 1988); M. Parisi & Son Const. Co., Inc. v. Adipietro, 21 A.D.3d 454, 800 N.Y.S.2d 723 (2d Dep't 2005).
12. See Novak v. Planning Bd. of Town of LaGrange, 136 A.D.2d 610, 523 N.Y.S.2d 590 (2d Dep't 1988), where §280-a relief was required for a property that fronted on the Taconic State Parkway but did not have actual access to that public road.
13. Indelicato v. Town of Lloyd, 34 A.D.3d 1056, 826 N.Y.S.2d 445 (3d Dep't 2006).
14. Open development areas are, apart from use as a relief mechanism under §280-a(4), a useful planning tool that can encourage landowners to create rural-style developments with country-style roads—something that would be financially difficult (or impossible) to achieve if typical town road or private road specifications needed to be met.
15. While creation of an open development area is not required for building permits to issue in private road subdivisions, an open development area *is* required before building permits can be issued for properties that obtain their access by way of easement not shown on a filed map. See Wiederspiel v. Leifeld, 197 A.D.2d 781, 602 N.Y.S.2d 712 (3d Dep't 1993).
16. King v. Saratoga County Bd. of Sup'rs, 89 N.Y.2d 341, 347-48, 653 N.Y.S.2d 233, 675 N.E.2d 1185 (1996); Coca-Cola Bottling Co. of New York, Inc. v. Board of Estimate of City of New York, 72 N.Y.2d 674, 679-80, 536 N.Y.S.2d 33, 532 N.E.2d 1261 (1988).
17. See 6 NYCRR §§617.3(a), (g); Village of Westbury v. Department of Transp., 75 N.Y.2d 62, 68-70, 550 N.Y.S.2d 604, 549 N.E.2d 1175 (1989); Teich v. Buchheit, 221 A.D.2d 452, 633 N.Y.S.2d 805 (2d Dep't 1995); Town of Coeymans v. City of Albany, 284 A.D.2d 830, 728 N.Y.S.2d 797 (3d Dep't 2001).
18. 6 NYCRR §617.7(c)(2)(ii); *Village of Westbury*, supra n. 17 at 75 N.Y.2d 68-69; Scenic Hudson, Inc. v. Town of Fishkill Town Bd., 258 A.D.2d 654, 685 N.Y.S.2d 777 (2d Dep't 1999).
19. Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 480-81, 442 N.Y.S.2d 67 (2d Dep't 1981) ("We read these provisions to mandate literal compliance with SEQRA; substantial compliance with the spirit of the act does not constitute adherence to its policies to the fullest extent possible.") (internal quotations omitted); Schenectady Chemicals, Inc. v. Flacke, 83 A.D.2d 460, 463, 446 N.Y.S.2d 418 (3d Dep't 1981).
20. Village of Westbury v. Department of Transp., 75 N.Y.2d 62, 550 N.Y.S.2d 604, 549 N.E.2d 1175 (1989).
21. Tri-County Taxpayers Ass'n, Inc. v. Town Bd. of Town of Queensbury, 55 N.Y.2d 41, 46, 447 N.Y.S.2d 699, 432 N.E.2d 592 (1982).

22. Muir v. Town of Newburgh, 49 A.D.3d 744, 854 N.Y.S.2d 727 (2d Dep't 2008) (*Muir I*). See also *Muir II:* Muir v. Town of Newburgh Planning Bd., 49 A.D.3d 742, 854 N.Y.S.2d 896 (2d Dep't 2008).
23. Maor v. Town of Ramapo Planning Bd., 44 A.D.3d 665, 843 N.Y.S.2d 163 (2d Dep't 2007).
24. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).
25. Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001).
26. *Palazzolo*, supra n. 25; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922).

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 §§31:37, 31:49, 31:51

RECENT CASES

SECOND CIRCUIT HOLDS THAT UNDER RLUIPA, NEW YORK CITY COULD NOT BAR CHURCH FROM USING ITS FACILITIES FOR PRIVATE CATERED EVENTS WHEN SECULAR INSTITUTIONS IN THE SAME NEIGHBORHOOD WERE ALLOWED TO DO SO.

In order to raise money for building renovations, the Third Church of Christ, Scientist, contracted with a catering company to give the company the right to hold private functions in the church building. Although the Manhattan Department of Buildings (DOB) initially granted an accessory-use permit for this activity in June 2006, in October 2007, after some of the Church's neighbors complained, the DOB issued a notice of intent to revoke the permit. The notice stated that the catering establishment was not an accessory use because it appeared to be a principal commercial establishment at the premises. The notice gave the Church ten days to submit evidence to the contrary, and stated that "in no event" would DOB allow catered events at the Church after April 29, 2008. In November 2007, DOB issued a final revocation of the June 2006 permit.

The Church sued the City of New York in federal court under the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), which reads "no government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" (42 U.S.C.A. § 2000cc(b)(1)). To show unequal treatment, the Church pointed out that two secular institutions in the same residentially-zoned area—the Beekman co-operative apartment building and the Regency hotel—were offering similar catering and event services. The district court issued a temporary restraining order preventing the City from enforcing DOB's revocation of the permit.

To rebut the Church's charge of unequal treatment, the City subsequently issued Notices of Violation (NOVs) to Beekman and Regency for operating outside their Certificates of Occupancy. The district court, however, concluded that an NOV—which merely starts an administrative process whose outcome is uncertain—was a different type of sanction from revocation of an accessory-use permit, and imposed a permanent injunction barring the City from revoking the Church's permit.

