

MILLER, MANNIX, SCHACHNER & HAFNER, LLC
ATTORNEYS AT LAW

Mark Schachner
Robert H. Hafner
Leah Everhart
Jacquelyn P. White
Thomas W. Peterson
Justin M. Grassi
Soha Jafarzade

Michael J. Hill, Of Counsel

15 WEST NOTRE DAME STREET
GLENS FALLS, NEW YORK 12801

Telephone: (518) 793-6611
Facsimile: (518) 793-6690

49 BURLINGTON AVE., 2ND FLOOR
PO BOX 578

ROUND LAKE, NEW YORK 12151
Telephone: (518) 899-1518
Facsimile: (518) 899-1561

John W. Miller (1908-1968)
John C. Mannix (1931-2006)

Toll Free: 1-800-421-6166

Web Site: millermannix.com
E-Mail: mschachner@mmslaw.com

NEW YORK PLANNING FEDERATION
ANNUAL PLANNING AND ZONING CONFERENCE
Bolton Landing, NY

PLANNING BOARD AND ZBA DECISION-MAKING TO AVOID
(OR AT LEAST SUCCESSFULLY DEFEND) ARTICLE 78 CHALLENGE

MARK SCHACHNER, ESQ.
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I. WHAT IS AN ARTICLE 78 PROCEEDING?

- A. "Article 78" is section of "New York Civil Practice Law and Rules" (CPLR)
- B. Legalese for a lawsuit/legal challenge to an "administrative decision" – decision by an "agency"
- C. Challenges to Planning Board and Zoning Board of Appeals Decisions, as well as most zoning decisions by a legislative body, are Article 78 Proceedings – Planning Boards and ZBAs are agencies.

II. WHO CAN MAINTAIN AN ARTICLE 78?

- A. "Petitioners" – anyone who is "aggrieved" (by Decision of "Respondent")
- B. If Decision is approval - person, neighbor, possibly corporation or business entity, neighborhood or environmental group or association which is harmed by Decision
- C. If Decision is denial - Applicant



III. WHO GETS SUED?

- A. Respondent – agency/entity that made the Decision
- B. If challenge to approval Decision, then applicant must also be Respondent – applicant is “real party in interest” – “necessary party”
- C. Municipal Respondent is the Board, not its individual members

IV. WHO HAS WHAT BURDEN IN ARTICLE 78 LITIGATION?

- A. Petitioner(s) must demonstrate illegality of Decision
- B. Can’t just criticize Decision as “wrong” or state reasons for disagreement

V. WHAT ARE THE POSSIBLE LEGAL GROUNDS FOR AN ARTICLE 78 PROCEEDING (POSSIBLE ILLEGALITY OF DECISION)?

- A. Decision was “arbitrary and capricious” – lacking “rational basis”
- B. Decision was not “supported by the Record” (also called “Return”)
- C. Decision was “affected by error of law”

VI. ARE THERE ANY PRESUMPTIONS OR DEFERENCE?

- A. Decision essentially presumed valid
- B. Court must afford “substantial deference” to Decision of Board and is not supposed to “substitute its judgment” – but substantial deference does not mean blind deference
- C. Court may disagree with Decision, but will not nullify it on that basis alone
- D. Not about Decision being “right” or “wrong” (oddly enough – really justice?) – what is “right” or “wrong”?

VII. SUBSTANTIVE CHALLENGE VS. PROCEDURAL CHALLENGE

- A. Challenges that simply state disagreement with Board are seldom troublesome – due to Petitioner having burden – presumption – deference – Decision upheld so long as rational basis
- B. Challenges alleging some procedural irregularity are what to really worry about – process errors are “errors of law” – very troublesome and difficult to defend



VIII. HOW TO PREVENT (OR AT LEAST PREVAIL)

- A. Follow the process – proper notices, public hearings, SEQRA review, voting requirements
- B. Identify the proper decision-making criteria
- C. Apply the proper decision-making criteria
- D. Discuss and deliberate prior to Decision (in open public meeting)
- E. Make sure that Minutes reflect discussion of criteria
- F. Decide by formal Motion with stated reasons for Decision based on criteria

