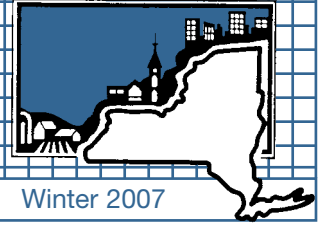


# PLANNING NEWS



New York Planning Federation

279 River Street, Suite 302, Troy, NY 12180

Winter 2007

## How to Avoid an Article 78 Lawsuit

By Scott F. Chatfield, Esq.

**C**PLR Article 78 is a statutory embodiment of three ancient writs controlling the actions of administrative elements of government. The three writs were known (in no particular order) as *certiorari*, *mandamus* and *prohibition*.

*Certiorari* is the most common form of Article 78 relief. In this type of proceeding the Court is asked to review an administrative determination to see if it was:

*“a determination made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion or if a hearing was involved, at which evidence was taken pursuant to direction by law was, on the entire record, supported by substantial evidence.”*

In other words, if your board made a determination to grant (or deny) a site plan, special permit, use or area variance, subdivision, interpretation or any similar administrative determination, such determination can be challenged by way of an Article 78 proceeding in the nature of *certiorari* for all sorts of reasons.

Number One on the hit parade is the failure to follow a lawful procedure. Almost every Article 78 proceeding in the nature of *certiorari* includes some element of failure to follow lawful procedure, mainly because there are so many procedures to follow.

Most procedural errors also include an element of an error of law. Occasionally, however, a board may make an interim determination based upon a miscalculation of

law, i.e., refusing to allow a non-resident to speak at a public hearing, or rejecting a protest petition on the basis that the landowner across the street isn't qualified to protest, or failure to recognize a prohibited conflict of interest under the General Municipal Law.

Likewise, most Article 78 proceedings allege that the decision was arbitrary and capricious or an abuse of discretion. Technically, for example, the failure to refer an application to a county planning agency (where required) is not arbitrary or capricious, but it does violate lawful procedure. “Arbitrary and capricious” mean just what the words suggest, that the decision lacks a well considered rationale.

If a decision is arbitrary and capricious, then it almost, by definition, can't be supported by substantial evidence in the record. On the other hand, it is theoretically possible to have a well thought out and deliberate decision that is not supported by evidence in the record.

Have I managed to confuse you yet? Suffice it to say that an Article 78 proceeding in the nature of *certiorari* will almost always allege all of these grounds in one long paragraph – that's because if you ask a lawyer what time it is, he will tell you how to build a watch.

The second ancient writ, *mandamus*, is a way to make an administrative official do something which the law mandates that he do. In the language of the statute:

*Continued on page 4*

**PLANNING NEWS**

Library of Congress No. 65-29356  
 Volume 5, No. 1 Winter 2007  
 Published quarterly by:  
 New York Planning Federation  
 279 River Street, Suite 302  
 Troy, New York 12180  
 (518) 270 9855 / 270 9857 (fax)  
 e-mail: nypf@nypf.org

*The New York Planning Federation also maintains a toll-free number for members. Call (800) 366-NYPF*

**THE NEW YORK PLANNING FEDERATION**

is a non-profit membership organization established in 1937. Our mission is to promote sound planning and zoning practice throughout New York State. Membership, which currently includes nearly 10,000 individuals, is open and welcome to anyone supporting this mission. Membership categories include municipalities, counties, public organizations, private businesses, individuals and libraries.

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# New Technical Assistance Programs

The New York Planning Federation can provide, at your request, training, advice, research and direct assistance on planning, zoning, land use or development matters. Our goal is to offer strategic, practical and affordable assistance designed to complement the work of community leaders, staff or consultants. Assistance requests can be customized to fill the unique needs of a specific community or organization or to participate in team efforts.

In addition to basic and advanced land use training, environmental review and SEQR, comprehensive planning workshops, affordable housing, growth management, open space protection and planning/zoning audits, we have added the following new short courses, each of which runs for two hours and is presented on-site at your municipality:

**Aquifer/Wellhead Protection:** This course describes the benefits of aquifer or wellhead protection of public groundwater supplies, threats to water supplies, how wellheads and aquifers are delineated and how they can be protected, with suggestions for zoning standards;

**Farmland Protection:** Identifies the many benefits of farmland and farming to communities, describes current threats to farming and explores a variety of effective approaches to protect farmland and support the farm community;

**Forestry Use:** Identifies multiple forest uses, benefits and threats to forestry and forest uses, and describes how local officials can protect the environment while allowing a variety of forest uses, including harvesting, that benefit the community;

