

NEW YORK ZONING LAW AND PRACTICE REPORT



REGULATING “ONE OF THE MOST CIVILIZED THINGS IN THE WORLD”:¹ ZONING CONSIDERATIONS FOR WINERIES

By Jill L. Yonkers²

With interest in wine and wine-making growing significantly in recent years, applying zoning regulations to vineyards and wineries has presented some unique challenges. Unlike other development projects, wineries operate within the agricultural, tourism, and alcoholic beverage industries. They are also heavily regulated at the state and federal levels, to the extent that several agencies control portions of winery operations even before local control is considered. Particularly with regional wines gaining wider acceptance among wine aficionados, local regulation of wineries is ripe for consideration. The path to approval may not always involve rosé-colored glasses, either. Wineries can present a host of zoning issues for the unwary, particularly given the heavy regulatory effect from other agencies’ control and the fact that various uses usually accompany them—everything from wine tastings to weddings. So, sit back with your favorite glass of wine, and read on about the issues underlying the regulation of wineries.

I. A BRIEF HISTORY OF NEW YORK’S WINE INDUSTRY

Agriculture is a leading industry in the state of New York.³ The wine industry has become a well-recognized component of both the agriculture and tourism industries, in addition to its obvious relation to the alcoholic beverage industry. Clusters of wineries are concentrated around the Finger Lakes, Lake Erie, and the Niagara Escarpment, among other areas. As of September 2011, New York wineries had produced 991,174 gallons of

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wine for the year, second only to California.⁴ That was an increase of over 150,000 gallons from ten years earlier.⁵

It should come as no surprise that New York has a rich grape history. Indeed, the Niagara grape traces its roots to Niagara County, New York, where two grape growers successfully cross-bred the purple Concord grape with the white Cassidy grape in 1868.⁶ Today, Niagara grapes thrive in New York.⁷ The Concord grape is grown with great success in New York also, particularly in the Finger Lakes and Lake Erie regions.⁸

For zoning enthusiasts, there are a number of issues to review with respect to wineries, including approval of vineyard locations; potential environmental impacts from vineyard management (such as pesticide application, fertilizer use, and composting); retail operations; the effect of consumer entertainment on the premises; use of grapes grown on land not part of the winery itself; and operation-related, accessory uses on the property, including residences, farm buildings, farm markets, restaurants, and even bed and breakfast establishments. The type of operation requested largely dictates the issues a municipality will face when reviewing winery applications.

II. FEDERAL AND STATE CONTROLS

Several federal and state agencies are involved in regulating wineries. For example, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”), part of the

U.S. Department of the Treasury, largely controls the federal wine permitting process. Anyone seeking to operate a winery must secure permission from the TTB first.⁹ This agency issues required winery licenses; regulates wine labeling, including how the wine’s origin should be indicated; collects federal alcohol taxes; controls importation and exportation; governs advertising for wines; designates production standards; and certifies appellation accuracy.¹⁰

Many local retailers stock their wines by region, and many consumers buy according to the regional tastes they have developed. Thus, a wine’s appellation, or its origin, is often a key consideration for consumers. The TTB’s role in appellation includes its acceptance of several areas as “American Viticultural Areas” (“AVAs”).¹¹ The AVAs in New York include Cayuga Lake, the Finger Lakes, the Hudson River region, Lake Erie, Long Island, the Niagara Escarpment, the North Fork of Long Island, Seneca Lake, and the Hamptons.¹² An AVA is a designated wine-growing region having distinct geographic features with boundaries defined by the TTB.¹³ Interested applicants—typically wineries and those involved with wine-making—request AVA designation from this agency. AVAs have no size limitations, so they cross political, local, and even municipal boundaries, but they do have unifying characteristics that distinguish them from neighboring areas, much like the usual zoning districts municipalities create. Typical features used for AVA distinction include climate, geology, soils, physical features, and elevation.¹⁴

AVA-designation is more useful for wine connoisseurs than those involved in zoning, as it offers a wine pedigree for consumers, allowing them to select a wine based on geographic origin; this designation does not appear to have any effect on zoning other than to demonstrate a federally recognized grape-growing region.¹⁵ Although applicants may tout it in an application, it usually has no bearing on municipal zoning decisions.

New York agencies regulate wineries on a number of levels too. In 1934, New York enacted the Alcoholic Beverage Control Law,¹⁶ which created the State Liquor Authority (“SLA”) and its primary agency, the Division of Alcoholic Beverage Control.¹⁷ The SLA was largely created to regulate and control the manufacture, sale, and distribution of alcoholic beverages such as wine.¹⁸ Similar to local police powers, the SLA’s goal was to protect the “health, welfare and safety” of New York residents.¹⁹ Today, the

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Division of Alcoholic Beverage Control has responsibilities that include issuing licenses and permits for the manufacture, wholesale distribution, and retail sale of alcoholic beverages; regulating trade and credit practices related to the sale and distribution of alcoholic beverages at the wholesale and retail levels; and inspecting premises where such beverages are manufactured and sold.²⁰

As discussed in more detail below, often the first step for a municipality is deciding how to classify a winery. For the SLA's purposes, it makes a distinction between wineries and farm wineries. Both are allowed to sell wine on wholesale and retail bases. But the SLA limits farm wineries to a maximum production of 150,000 gallons of wine annually, and it prohibits them from manufacturing and selling any wine not produced from 100% grapes, other fruit, or agricultural products grown or produced in New York.²¹ By comparison, the SLA permits wineries to manufacture wine from crushed grapes or grape concentrate; to blend wine; to bottle wine from a parent winery located outside New York; to sell wine to wholesalers and retailers in specified quantities; to manufacture wine from honey; and to sell certain quantities of wine, under a specific permit, to food, wine, vinegar, and pharmaceutical manufacturers.²²

Two other state agencies are important to the considerations underlying winery-zoning. First, the New York State Department of Agriculture and Markets generally governs agricultural matters, including those involving fruit such as grapes, and the "production, processing, transportation, storage, marketing and distributing of food."²³ Its authority to create state-certified agricultural districts, which can usurp a community's ability to control wineries through zoning, is of pivotal importance in reviewing regulatory control of wineries, and will be discussed in detail below. This Department also performs inspections of food manufacturers, including beverage processors;²⁴ investigates events that affect grape crops and other fruit products used in wine production;²⁵ establishes regulations for pesticide use and pesticide management for major fruit crops;²⁶ and establishes standards for grading the quality of grapes and for classifying and packing grapes;²⁷ among other duties.

Second, the New York State Department of Environmental Conservation ("DEC") governs the issuance of wastewater management permits, storm water industrial permits for food processors, and

solid waste disposal. Wineries can have a significant impact on water resources and waste disposal abilities, depending on the volume of production and practices employed. Most wineries would require some level of environmental review as part of the approval process.

Another factor which allows the state to influence local control of winery zoning is a state-sponsored agricultural exemption. Because New York recognizes that agriculture is vital to the economy and growth of many communities,²⁸ it has limited the reach of local governments on zoning issues in designated agricultural areas. Indeed, farm operations in state-certified agricultural districts enjoy great protection from the reach of local zoning. New York Agriculture and Markets Law §305-a insulates them from unreasonable interference, restriction, or regulation by local governments.²⁹ Specifically, the local municipalities must "not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened."³⁰ The State Commissioner of Agriculture and Markets has the power to review local regulations and their application to projects, to determine whether they are excessively restrictive or are being enforced in such a way that the farm operation is being unreasonably interfered with.³¹ The Commissioner's authority is great; he or she can prohibit the local action if it does not comport with these provisions.³² As an example, the Commissioner's decision that a village ordinance regulating the use of pesticides and prohibiting the application of liquid manure unreasonably restricted farm operations was recently upheld by the Third Department.³³

This same protection would no doubt be given to wineries located in state agricultural districts, and thus, it cannot be overlooked. These districts come about through a proposal to the county for a designation; the county considers the viability of active farming in the proposed district, the presence of viable lands not involved in active farming, county development plans, and other relevant factors.³⁴ If a winery is proposed in one of these areas, municipal control over the operation can be significantly reduced.