IX. THE MORE COMPLEX/CONTROVERSIAL THE APPLICATION, THE GREATER LEVEL OF FORMALITY APPROPRIATE

- A. “Easy application”/ “slam dunk” – formality may be less necessary
- B. Be extra vigilant and wary if difficult application – especially if attorneys are involved

X. MAKE SURE MINUTES AND DECISION DOCUMENTS ARE DETAILED AND ACCURATE

- A. Detailed minutes not required, but extremely helpful
- B. Document “rational basis”
- C. Court reviews and decides based on Record/Return

XI. PREPARE DECISION MOTION IN WRITING IN ADVANCE (BUT NOT TOO FAR IN ADVANCE)

- A. Before Decision meeting
- B. But not before Public Hearing and some deliberation

XII. SEEK ASSISTANCE OF MUNICIPAL COUNSEL – INCLUDING PREPARATION OF DRAFT DECISION(S)

- A. Approval, approval with conditions or denial
- B. Can have more than one Draft Decision – going “same way” or opposite ways
- C. But Municipal Counsel cannot and should not make Board Decision



XIII. DEFENDING ARTICLE 78 PROCEEDINGS

- A. Engage competent legal representation – specialized area of law
- B. Evaluate and possibly assert threshold defenses – lack of “Standing” (not “aggrieved”) – failure to exhaust administrative remedies (didn’t participate in Planning Board or ZBA proceeding) – untimely (didn’t file challenge within 30 days of Decision)
- C. May not have to defend on merits – may not even have to file Record/Return – easier and cheaper, but sometimes frowned upon by municipality (let our constituents have their day in Court)

XIV. EFFECT OF “PRECEDENT”

- A. Important to recognize/remember if Board has dealt with same or substantially similar situation in past
- B. General rule of precedent: Treat same or substantially similar application in same manner – make same Decision
- C. Adherence to “precedent” important, but rule is not “iron-clad” or absolute
- D. Can rule differently despite/against precedent, but must explain/state reasons for different result on Record as part of Decision – must be legally valid reasons

XV. WHAT RESULT IN THE (UNLIKELY) EVENT OF FAILURE?

- A. Decision typically nullified
- B. Application may be sent back to Board for further review or “reconsideration”
- C. Decision seldom (but sometimes) actually reversed – more often reversed from approval to denial than denial to approval – nullification of denial decision often results in reconsideration
- D. Reconsideration may be narrow or may be “back to square one” - depends on ground for nullification – back to start result can be very harsh, but is most common
- E. Upon reconsideration, Board may reach same or similar result in lawful manner
- F. Could be challenged again, but hopefully no chance of success



Mark Schachner is the Senior Principal Attorney of MILLER, MANNIX, SCHACHNER & HAFNER, LLC in Glens Falls and Round Lake. While the firm maintains a general practice of law, Mr. Schachner's efforts are concentrated in the areas of municipal, environmental, land use and planning/zoning law. Mr. Schachner and his colleagues represent numerous municipalities in Essex, Franklin, Fulton, Hamilton, Saratoga, Warren and Washington Counties. He also serves as Counsel to the Saratoga County Water Authority and the Gloversville-Johnstown Joint Sewer Board. His practice includes extensive participation in regulatory proceedings before the New York State Department of Environmental Conservation, Adirondack Park Agency and Lake George Park Commission. Mr. Schachner is a graduate of Brown University and Boston University School of Law. He is author of the chapter entitled "Environmental Law - New York State Environmental Quality Review Act ("SEQRA")" in the book Pitfalls of Practice published by the New York State Bar Association in 1993 and 2002. Mr. Schachner has lectured about municipal, environmental, planning and zoning law matters at numerous conferences throughout the State. He is a Director-at-Large of the New York Planning Federation and has been a presenter at numerous Planning Federation events since 1988, including as Keynote Speaker at the Federation's 2014 Annual Conference in Saratoga Springs.