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**Open Space Protection:** Defines the many types of open space, identifies the fiscal and environmental benefits of protecting these areas, surveys a variety of preservation and protection approaches, and suggests possible open space protection options for your community;

**Wind Energy Development:** Guides communities through the process of inventorying prime wind sites in the comprehensive plan, identifying potential conflicts, mitigating or resolving these conflicts and developing effective review standards for proposed wind energy facilities. ❖

# Municipal Training Update

By Katherine Daniels, AICP

The New York Planning Federation office has been receiving a steady stream of calls from local officials inquiring about the new municipal training requirements. In truth, fulfilling the requisite four hours couldn't be easier or more flexible, as it is left to each municipality to decide on the type of annual training they feel is suitable for their planning and zoning boards.

Questions and answers regarding the training process are posted on the NYPF website at [www.nypf.org](http://www.nypf.org) under "Training Opportunities." Also, on page 6 of this newsletter is a model resolution that governing bodies can adopt as is or modify as needed in order to start the process in motion.

In this model resolution, the responsibility for locating suitable training is delegated from the governing body to the respective board chairs. We propose this for two reasons: (1) most governing bodies feel that their appointed boards are in a better position to determine the type of training that will most benefit them; and (2) a one-time resolution delegating this authority to the planning and zoning boards eliminates the need for annual resolutions by the governing body specifying the need for training.

Regardless of the other types of training selected, the Planning Federation recommends that boards with newly or recently appointed members participate in a joint training session covering the basics of board responsibilities. This helps assure consistent interpretation of the law, as well as well-supported decision making.

Respective board chairs may also provide a menu of training options to their board members, each of whom would then receive the training of their choosing and then report back to the board chair upon completion. This alternative may be more suitable for boards with

considerable experience where individual members want to pursue specialty training in a particular area of interest.

We recommend that board members receive no more than an additional one year credit for excess hours. The law, as well as planning and zoning issues, change constantly; it is important that board members keep up-to-date by receiving training at least every two years.

*Continued on page 5*

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*Avoiding an Article 78 (continued from page 1)*

*“whether the body or officer failed to perform a duty enjoined upon it by law;”*

*Mandamus* relief will not be granted if the “duty” is discretionary, i.e., refusal of a CEO to cite someone for a violation, but will be granted where the duty is clear, but a particular outcome may be discretionary, i.e., refusal of a CEO to issue a determination on a formal request for interpretation because his determination is a prerequisite to the jurisdiction of the Zoning Board of Appeals to decide the appeal – he just can’t be compelled to decide the question in any particular way.

An Article 78 proceeding in the Nature of Prohibition is probably the rarest of types in land use. *Prohibition* is used to prevent an administrative body or official from doing something beyond their authority. In the language of the statute:

*“Whether the body or officer proceeded, or is about to proceed without or in excess of jurisdiction.”*

An example of this type of relief might be...suppose a Planning Board granted site plan approval and the neighbors didn’t like it. They appeal to the Zoning Board of Appeals to have it set aside and the ZBA is about to hold a hearing. (If the Zoning Board had already overruled the Planning Board’s decision, prohibition would be appropriate, but so too would the grounds of “error or law” and “in violations of lawful procedure.”)

So much for what an Article 78 proceeding is. Now for what it isn’t.

An Article 78 proceeding is not the appropriate way to challenge the substance of a legislative decision (think zone change). This should be done by a Declaratory Judgment proceeding. However, an Article 78 proceeding is appropriate to challenge a zone change for failure to follow a lawful procedure or for an error of law, e.g. failure to refer to the county planning agency where required, or failure to comply with SEQR.

In most cases, a skillful lawyer who is challenging a legislative enactment in the land use field will bring what is called a *hybrid proceeding*; that is, he will join an Article 78 proceeding and a Declaratory Judgment proceeding in the same set of papers. It’s like wearing a belt and suspenders. The Courts will usually overlook

this distinction and will readily convert one type of proceeding into the other. However, beware, because there are different statutes of limitations for the types of proceedings.