There are a number of definitions in the New York Agriculture and Markets Law that would no doubt apply to wineries in these districts. First, in pertinent part, "farm operation" means "the land

and on-farm buildings, equipment, ... and practices which contribute to the production, preparation and marketing of crops, livestock and livestock products as a commercial enterprise[.] Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.”³⁵ “Crops, livestock and livestock products” includes fruits such as apples, grapes, cherries, and berries.³⁶ With these definitions as a backdrop, the production, preparation, and marketing of grapes as part of a farm operation would likely enjoy significant protection from local control. The protection could even extend to agricultural commodities produced on the farm and to parcels owned or leased by a farmer throughout an area.

The designation is not automatic, however, and the Department of Agriculture and Markets requires that certain conditions be met for a winery to enjoy this protection. First, the prepared wine must be composed of predominantly grapes (and other fruit) produced on the farm.³⁷ Farm wineries are allowed to market wine-related products such as cheese, pies, ice cream, wine glasses, chillers, and corkscrews as long as the gross annual sales of these items does not exceed the gross annual sales of the farm’s wine.³⁸ The production of wine-related products is thus very much akin to accessory or secondary uses allowed in municipal zoning districts. If sales of the related wine products eclipsed those of the wine, it would equate to the accessory use impermissibly dwarfing the primary use in a zoning district.

It is also clear that the Department of Agriculture and Markets will relax the predominance standard for new, start-up wineries, allowing them a reasonable period of time to meet the standard, given the reality that they need time to grow vines and fruit trees on the property and to develop a customer base.³⁹

III. MUNICIPAL TOOLS FOR REGULATING WINERIES

A. GENERAL POWER AND OVERALL ZONING CONSIDERATIONS

Even with all of the state and federal regulatory control over wineries, local governments still retain significant power over wineries in many circumstances. Municipalities generally govern such operations through their zoning and other regulations. They make threshold determinations as to which

uses are allowed in specified zoning districts, keeping in mind the potential sensitivities of neighboring uses or districts. They can characterize uses as those allowed as-of-right, those permitted on an accessory basis, or those contemplated with a special permit. The local government is also charged with issuing building permits for approved projects.

Even with all of the state and federal regulatory control over wineries, local governments still retain significant power over wineries.

The municipal trend appears to be general acceptance of these businesses given the potential boon to the local economy. Most communities therefore allow wineries in rural and agricultural districts as-of-right. Other locations are more selective in permitting these operations generally, and they may limit the types of allowed activities, specifically. Structuring the zoning regulations to meet specific community needs is no easy task.

There are many factors to consider from the outset when reviewing wineries at the local level. Much like other development projects, one of the pivotal issues is the size. Many municipalities distinguish between wineries first and foremost based on how large the operation will be. There is no universal standard for “small wineries” compared to “large” or even “medium-sized” wineries, but there are some ways to distinguish them. Probably the most common method of characterizing a winery is simply by its volume of production, in either gallons or the number of cases produced.⁴⁰ It is probably best to use the potential production capability of the winery, rather than actual, which will likely be less in the first years of operation.

Another method is to evaluate whether the winery will use its own or outside resources as part of the operation. Some wineries rely on grapes and the processing of grapes all grown and processed onsite. Others utilize grapes grown or processed elsewhere. The location of the grapes and vineyards can be of primary importance to the community, with most favoring the use of locally grown crops. Municipalities therefore must consider the impact of operations occurring off-site in their review.

Capital expenditures can be used as a benchmark too, although this may not be entirely accurate since the costs are generally front-end loaded when operations begin. Finally, some local governments have considered the number of special events held as part of the way to characterize winery operations, placing limitations on the number allowed per year.⁴¹ Municipalities should bear in mind that any limitations should be in line with the size of the operation, so that they are not allowing a small winery to host a disproportionately large number of events, for example.

What the operation encompasses is another prime consideration when evaluating wineries. Whether to allow an operation outright in a particular district, usually an agricultural or rural zone, depends on the precise business contemplated.⁴² For example, some municipalities may allow vineyards, wineries, retail sales, and related special events in a designated district or districts; others restrict the use, largely preventing the retail aspects and special events from certain districts in whole or in part.⁴³ Thus, there are critical decisions to make regarding allowing wineries as a permitted principal use, as a special use, or as an accessory use, and which activities to allow under these categories, if any.

Playing a part in the use and location decisions municipalities make is how to define wineries. Some municipalities choose to create a specific winery definition. Others include the activities underlying wineries as part of their agriculture definition. A third option has developed where communities define them as part of a broader agribusiness or agritourism definition. Choosing the proper definition usually requires a broader look at a local government's entire zoning scheme.

The places that specifically define wineries may leave little room for flexibility for the next evolution of that business, and their terms may be construed against them. On the other hand, communities that use a broader definition of agriculture to govern wineries may open Pandora's Box to activities related to wineries that they did not intend to allow. Employing the agribusiness or agritourism definition may be a better fit for a community over at least a broad agriculture definition, but still could open a municipality to allowing other activities unintentionally. Great care must be exercised in choosing the definition and zoning structure that best fits your community's needs.

B. COMPREHENSIVE PLANS

One of the key components to zoning is the comprehensive plan. A municipal comprehensive plan—sometimes referred to as a master plan or strategic plan—allows a community to officially record its legitimate interest and show how regulations will meet community goals. Local governments in New York can exercise broad powers, to the point of excluding or limiting a particular use if they “rationally exercised [their] police power” and ensured that their decision “was required for the well-being of the community.”⁴⁴ As with other legislative determinations, the municipal decision will be held beyond reproach if it “substantially advances legitimate state interests.”⁴⁵

A comprehensive plan thus serves not only as the flagship document for guiding future development, but also is the written record that communities use to demonstrate their interests and how their regulations advance those interests.⁴⁶ Representing a collection of community values and objectives, it provides overall direction to the day-by-day decisions of the local government's leaders. The plan organizes the values of the public with respect to the physical, social, economic, and environmental character of the area. It identifies a realistic vision of where the municipality intends to be in the future, and charts the course of conservation and development that will bring that future to fruition.

If wineries are valued by a community, evidence of that valuation is usually found in comprehensive plan.

The comprehensive plan has important zoning implications, as local zoning regulations must be made in accordance with the comprehensive plan.⁴⁷ A municipality cannot ignore its plan, once adopted. Doing so is the type of “ad hoc and arbitrary application of zoning power that the comprehensive planning requirement was designed to avoid.”⁴⁸ Comprehensive plans are therefore complementary to local zoning codes, providing guidelines for the community's development and future.⁴⁹ The zoning code then provides detailed regulations for each district and use, defining them and mapping out their permitted geographic areas.

If wineries are valued by a community, documented evidence of that valuation is usually found in the sections of a comprehensive plan that focus on promoting and maintaining agricultural areas, spurring the local economy, and recognizing and endorsing what can be a critical economic component for the community: tourism.

When a comprehensive plan speaks to the importance of agricultural land for vineyards and retaining rural character and quality of life, and it further identifies appropriate uses for agriculture and open space areas to include wineries and the sale of winery products,⁵⁰ the municipality cannot lightly ignore these statements when reviewing a winery application. The Village of Naples, New York, for instance, has recognized the importance wine has played in creating its very identity, “Grape Country,” a phrase first used in the late 1880s.⁵¹ The Village attributes its character and economy to grape-growing and the Widmer Winery, in particular.⁵² Thus, it is very protective of agricultural land, which consists of primarily vineyards.⁵³

To be a complete and accurate document, a comprehensive plan should tout the benefits of wineries, if that is one of the community’s values, but it should also identify problems associated with them. For example, if there are access issues from certain roadways, parking concerns, traffic congestion, noise considerations, and waste and water usage issues, the plan should detail them as a precursor to legislation and any decision-making.