On appeal, the United States Court of Appeals for the Second Circuit affirmed. Although the City argued that Beekman and Regency were not valid secular comparators to the Church, the Court agreed with the district court that they were. All three entities were located in the same residentially-zoned neighborhood on the Upper East Side of Manhattan. All three were engaged in large-scale catering activities. Although the City asserted that Beekman's and Regency's activities were accessory uses, while the Church's similar activities were not, the court noted that all three entities' activities were deemed illegal by the City—the Church's because its activities were not an accessory use, and Beekman's and Regency's because theirs exceeded their Certificates of Occupancy. That, said the court, was enough to make all three similarly situated. The court rejected the City's contention that the fact that the Church had sought permission for its catering activities, while Beekman and Regency never had, made Beekman and Regency invalid comparators.

The next question, said the court, was whether it was unreasonable for the district court to conclude that the City had treated the Church differently from Beekman and Regency. The court held that the district court's finding on this point was well within the range of reasonableness. The notice issued to the Church by DOB stated that "in no event" would the Church be allowed to hold catered events after April 29, 2008—an absolute prohibition that apparently denied permission even to hold a small catered reception in connection with the wedding or baptism of a Church member, a type of event that no one suggested would fail to qualify as an accessory use for a church. By contrast, there was no evidence that the City had threatened to shutter the catering facilities at either Beekman or Regency, and neither institution had ceased its catering operations, even though the City had a wide variety of enforcement mechanisms it could have

pursued against them. *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667 (2d Cir. 2010).

NORTHERN DISTRICT OF NEW YORK HOLDS THAT ACTION BY LANDOWNER AND WINERY, BASED ON FAILURE TO APPROVE PROPOSED LAND USE, WAS NOT RIPE BECAUSE NO VARIANCE HAD BEEN SOUGHT.

Rivendell Winery, LLC, operated a vineyard and winery until forced to cease operations due to storm damage. Intending to resume the winery's activities, Rivendell's principal owner, Susan L. Wine, acquired two contiguous parcels of land in the Town of New Paltz and leased them to Rivendell. The land was located in a zoning district in which agriculture was one of a number of permitted uses. Wine and Rivendell applied to the Town Planning Board for approval of the proposed use.

Although Wine and Rivendell had been told by the Board chairman that the proposed use was agricultural and therefore permissible, the Town Building Inspector, Thomas Wiacek, said in a letter to the Board that the proposed retail sale of wine in a house on the premises would be contrary to the Town Code, which provided for retail sale of agricultural produce only from a road stand. Wiacek indicated that a variance from the Zoning Board of Appeal would be necessary. Later he concluded in another letter that the proposed use of the building on the property was business and not agricultural and therefore not permitted, although the land could be used for agricultural purposes.

Wine and Rivendell appealed Wiacek's determination to the Zoning Board of Appeals (ZBA). In support of their appeal, they submitted a letter from the state Commissioner of Agriculture and Markets, Patrick Hooker, in which he stated that the proposed use of the property, including the marketing of the wine on the premises, was a "farm operation" under the state Agricultural and Markets Law. In addition, the County Planning Board, in response to a request from the ZBA, opined that the proposed winery was an agricultural use within the Town's zoning statute. However, the ZBA denied the appeal of Wine and Rivendell without addressing the findings made by Commissioner Hooker or the Planning Board.

Wine and Rivendell filed an Article 78 proceeding in state court but were unsuccessful. They then sued the Town, the ZBA, and others in federal court, alleging, inter alia, that the adverse decisions against them were the result of undue pressure applied to the decision makers by persons who had personal interests in keeping the winery from opening.

The defendants moved for dismissal on the grounds of, inter alia, lack of subject matter jurisdiction, and the court granted the motion. The defendants argued that the plaintiffs' claims were unripe because they had not sought a variance from the Town's zoning laws. The court noted that generally a final decision as to how property may be used has not been made unless the owner seeks a variance. However, the court continued, a variance need not be sought if it can be shown that an application therefore would be futile, i.e., if the zoning agency lacks discretion to grant it, or has "dug in its heels" and made clear that all such applications will be denied. The plaintiffs conceded that they had not sought a variance, but contended that they had demonstrated that any application would have been futile.

The court disagreed. While admitting that the success of an application would have been doubtful, the court said that mere doubt is insufficient to establish futility. Even taking the allegations of the complaint as true, the facts did not show that the ZBA would necessarily have denied an application for a variance. To the contrary, said the court, several facts suggested that such an application might have been granted; the Town Assessor had determined that nine acres of the property qualified as agricultural use, and Wiacek himself had suggested that the plaintiffs apply for a variance. Most importantly, continued the court, different standards would govern the consideration of the plaintiffs' site-plan application and any application they might make for a variance. Although the plaintiffs had made several assertions that, if true, tended to show that the defendants did not feel that the proposed winery qualified as an agricultural use, the allegations in the complaint were far from sufficient to establish that the ZBA had dug in its heels and made clear that an application for a variance would be denied. The court ruled that if the plaintiffs' claims later became ripe upon denial of an application for a variance, they could refile their claims without payment of the usual filing fee. *Rivendell Winery, LLC v. Town of New Paltz*, 725 F. Supp. 2d 311 (N.D. N.Y. 2010).