Municipalities that rely upon their comprehensive plans as part of making a zoning decision (which they should do) generally fare well when such decisions are later challenged. For example, the Fourth Department held that a town properly denied a special use permit where the proposed use, a mini-storage unit facility, was prohibited by the town’s comprehensive plan.⁵⁴ In that case, the master plan allowed commercial uses in the area, and the court agreed that such a storage facility should be considered an allowed commercial use.⁵⁵ But the court held that since the town’s comprehensive plan restricted commercial uses to newly created business park districts, as part of that community’s goal to avoid negative impacts upon existing residential areas, the special use permit was properly denied.⁵⁶

Generally speaking, as long a municipal comprehensive plan is well-considered and is enacted to serve a legitimate government purpose, and there

is a reasonable link between the end sought to be achieved and the means used to achieve that end, it will be upheld.⁵⁷

C. ENVIRONMENTAL CONSIDERATIONS

The New York State Environmental Quality Review Act (“SEQRA”) provides an additional way for municipalities to create a record supporting their regulations. Undergoing a SEQRA analysis can expose problems wineries may cause, and thus provide valuable support for regulation and decision-making. SEQRA can be employed, for example, through a generic environmental review for a comprehensive plan, local regulatory law, or even a project-specific evaluation. Using SEQRA may be of particular importance to communities without zoning regulations. But even local governments with zoning can use SEQRA to support regulatory measures.

The SEQRA regulations declare that “the basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time,” and that “it is the intention of ... [SEQRA] that a suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes” of such agencies.⁵⁸ The regulations add that “[i]t is not the intention of SEQRA that environmental factors be the sole consideration in decision-making.”⁵⁹

To fulfill this fundamental objective, SEQRA requires a local governmental body to consider potentially adverse impacts on the environment before taking action. First, an agency must “determine whether a proposed action may have a significant effect on the environment.”⁶⁰ It does so by identifying the relevant areas of environmental concern and fully examining them. When there are no significant impacts found, a “negative declaration” may be issued, identifying the areas of environmental concern and explaining why the proposed action will not significantly affect the environment. An agency must take a sufficiently “hard look” at the proposal before making its final determination, and it must set forth a reasoned elaboration for its decision.⁶¹ “An agency’s responsibility under SEQRA must be viewed in light of a ‘rule of reason;’ not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency’s responsibility.”⁶²

Issues to consider under SEQRA with respect to wineries will largely depend on the local concerns generally, but typically will include how the operation controls dust, pests, diseases, mold, and weeds, and thus its use of pesticides, fungicides, and fertilizers; how it disposes of waste, including composting; and how it treats waste water.⁶³ Under §360-1.2 of its rules and regulations, the DEC considers food processing waste to include waste produced from winery operations.⁶⁴ Thus, such waste is regulated as a solid waste in accordance with §360-1.2. But remember that the State Legislature has specifically preserved local regulatory power, such as the right to control the disposal of solid waste.⁶⁵ Thus, disposal issues related to wineries are for municipal governance also.

D. SPECIAL USE PERMITS

Another tool municipalities can rely upon when reviewing development proposals generally, and those related to wineries, specifically, are special use permits. They allow an area to be developed in a way specifically contemplated under the zoning code, but with express conditions not applicable to the general as-of-right uses.⁶⁶ The conditions help ensure that the proposed use is compatible with the area where the proposal will be located, assuming the other zoning requirements are met.⁶⁷

Keep in mind that special uses are allowed uses; by including them in a zoning code, the municipality has made the equivalent of a legislative determination that they are proper for the zoning district.⁶⁸ Accordingly, if a use is allowed by special permit in the zoning district at issue, the municipality should not deny an application on the ground that it is not in harmony with the purpose and intent of the zoning district.⁶⁹ Specifying the use as a special use belies any such claim. A reviewing body is required to grant the special use permit “unless there are reasonable grounds for denying it.”⁷⁰ Only where the record underlying the municipal decision shows that a particular use would have a significant negative impact will a special use permit denial be upheld on review.⁷¹

It is also possible to approve specially permitted uses subject to conditions that are directly related and incidental to the use.⁷² Conditions on wineries may include compliance with federal and state mandates, for example.

There is one final note to keep in mind with respect to these permits: once issued, the special use permit runs with the land.⁷³ So, approval may have far-reaching future implications.

In essence, special use permits allow a municipality a heightened level of review of an allowed use. If special use permit approval is required, the reviewing body may place restrictions or safeguards on projects that could, especially when combined with SEQRA mitigation, further community values or mitigate detrimental impacts. Typical (and proper) restrictions may include those related to lighting, air quality, safety, population density, traffic, property values, aesthetics, and environmental factors.

E. SITE PLANS

Nearly every development proposal, even those that meet zoning mandates from the outset, require a site plan to be submitted to the reviewing municipal board. Evaluating a site plan allows a local government to review the scale, dimensions, location, and other features of a project that may have an unanticipated effect on the community’s planning goals. Municipalities have broad discretion to review projects using these criteria.⁷⁴

Thus, at the very minimum, a municipality reviewing a winery should exercise its site plan controls. Generally, site plan review is performed by planning boards, and their review includes general features such as the project’s arrangement, layout, and design, and specific factors such as parking, access for vehicles (emergency and non-emergency) and pedestrians, screening, signage, landscaping, lighting, drainage, architectural features, location and dimension of buildings, adjacent uses, and physical features meant to protect adjoining land uses.⁷⁵ Here too, municipalities can approve site plans subject to reasonable conditions or restrictions.⁷⁶

Reviewing a project’s site plan has important SEQRA implications too. Under SEQRA, a planning board must review every potential environmental impact that could result from the proposed site plan approval.⁷⁷ As mentioned earlier, SEQRA requires that communities investigate the environmental impacts of a proposed action before allowing that action, and their investigation must occur at the earliest possible time.⁷⁸ Ultimately, this interplay between SEQRA and site plan control creates another review opportunity. A winery proposal could, for example, meet the specific requirements of the

municipal zoning code, but still be denied site plan approval because of other environmental effects or large secondary impacts. Courts reviewing site-plan decisions will evaluate whether the decision was arbitrary and capricious, or not supported with substantial evidence, but they largely defer to the municipality's decision when a proper record supports that decision.⁷⁹

IV. COURT REVIEW OF WINERY ISSUES

There are few published cases involving the zoning of wineries, but one recent case demonstrates the pitfalls for the unwary zoning practitioner. In *Rivendell Winery, LLC v. Donovan*,⁸⁰ a winery sought special use permit approval for a farm winery from the town of New Paltz in a zoning district the town zoned as agricultural. The building inspector denied the application, which was upheld by the town's zoning board of appeals ("ZBA"), by the lower court, and by the Third Department on further appeal.⁸¹

First, the Third Department looked at whether the ZBA's decision to use the town's definition of agriculture—not found in its own zoning definitions, but in other parts of the code—was proper. The town's zoning code allowed the town to borrow definitions from other parts of the code,⁸² and it defined agriculture in two other sections as:

[a]ll agriculture operations and activities related to the growing or raising of crops, ... and agricultural products, as such terms are defined in or governed by the Agriculture and Markets Law of the State of New York on lands qualified under Ulster County and New York State law for an agricultural exemption by the Assessor of the Town of New Paltz.⁸³

The court then focused on New York Agriculture and Markets Law §301(4) to see how the state described land that qualified for such an exemption. That section defines "[l]and used in agricultural production" as land comprising "not less than seven acres" used in agricultural production, and which specifically excludes "land or portions thereof used for processing or retail merchandising of such crops[.]"⁸⁴ Interestingly, the court seemingly ignored the definition of "farm operation," discussed above, from that same section.⁸⁵

Satisfied with the town's selected definition, the court next reviewed whether the ZBA's determination

that the proposed use was not agricultural under that definition was rational. Zoning board decisions are afforded great deference by reviewing courts.⁸⁶ Consequently, "judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion."⁸⁷ A ZBA's decision is presumed correct, and the burden to prove otherwise is on the challenger.⁸⁸ "[A] reviewing court should refrain from substituting its own [judgment] for the reasoned judgment of the zoning board. It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decision but not, absent proof of arbitrary and unreasonable action, to make them."⁸⁹ Thus, the winery faced a difficult legal challenge from the outset.

And the Third Department did not substitute its judgment for that of the ZBA. It decided not to set aside the ZBA's determination, in large part because the winery was not yet under way.⁹⁰ Conspicuously absent from the record was concrete proof of an actual operation. For example, of the approximately four acres owned by petitioners, none had any vines, grapes, or other crops planted, growing, or being harvested.⁹¹ The court was also not swayed by the petitioners' having prepared only one and one-half acres for planting, nor their plan to execute a lease to develop seven additional acres for planting vines.⁹² Finally, the court based its decision on the petitioners' plans to produce, manufacture, bottle, store, and distribute wine as well as to operate retail wine-tasting facilities and picnic areas open to the public at the proposed location.⁹³ All of these facts doomed the application for a special use permit in the court's view.

The facts underlying this case leave no doubt that incorporating the right definitions to fit your community's specific needs is of paramount importance. While definitions can be construed against a municipality, there can be a danger in borrowing them from other code sections or other statutes. One way to avoid any potential definitional conundrum is to provide clear and unambiguous definitions that speak to wineries, whether through a definition of agriculture, agribusiness, wineries, or otherwise.

This case may leave the zoning practitioner puzzled, and with good reason, as there is no mention of any state-certified, county-approved agricultural district that might have saved the petitioners' application. The full history, as alleged by the petitioners in a related federal lawsuit, provides further insight

on that very issue, as well as the municipality's initial advice on the allowed use of the property.

Apparently, the petitioners did consult the town before submitting a special use permit application (although after the purchase of the land) about the allowed use of the property, and were advised by the Planning Board Chairman that the proposed use was agricultural, and thus permissible; the building inspector even agreed with that assessment.⁹⁴

They sought the state certification on two occasions.⁹⁵ The Ulster County Agriculture and Farmland Protection Board ("UCAFPB") sent a letter to the Ulster County Legislature recommending approval of the first application, but supposedly one of the county legislators convinced the petitioners to withdraw the application due to public outcry.⁹⁶

As part of their appeal of the building inspector's decision to the ZBA, the petitioners included a letter from the Agriculture and Markets Commissioner, who stated that the proposed use of the property constituted a "farm operation" under Agriculture and Markets Law §301, which expressly includes land and buildings used for producing, preparing, and marketing crops as a commercial operation, such as that proposed.⁹⁷ The Commissioner employed the predominance standard, finding that as long as the wine consisted predominantly of grapes produced on the farm winery at issue, the buildings, equipment, and marketing of its wine would be part of a protected farm operation, and not subject to local zoning.⁹⁸ This is the exact scenario discussed above with respect to the power of the state agricultural exemption.

The ZBA apparently ignored the Commissioner's findings.⁹⁹ Following the ZBA's adverse decision, the petitioners made their second application for State certification, which the UCAFPB again recommended for approval.¹⁰⁰ But this time the county legislature voted to deny the application; one dissenting legislator stated that the decision was improperly politically motivated.¹⁰¹ Although the federal case was dismissed on ripeness grounds initially, because the petitioners did not seek a zoning variance first,¹⁰² there is a federal action currently pending between these parties.

If there are no other procedural issues, there are a host of issues for the court's future review. From a zoning standpoint, the ZBA's failure to address the Commissioner's interpretation and decision that

the winery was exempt from local zoning could be very damaging. The failure to address documents in the record can be fatal to the municipality's decision.¹⁰³ If the facts underlying the county's decision are proved true also, the municipal defendants could face serious consequences on constitutional and other grounds.

To avoid these circumstances on any matter, and particularly with respect to wineries, municipalities should review the documents in the record, provide a reasonable basis for their determination, and not rely solely on public opposition for any decisions.¹⁰⁴ Municipalities still enjoy great deference from the courts, but only when these steps are followed.

New York is not alone in evaluating whether wineries can enjoy exemption from local regulation. Similar to the facts of *Rivendell Winery, LLC*, the Myrddin Winery in Ohio inquired of the town zoning inspector whether such a use would be allowed.¹⁰⁵ After being informed that the use was allowed without needing even a written permit or approval, the winery sought and obtained the required state and federal permits to operate.¹⁰⁶ Following phone calls from an apparently disgruntled neighbor, the town zoning inspector filed a complaint seeking to terminate the use of the property as a retail business and restaurant in a residential district.¹⁰⁷

Both the lower court and appellate court held that the winery activities conducted on the property were not agricultural uses as defined in §519.01 of the Ohio Revised Code ("ORC") and that the winery was not exempt from local zoning under ORC §519.21(A).¹⁰⁸ But on further appeal, the Supreme Court of Ohio disagreed, holding that the winery conducted an exempt use, so that the town's zoning regulations did not apply.¹⁰⁹

Similar to New York, Ohio recognizes the importance of agriculture, and therefore limits the ability of municipalities to prohibit land use for agricultural purposes, including buildings or structures incidental to the agricultural use.¹¹⁰ The exemption extends to buildings and structures "used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture[.]"¹¹¹ In other words, there are two ways to be exempt from local zoning under this Ohio regulation: (1) use the property for agricultural purposes or (2) use buildings or structures on the property that are incidental to an agricultural use of the land.¹¹²

The court evaluated the statutory meaning of agriculture, finding that it included viticulture, or the cultivation or culture of grapes, especially for making wine.¹¹³ While the court recognized that the defendant's property might be employed for a qualifying agricultural use, either in viticulture or in processing and marketing agricultural products (the vinting and selling of wine), it held that the mere five percent of the winery's sales attributable to grapes produced on the property did not meet the definition of agriculture, which required the vinting and selling activity to be secondary to the production of agricultural products (the grapes).¹¹⁴ Because the vinting and selling of wine was not secondary to viticulture activities, the winery operation could not meet the general definition of agriculture, and thus, the winery could not meet the first exemption.¹¹⁵

But the court next examined whether the operation could meet the second exemption, by showing that buildings or structures used mainly for vinting and selling wine and were located on land, any part of which was used for agriculture. It held that the winery did meet this exemption.¹¹⁶ Unlike the other exemption, the court held that there was no requirement that the vinting and selling of wine be a secondary or subordinate use of the property, or that viticulture must be the primary use.¹¹⁷ As the court recognized, a municipality "may not prohibit the use of a property for vinting and selling wine if any part of the property is used for viticulture[;] 'any' can mean one vine."¹¹⁸

Ohio is also similar to New York in that both states recognize that zoning laws are in derogation of common-law property rights, so that they are strictly construed against the municipality seeking to enforce them.¹¹⁹ As stated by the New York Court of Appeals, "zoning restrictions, being in derogation of common-law property rights, should be strictly construed and any ambiguity resolved in favor of the property owner."¹²⁰ And the ambiguity does not have to be large; courts in this state construe *any* ambiguity in the language in favor of the property owner.¹²¹ This is yet another reason why specificity in defining wineries could be more advantageous to New York municipalities than a broader definition.

With the amount of litigation that can ensue, municipalities face an expensive prospect that may be avoided with careful planning. Structuring zoning regulations properly can help protect valuable as-

sets, allow for economic development, and prevent lengthy and damaging lawsuits.

V. SPECIAL EVENTS GENERALLY

What happens then when the business of running a winery turns to other, related activities such as weddings, parties, festivals, wagon rides, and wine tastings? For wineries within state-certified agricultural districts, the Department of Agriculture and Markets evaluates the activity *ad hoc*, similar to the way municipalities generally review zoning applications.

Of pivotal importance to the Department in determining whether these activities are protected as part of a farm operation, effectively shielding them from local zoning regulation, is the revenue generated. For events that involve renting the facility or vendor fees, the income produced on an annual basis must not exceed the yearly sales of the farm's wine and wine-related products. In other words, the primary purpose of the farm winery must be to sell its wine and related products, not to generate rental income.

Special events held at a winery may be protected against local zoning regulation if they are deemed part of a farm operation.

Farm wineries can also use special events conducted as part of their marketing strategy without fear of losing the protection afforded them as a farm winery. If the event is open to the public—as are many wine tastings, dinners, or festivals—and no facility rental or vendor fees are involved, the Department does not review the income generated by the event.¹²² The winery must conduct the event for the primary purpose of marketing its wines, and the event must be sufficiently related to the farm operation.

What about charitable events? These occasions, much like other special events, can form an important part of a winery's business plan. Again, the Department will evaluate each occurrence on a case-by-case basis, but its main focus will be on whether the farm's wines are sold at the event, whether the primary purpose of the event is to market the farm's wines, and whether the occasion is sufficiently related to the farm operation.¹²³ The fact that admission fees or a portion of the sales are donated to charity does not necessarily destroy the allowed primary purpose.

If the charitable occasion meets the standard for special events, again, the annual sales of the farm's wine and wine products does not have to be greater than the fees charged for the event.

In areas that do not have the state-agricultural-zone designation, the municipality must decide whether to allow special events generally, a certain number annually, or otherwise. For example, the Village of Naples, New York recently eliminated its L-1, Light Industrial zoning district, replacing it with the C-3 winery district, where it specifically allows wineries and special activities such as wagon rides and weddings, as of right.¹²⁴ It placed standards on new and relocated businesses there to retain its ability to evaluate the impact from signs, parking, access, ingress and egress, and wastewater, among other issues.¹²⁵ This Village is not alone. Other municipalities have considered the benefit to allowing concerts, weddings, meetings, and retreats at wineries as a boost to the local economy.¹²⁶ Note too that all of these events are subject to state and federal requirements for processing, storing, and selling alcoholic beverages. While not necessarily a local concern, you should ensure that the proper permits were obtained.

VI. OTHER ISSUES

With the popularity of wineries growing, owners must be cognizant of other laws that may affect their operations. For example, regulations such as the Americans With Disabilities Act ("ADA") can have implications in the zoning realm. Consider the example of Jarek Molski, a paraplegic who visited the Foley Estates Vineyard and Winery in California.¹²⁷ While attending a wine tasting with his grandmother, Molski encountered various physical barriers that prevented his entry into a wine-tasting room with his wheelchair.¹²⁸ The winery attempted to resolve the issue by undertaking renovations, costing nearly \$24,000, to provide all services on a wheelchair-accessible gazebo that included a large bell that patrons could ring for service.¹²⁹ It refused to remove the barriers to its historic wine-tasting room.¹³⁰ It appears that instead of removing the barriers, the winery was attempting to offer a public accommodation through the creation of the gazebo.

When Molski sued the winery, the district court ordered various barriers to Molski's access removed from inside the building, but held that it would not be "readily achievable" for the winery to provide

a wheelchair-accessible ramp to the entrance of the building.¹³¹ On appeal, the Ninth Circuit upheld the district court's decision with respect to removing the interior barriers in the wine-tasting room.¹³² The provisions of the gazebo could not excuse the winery from removing the barriers.¹³³ In other words, because the removal of the barriers was readily achievable, no alternative accommodations could supplant the legal requirement to remove the obstacles.¹³⁴

But the Ninth Circuit also remanded to the district court to determine whether provision of a ramp to the building's entrance would be readily achievable under both the ADA and the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG").¹³⁵ It further held that the burden of proof was on the winery to show that installing the exterior ramp would threaten the historical significance of the building.¹³⁶

The historical nature of the building became one of the winery's primary defenses against making changes beyond the gazebo; during the litigation, the Santa Barbara County Historic Landmarks Advisory Committee declared Foley Estates a "Place of Historical Merit."¹³⁷ At the trial, the winery proffered expert testimony from an architectural historian that an access ramp would have a severe impact on the historical nature of the winery.¹³⁸ The Ninth Circuit remand would allow the district court to apply the ADA and ADAAG regulations specifically.¹³⁹

Interestingly, one of the Ninth Circuit judges, Judge Fernandez, agreed with the district court on this issue, finding that the changes suggested to the exterior would "severely impact or destroy the historical significance of Foley's building" particularly in light of the building's historic designation and identity as a Craftsman house, and given the expert testimony developed at the trial on this issue.¹⁴⁰ It is likely that once the ADA and ADAAG regulations are applied, the district court will reach the same determination.

VII. CONCLUSION

Wineries can present some unique zoning issues given the multiple levels of regulation they are subject to; considering the great protection afforded state-certified agricultural areas, where they are often found; and in light of the related uses that often arrive hand-in-hand with a vineyard or winery, everything from wagon rides to weddings. Local governments should be aware of the general permitting

process required by federal and state agencies for approval, and the type of activities planned, to determine how far their zoning reach will extend.

NOTES

1. Ernest Hemingway, *Death in the Afternoon* 8 (Scribner 1996) (1932).
2. Jill Yonkers is a partner at Hodgson Russ LLP in the Buffalo, NY office.
3. N.Y. Agric. & Mkts. Law §296.
4. Department of the Treasury Alcohol and Tobacco Tax and Trade Bureau Statistical Report—Wine, September 2011, <http://www.ttb.gov/statistics/2011/201109wine.pdf> (last visited January 5, 2012).
5. Alcohol and Tobacco Tax and Trade Bureau National Revenue Center Monthly Statistical Release—Wines, September 2001, http://www.ttb.gov/statistics/wine_sep01.pdf (last visited January 5, 2012).
6. National Grape Cooperative, the Niagara Grape, http://www.nationalgrape.com/02c_nia.shtml (last visited January 5, 2012).
7. National Grape Cooperative, the Niagara Grape, *supra* n. 6.
8. National Grape Cooperative, the Concord Grape, http://www.nationalgrape.com/02b_ccd.shtml (last visited January 5, 2012).
9. Alcohol and Tobacco Tax and Trade Bureau, <http://www.ttb.gov/wine/wine-permits.shtml> (last visited January 5, 2012).
10. Alcohol and Tobacco Tax and Trade Bureau, <http://www.ttb.gov/wine/index.shtml> (last visited January 5, 2012).
11. 27 C.F.R. §4.25(e).
12. *See* Alcohol and Tobacco Tax and Trade Bureau Authorized Wine Appellations of Origin—U.S. Viticultural Areas, http://www.ttb.gov/appellation/us_by_ava.pdf (last visited January 5, 2012); 27 C.F.R. §§9.34, 9.47, 9.83, 9.1001, 9.127, 9.128, 9.170.
13. Alcohol and Tobacco Tax and Trade Bureau, FAQs, <http://www.ttb.gov/wine/wine-faq.shtml#w2> (last visited January 5, 2012); 27 C.F.R. Part 9.
14. FAQs, *supra* n. 13; 27 C.F.R. §9.12(a)(3)(i-v).
15. Alcohol and Tobacco Tax and Trade Bureau, American Viticultural Area, <http://www.ttb.gov/wine/ava.shtml> (last visited January 5, 2012).
16. N.Y. Alco. Bev. Cont. Law §1.
17. N.Y. Alco. Bev. Cont. Law §2.
18. N.Y. Alco. Bev. Cont. Law §2.
19. N.Y. Alco. Bev. Cont. Law §2.
20. New York State Liquor Authority Division of Alcoholic Beverage Control, Historical Overview, <http://www.sla.ny.gov/historical-overview> (last visited January 5, 2012). *See* N.Y. Alco. Bev. Cont. Law Article 6 for the special provisions relating to wine and Article 8 for general provisions related to alcoholic beverages.
21. New York State Liquor Authority Division of Alcoholic Beverage Control, Frequently Asked Questions, <http://www.sla.ny.gov/frequently-asked-questions#wholesale10> (last visited January 5, 2012).
22. Frequently Asked Questions, *supra* n. 21.
23. N.Y. Agric. & Mkts. Law §16.
24. New York State Department of Agriculture & Markets, Division of Food Safety & Inspection, <http://www.agriculture.ny.gov/FS/FSHome.html> (last visited January 5, 2012).
25. N.Y. Agric. & Mkts. Law §16(42).
26. N.Y. Agric. & Mkts. Law §148-c.
27. N.Y. Agric. & Mkts. Law §160-i.
28. *See, e.g.*, N.Y. Agric. & Mkts. Law §300.
29. N.Y. Agric. & Mkts. Law §305-a; *Rivendell Winery, LLC v. Town of New Paltz*, 725 F. Supp. 2d 311, 314 (N.D. N.Y. 2010).
30. N.Y. Agric. & Mkts. Law §305-a(1);
31. N.Y. Agric. & Mkts. Law §305-a; *Rivendell Winery*, *supra* n. 29 at 314.
32. N.Y. Agric. & Mkts. Law §305-a; *Rivendell Winery*, n. 29 at 314. The seminal case upholding N.Y. Agric. & Mkts. Law §305-a, and confirming the great deference owed to the Commissioner's interpretations, is *Town of Lysander v. Hafner*, 96 N.Y.2d 558, 563-65, 733 N.Y.S.2d 358, 759 N.E.2d 356 (2001) (town's requirement of one-story residences with minimum living area had an unreasonable restriction or regulation on farm operations; mobile homes for migrant workers were allowed).
33. *Village of Lacona v. State, Dept. of Agr. and Markets*, 51 A.D.3d 1319, 858 N.Y.S.2d 833 (3d Dep't 2008). The court also found that the local law was preempted by state law. *See* N.Y. Envtl. Conserv. Law §33-0303(1).
34. N.Y. Agric. & Mkts. Law §303.
35. N.Y. Agric. & Mkts. Law §301(11).
36. N.Y. Agric. & Mkts. Law §301(2)(b).
37. *See* the Department of Agriculture and Markets Draft Guidelines for Review of Local Laws Affecting Farm Wineries. The wine must comprise 51% or more of on-farm-produced grapes or other fruit. If imported as whole fruit, the gross weight of the on-farm produced grapes or fruit must be at least 51% of the finished wine. If juice is imported, the juice's gross volume from on-farm produced grapes or fruit must be at least 51% of the finished wine.
38. *See* Draft Guidelines, *supra* n. 37; *see also* N.Y. Agric. & Mkts. Law §301(4).
39. *See* Draft Guidelines, *supra* n. 37.
40. *See, e.g.*, PLACER COUNTY, CALIFORNIA CODE §17.56.330(B), where it defines small wineries as those producing less than 20,000 cases per year and large wineries having an annual production of 20,000 cases or more. A case is 12 standard size (750 milliliter) bottles (available at http://qcode.us/codes/placercounty/view.php?topic=17-2-viii-17_56-17_56_330&frames=on); SHASTA COUNTY, CALIFORNIA CODE §17.88.300(C)(1-3), which defines small wineries as those with a maximum production capacity of 5,000 cases per year, medium as those with a maximum production capacity of 25,000 cases per year, and large as those with a maximum production capacity above 25,000 cases (available at http://www.co.shasta.ca.us/ShastaCountyInternet/Resource_Management/zoning_plan/1788.sflb.ashx).
41. SOLANO COUNTY, CALIFORNIA, ZONING AND DEVELOPMENT STANDARDS: PLANNING FOR A SUSTAINABLE SOLANO COUNTY, pp. 10-13 (available at <http://www.co.solano.ca.us/civicax/filebank/blobdload.aspx?blobid=6536>).
42. *See* WALLA WALLA, WASHINGTON MUNICIPAL CODE, §20.172.020, which largely divides wineries into three categories based on whether they have pedestrian-

- oriented sales and service, on-site primary fruit processing, or bulk fermentation (available at <http://www.codepublishing.com/WA/WallaWalla/wallawalla20/wallawalla20172.html#20.172>).
43. CLARK COUNTY, WASHINGTON CODE §40.260.245 (available at <http://www.mrsc.org/ords/c52o2010-10-12.pdf>); Kennewick, Washington Municipal Code §18.12.305 (available at <http://www.mrsc.org/subjects/planning/agwineries.aspx>); PLACER COUNTY, CALIFORNIA CODE §17.56.330(C) (available at http://qcode.us/codes/placercounty/view.php?topic=17-2-viii-17_56-17_56_330&frames=on).
 44. Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 684, 642 N.Y.S.2d 164, 664 N.E.2d 1226 (1996), citing Khan v. Zoning Bd. of Appeals of Village of Irvington, 87 N.Y.2d 344, 639 N.Y.S.2d 302, 662 N.E.2d 782 (1996); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731 (1951).
 45. Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 N.Y.2d 96, 105, 699 N.Y.S.2d 721, 724, 721 N.E.2d 971 (1999), quoting Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 122 (1980).
 46. Osiecki v. Town of Huntington, 170 A.D.2d 490, 565 N.Y.S.2d 564, 565 (2d Dep't 1991) ("A comprehensive plan is a compilation of land use policies ...").
 47. N.Y. Gen. City Law §§20(25), 28-a; N.Y. Town Law §§263, 272-a; N.Y. Village Law §§7-704, 7-722.
 48. Osiecki, supra n. 46, 170 A.D.2d at 491.
 49. Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 787, 527 N.E.2d 265 (1988) ("The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land.") (citation omitted).
 50. JERUSALEM, N.Y., TOWN OF JERUSALEM COMPREHENSIVE PLAN (2006) (available at http://www.jerusalem-ny.org/comp_plan/2006%20Comprehensive%20Plan.pdf).
 51. NAPLES, N.Y., VILLAGE OF NAPLES STRATEGIC PLAN (2003), p. 1 (available at http://www.naplesny.us/village/development_village.asp).
 52. NAPLES, N.Y., VILLAGE OF NAPLES STRATEGIC PLAN (2003), p. 12 (available at http://www.naplesny.us/village/development_village.asp).
 53. NAPLES, N.Y., VILLAGE OF NAPLES STRATEGIC PLAN (2003), p. 13 (available at http://www.naplesny.us/village/development_village.asp).
 54. Francis Development and Management Co., Inc. v. Town of Clarence, 306 A.D.2d 880, 761 N.Y.S.2d 760 (4th Dep't 2003).
 55. Francis Development, supra n. 54, 761 N.Y.S.2d at 761.
 56. Francis Development, supra n. 54, 761 N.Y.S.2d at 761; see also Western New York Dist., Inc. of Wesleyan Church v. Village of Lancaster, 17 Misc. 3d 798, 841 N.Y.S.2d 740, 757 (Sup 2007), citing Francis Development to support decision upholding village's denial of special use permit for church in industrial park based in part on comprehensive plan.
 57. Asian Americans for Equality, supra n. 49, 531 N.Y.S.2d at 787.
 58. N.Y. Comp. Codes R. & Regs. tit. 6, §617.1(c), (d).
 59. N.Y. Comp. Codes R. & Regs. tit. 6, §617.1(d).
 60. N.Y. Envtl. Conserv. Law §8-0109(2).
 61. WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd, 79 N.Y.2d 373, 381, 583 N.Y.S.2d 170, 174, 592 N.E.2d 778 (1992).
 62. Neville v. Koch, 79 N.Y.2d 416, 425, 583 N.Y.S.2d 802, 806, 593 N.E.2d 256 (1992).
 63. Larry W. Moore, Ph.D., P.E., DEE, *Improved Wastewater Treatment at Hess Collection Winery*, http://www.airoflo.com/reports/hess_paper.pdf.
 64. N.Y. Comp. Codes R. & Regs. tit. 6 §360-1.2(b)(70)(ii).
 65. Town of Concord v. Duwe, 4 N.Y.3d 870, 799 N.Y.S.2d 167, 832 N.E.2d 23 (2005) (state did not intend to preempt the field but had explicitly delegated to municipalities broad powers to manage their waste).
 66. North Shore Steak House, Inc. v. Board of Appeals of Incorporated Village of Thomaston, 30 N.Y.2d 238, 331 N.Y.S.2d 645, 649, 282 N.E.2d 606 (1972).
 67. N.Y. Gen. City Law §27-b(4); N.Y. Town Law §274-b(4); N.Y. Village Law §7-725-b(4).
 68. North Shore Steak House, supra n. 66, 331 N.Y.S.2d at 649.
 69. N.Y. Gen. City Law §27-b(4); N.Y. Town Law §274-b(4); N.Y. Village Law §7-725-b(4) North Shore Steakhouse, supra n. 66, 331 N.Y.S.2d at 649.
 70. Texaco Refining & Marketing, Inc. v. Valente, 174 A.D.2d 674, 571 N.Y.S.2d 328, 330 (2d Dep't 1991); see Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 226 N.Y.S.2d 374, 378, 181 N.E.2d 407 (1962).
 71. See, e.g., Penny Arcade, Inc. v. Town Bd. of Town of Oyster Bay, 75 A.D.2d 620, 427 N.Y.S.2d 52 (2d Dep't 1980); see also Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 800 N.Y.S.2d 535, 833 N.E.2d 1210 (2005) (upholding decision to not renew solid waste special use permit based on potential harmful effects).
 72. N.Y. Gen. City Law §27-b(4); N.Y. Town Law §274-b(4); N.Y. Village Law §7-725-b(4).
 73. Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870 (1975).
 74. N.Y. Gen. City Law §27-a; N.Y. Town Law §274-a(2)(a); N.Y. Village Law §7-725-a(2)(a).
 75. N.Y. Gen. City Law §27-a(2)(a); N.Y. Town Law §274-a(2)(a); N.Y. Village Law §7-725-a(2)(a).
 76. N.Y. Gen. City Law §27-a(4); N.Y. Town Law §274-a(4); N.Y. Village Law §7-725-a(4).
 77. Di Veronica v. Arsenault, 124 A.D.2d 442, 507 N.Y.S.2d 541, 543-44 (3d Dep't 1986) (holding that compliance with SEQRA is required before a decision on a site plan can be made).
 78. N.Y. Envtl. Conserv. Law §8-0109(4).
 79. Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 304-05, 494 N.E.2d 429 (1986); Rivendell Winery, LLC v. Donovan, 74 A.D.3d 1594, 903 N.Y.S.2d 597 (3d Dep't 2010).
 80. Rivendell Winery, supra n. 79, 74 A.D.3d at 1594.
 81. Rivendell Winery, supra n. 79, 74 A.D.3d at 1594-95.
 82. NEW PALTZ, N.Y. ZONING CODE, §140-4(A) (2011) (stating in pertinent part, "[f]or the purposes of these regulations, certain words used herein are defined as follows. If a term is not listed below, but is defined in ... Chapter 140 of the Town Code, then for purposes of these regulations the meaning of that term shall be as defined therein." (Available at <http://www.townofnewpaltz.org/>).

83. Rivendell Winery, *supra* n. 79, 74 A.D.3d at 1595.
84. Rivendell Winery, *supra* n. 79, 74 A.D.3d at 1595.
85. N.Y. Agric. & Mkts. Law §301(11).
86. *Ifrac v. Utschig*, 98 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 669, 774 N.E.2d 732 (2002).
87. *Ifrac*, *supra* n. 86; *Crilly v. Karl*, 67 A.D.3d 793, 795, 888 N.Y.S.2d 189, 191 (2d Dep't 2009) ("The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them. Upon judicial review, the general rule is that, absent evidence of illegality, a court must sustain the determination if it has a rational basis in the record before the zoning board." (internal quotation omitted)).
88. *First Nat. Bank of Glens Falls v. Sheehan*, 30 A.D.2d 912, 292 N.Y.S.2d 741, 743 (3d Dep't 1968) ("[W]e start out with the presumption that the decision of the board was correct and, therefore, the burden is upon the appellant." (internal citations omitted)).
89. *Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 237, 814 N.E.2d 404 (2004) (internal quotation omitted).
90. Rivendell Winery, *supra* n. 79, 74 A.D.3d at 1595.
91. Rivendell Winery, *supra* n. 79, 74 A.D.3d at 1595.
92. Rivendell Winery, *supra* n. 79, 74 A.D.3d at 1595.
93. Rivendell Winery, *supra* n. 79, 74 A.D.3d at 1595.
94. Rivendell Winery, LLC, *supra* n. 29 at 314-15.
95. Rivendell Winery, LLC, *supra* n. 29 at 314.
96. Rivendell Winery, LLC, *supra* n. 29 at 314.
97. Rivendell Winery, LLC, *supra* n. 29 at 314.
98. Rivendell Winery, LLC, *supra* n. 29 at 316. The Commissioner also stated that it would consider the facility a start-up farm operation that is afforded a reasonable period of time to meet the predominance standard; he specifically stated in this regard that "[i]t generally takes approximately five to six years for vines to begin producing grapes of a quantity needed to support the facility." Rivendell Winery, LLC, *supra* n. 29, Ex. A to the Complaint, Docket No. 1-1.
99. Rivendell Winery, LLC, *supra* n. 29 at 316.
100. Rivendell Winery, LLC, *supra* n. 29 at 317.
101. Rivendell Winery, LLC, *supra* n. 29 at 317.
102. Rivendell Winery, LLC, *supra* n. 29 at 317-19. The court held that the petitioners would have to apply for a use variance, a particularly exacting standard in New York in general, and especially when compared to the special use permit standard. See N.Y. Town Law §267-b(2); N.Y. Village Law §7-712-b(2); N.Y. Gen. City Law §81-b(3). Neither the town tax assessor's opinion that nine acres qualified for the agricultural exemption, nor the fact that the building inspector's suggestion that the winery should apply for a variance are factors under the New York use variance standard. Rivendell Winery, LLC, *supra* n. 29 at 319. The court's reliance upon these facts to suggest that the winery would get the variance is erroneous, although the court might have still reached the same conclusion regarding the winery's failure to show that denial was more than merely doubtful.
103. See, e.g., *Concerned Residents of New Lebanon v. Zoning Bd. of Appeals of Town of New Lebanon*, 226 A.D.2d 997, 641 N.Y.S.2d 199, 201 (3d Dep't 1996); *Citizens Against Illegal Zoning v. Zoning Bd. Of Appeals Of Town Of Rochester*, 276 A.D.2d 897, 714 N.Y.S.2d 145, 147 (3d Dep't 2000).
104. *Ifrac*, *supra* n. 86, 98 N.Y.2d at 308 (the board may not base its decision on generalized community objections).
105. *Terry v. Sperry*, 130 Ohio St. 3d 125, 2011-Ohio-3364, 956 N.E.2d 276 (2011).
106. *Terry*, *supra* n. 105 at 278.
107. *Terry*, *supra* n. 105 at 278.
108. *Terry*, *supra* n. 105 at 278.
109. *Terry*, *supra* n. 105 at 282.
110. *Terry*, *supra* n. 105 at 279-80.
111. *Terry*, *supra* n. 105 at 280, citing Ohio Revised Code §519.21(A).
112. *Terry*, *supra* n. 105 at 280.
113. *Terry*, *supra* n. 105 at 280-81.
114. *Terry*, *supra* n. 105 at 281.
115. *Terry*, *supra* n. 105 at 281.
116. *Terry*, *supra* n. 105 at 281-82.
117. *Terry*, *supra* n. 105 at 281.
118. *Terry*, *supra* n. 105 at 281-82.
119. *Terry*, *supra* n. 105 at 279.
120. *Toys R Us v. Silva*, 89 N.Y.2d 411, 654 N.Y.S.2d 100, 106, 676 N.E.2d 862 (1996) (citation omitted).
121. See, e.g., *Town of Johnsbury v. Town of Johnsbury Zoning Board of Appeals*, 299 A.D.2d 796, 751 N.Y.S.2d 85 (3d Dep't 2002); *Allen v. Adami*, 39 N.Y.2d 275, 277, 383 N.Y.S.2d 565, 567, 347 N.E.2d 890 (1976) ("Any ambiguity in the language used in such regulations must be resolved in favor of the property owner.").
122. See the Department of Agriculture and Markets Draft Guidelines for Review of Local Laws Affecting Farm Wineries.
123. See the Department of Agriculture and Markets Draft Guidelines for Review of Local Laws Affecting Farm Wineries.
124. NAPLES, N.Y. CODE §385-21(C) (2011) (available at http://www.naplesny.us/village/development_village.asp).
125. NAPLES, N.Y. CODE §385-21(E) (2011) (available at http://www.naplesny.us/village/development_village.asp).
126. See, e.g., the CLARK COUNTY, WASHINGTON CODE §40.260.245 (available at <http://www.mrsc.org/ords/c52o2010-10-12.pdf>).
127. *Molski v. Foley Estates Vineyard and Winery, LLC*, 531 F.3d 1043 (9th Cir. 2008).
128. *Molski*, *supra* n. 127, at 1045.
129. *Molski*, *supra* n. 127, at 1045-46.
130. *Molski*, *supra* n. 127, at 1045-46.
131. *Molski*, *supra* n. 127, at 1045.
132. *Molski*, *supra* n. 127, at 1049-50.
133. *Molski*, *supra* n. 127, at 1049-50.
134. *Molski*, *supra* n. 127, at 1050.
135. *Molski*, *supra* n. 127, at 1047-48.
136. *Molski*, *supra* n. 127, at 1049.
137. *Molski*, *supra* n. 127, at 1046.
138. *Molski*, *supra* n. 127, at 1046.
139. *Molski*, *supra* n. 127, at 1046.
140. *Molski*, *supra* n. 127, at 1051-52.

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* §14:3

RECENT CASES

IN CASE OF FIRST IMPRESSION, SUPREME COURT, TOMPKINS COUNTY, UPHOLDS ZONING AMENDMENT PROHIBITING EXPLORATION FOR AND PRODUCTION OF OIL AND NATURAL GAS.

The Town of Dryden is located above the Marcellus shale formation underlying the southern portion of New York State. To prohibit “hydrofracking” (or “fracking”), a controversial technique for extraction of natural gas in which up to a million gallons of chemical-laced water are injected into the ground at high pressure, the Town amended its zoning ordinance to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum.

The Anschutz Exploration Corporation owned gas leases covering approximately 22,200 acres in the Town that were obtained prior to enactment of the antifracking amendment. Anschutz commenced a hybrid CPLR article 78 proceeding/declaratory judgment action against the Town, seeking invalidation of the amendment on the grounds that it was preempted by the Oil, Gas and Solution Mining Law (OGSML).

The Supreme Court, Tompkins County, dismissed the article 78 proceeding and granted summary judgment to the Town. The court noted that challenges to the substantive validity of a legislative act may not be maintained in an article 78 proceeding. Inasmuch as Anschutz challenged only the substantive validity of the Zoning Amendment, and not the procedures utilized in its enactment, its article 78 proceeding had to be dismissed.

Turning to the preemption issue, the court noted that the OGSML contained the following express supersedure clause: “The provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government

jurisdiction over local roads or the rights of local governments under the real property tax law.” (Emphasis supplied by the court.)

The court regarded *Frew Run Gravel Products, Inc. v. Town of Carrol*, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987) as binding precedent in the case at bar. In *Frew Run*, the Court of Appeals held that a similar supersedure clause in the Mined Land Reclamation Law (MLRL) did not preempt local zoning regulations affecting mining operations. The Supreme Court said that inasmuch as both the MLRL and the OGSML preempted only local regulations “relating” to the applicable industry, they had to afford the same plain meaning—that they did not expressly preempt local regulation of land use, but only regulations dealing with operations. Neither supersedure clause contained a clear expression of legislative intent to preempt local control over land use and zoning.

The court rejected Anschutz’s attempts to reach a different result on the basis of perceived differences between the MLRL and the OGSML. The court also remarked that other state statutes that indisputably preempt local zoning power do so with express language to that effect, and contain provisions by which the traditional concerns of zoning must be considered by the agency charged with deciding whether to issue a permit under state law. The OGSML does not require consideration of such factors prior to issuance of well permits. The court concluded its analysis by noting that the highest courts of Pennsylvania and Colorado had reached conclusions similar to that of the court in the instant case.

Another provision of the antifracking amendment provided that any permit issued by a local, state or federal government permitting any use banned by the amendment would not be deemed valid by the Town. This provision, said the court, was void inasmuch as the Town’s power to regulate land use did not include the authority to invalidate a permit issued by another governmental entity. Moreover, by purporting to invalidate permits that might be issued by a state agency, the provision related directly to regulation of the oil and gas industries and was as such expressly preempted by the OGSML. However, the court held that this invalid provision did not invalidate the entire amendment, because it could be severed without impairing the underlying purpose of the amendment. The court

decreed the provision severed and stricken from the amendment. *Anschutz Exploration Corp. v. Town of Dryden*, 2012 WL 556172 (N.Y. Sup 2012).

COUNTY COURT HOLDS THAT STARTING CONSTRUCTION WITHOUT OBTAINING A BUILDING PERMIT WAS NOT A CRIMINAL OFFENSE UNDER EXECUTIVE LAW §382(2).

Wayne Grimditch owned land in the Town of North Elba, on Lake Placid. He hired Daniel Nardiello as general contractor to build a boathouse on the property. Nardiello hired Robert Scheefer as a subcontractor. Construction of the boathouse began although no building permit had been issued.

The Town's Code Enforcement Officer tried to serve on Nardiello and Scheefer, and delivered to Grimditch's house, (1) a letter requesting that no construction be undertaken until a building permit had been issued; and (2) a stop work order. When the officer returned to the building site the next day, he observed ongoing construction activity.

Grimditch, Nardiello and Scheefer were each charged by grand jury indictment in County Court with violating Executive Law §382(2), which provides:

Any person, having been served...with an order to remedy any condition...in violation of the uniform fire prevention and building code, who shall fail to comply with such order[,] and any owner[,] contractor[, or] subcontractor... who shall knowingly violate any...provision[] of the uniform code or any lawful order...regarding standards for construction, maintenance, or fire protection equipment and systems, shall be punishable by a fine of not more than one thousand dollars per day of violation, or imprisonment exceeding one year, or both.

The defendants were also charged with a non-criminal violation for failing to obtain a building use permit as required by Town land use law.

Upon motion by the defendants, the court dismissed the indictment. The court noted that there are two ways in which a defendant can be found guilty of violating the statute. First, a defendant could be served with an order to remedy a condi-

tion in violation of the state building code, and fail to comply with the order. However, said the court, a "condition" in violation of the state building code does not include the lack of a building permit.

The other way in which a defendant could be found guilty of violating the statute would be if he or she took part in the construction of a building and knowingly violated a provision of the building code or any lawful order regarding standards for construction, maintenance, or fire protection equipment and systems. But the mere failure to obtain a building permit, said the court, is not a violation of "standards for construction, maintenance, or fire protection equipment and systems."

The express language of the statute, continued the court, did not disclose any intent by the Legislature to criminalize all violations of the uniform code. The Legislature clearly intended to criminalize only those violations which created a danger to the public. If the Legislature had intended it to be a criminal offense for a person to fail to apply for a building permit, it would have said so. The indictments charging the defendants with violations of Executive Law §382(2) were therefore defective on their face.

The court went on to say that the evidence before the grand jury was also insufficient to support the charges of violating Executive Law §382(2). There was no evidence presented to the grand jury as to a specific provision of the state building code, or any standard of construction or maintenance in the code, that was violated by the construction work. Neither was there evidence establishing that any of the defendants were served personally or by certified mail, as required by the statute, with the stop work order.

Finally, the court dismissed the counts of the indictments pertaining to the defendants' failure to obtain a building use permit under Town law, on the grounds that the boathouse, being located entirely within Lake Placid, was exempt from the Town's land use laws as a structure located in a navigable water and as such under the exclusive jurisdiction of the state. *People v. Grimditch*, 936 N.Y.S.2d 527 (County Ct. 2012).