The following are some (but by no means all) of the common problems leading to Article 78s:

1. **Failure to comply with notice requirements** (public hearing notices, nature of public meetings, local requirements for notice to neighbors);
2. **Failure to properly constitute the board** (improper number, oath of office, prohibited conflicts, lack of residency);
3. **Failure to observe application procedures** (no GMI certification, lack of written decision by the CEO, failure to establish right to relief, inadequate submission under local regulations);
4. **Open meetings problems** (“private” conversations, executive sessions, discussions outside of meeting, minute keeping);
5. **Prohibited conflicts** (financial interest of board members, failure to disclose, failure to recuse);
6. **General Municipal Law Section 239** (failure to refer, failure to consider, inadequate vote to override);
7. **Failure to notify in certain circumstances** (State Parks Commission 267-a(10), new or amendment of zoning codes 264(2), agricultural data statutes 283-a);
8. **Conduct of meeting/hearing** (lack of fundamental fairness or due process);
9. **SEQR** (improper designation, hard look, reasoned elaboration, timing of decision);
10. **Decision writing/documentation**;
11. **Post decision procedures** (filing, publication, notification). ❖

*The author is an attorney in private practice in Marietta, NY and is also a board member of the New York Planning Federation. This article was the outline for a very popular session on “Article 78’s” at the 2006 NYPF annual conference.*

**Got questions?  
Look here for answers!  
[www.nypf.org](http://www.nypf.org)**

*Training Updates (continued from page 3)*

Some communities may be considering opting out of the training entirely. We believe this would be unfortunate, as it leaves municipalities with untrained boards vulnerable to legal actions. However, opting out of training is permissible via two options – (1) for cities with populations of over one million; and (2) if the governing body finds in a resolution that it is “in the best interest of the community” not to require training. The latter exemption was intended to apply to communities which already have well-trained boards that may not require further training in any given year.

The New York Planning Federation offers several low-cost ways for municipalities to receive training. These include:

*The Short Course: A Basic Guide for Planning Boards and Zoning Boards of Appeal in NYS* (a self-study book published by NYPF. See page 8 to order);

*Land Use Training and Certification School* (downloadable, self-study tutorials with quizzes at no cost, or \$50.00 plus \$5.00 s/h for a hard copy and CD. Visit [www.nypf.org](http://www.nypf.org) “Training Opportunities” or call 518 270 9855 to order);

We also offer both basic and advanced presentations to local boards in a variety of relevant planning and training topics including SEQR, comprehensive planning, farmland protection and affordable housing, among many others. Call our office for more information. ❖



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# Model Resolution Establishing Mandatory Training for Planning Boards & Zoning Boards of Appeal

**W**HEREAS, the adoption and implementation of Local Land Use decisions have a profound effect on the character of a community and the well being of its citizens; and

WHEREAS, the administration of Land Use Laws is a complex and highly diverse process that requires specialized knowledge and familiarity with the applicable laws and regulations; and

WHEREAS, well considered and timely decisions, consistent with those laws and regulations attract quality community development, result in fewer lawsuits and generally decrease the discord within the community; and

WHEREAS, the \_\_\_\_\_ of \_\_\_\_\_ desires to provide, for the benefit of its citizens, a well trained and knowledgeable body of officials to administer the Local Land Use process.

NOW THEREFORE BE IT RESOLVED, as follows:

1. Pursuant to the provisions of Town/City/Village Law Section \_\_\_\_\* all Planning Board and Zoning Board of Appeals members shall be required to complete at least four (4) hours of suitable training per year.

2. The authority to determine suitable training is hereby delegated from the \_\_\_\_\_ (*governing body*) to the respective Planning and Zoning Board chairs, who shall note annually in Board minutes the selected training.

3. The training requirement may be satisfied by educational activities substantially devoted to planning, zoning or other land use issues, such as 1) attending conferences, seminars or workshops; 2) participating in on-line training or tutorials; 3) attending college courses; 4) reading journal articles or books; or 5) any other educational activities considered acceptable by the respective Board chair. Training may be offered by a municipality, regional or county planning office or commission, county, regional or state planning federation, state agency, statewide municipal association, college or university or other similar entity.

4. A record of annual completion of training shall be maintained by the Town/City/Village clerk or planning director and a copy provided to the \_\_\_\_\_ (*governing body*) prior to considering a Planning Board or Zoning Board member for reappointment. Eligibility for reappointment to these Boards shall be conditioned upon completion of training prior to the end of each calendar year.

5. Suitable training in excess of four (4) hours per year may be accumulated and carried over into the succeeding year for the purpose of satisfying these training requirements.

\* 267 and 271 (Town Law); 7-712 and 7-718 (Village Law); 27 and 81 (General City Law).

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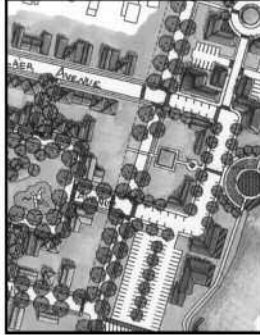
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*For more information on the benefits of becoming a New York Planning Federation member, we invite you to call Marie Schlosser at 518 270 9855 or email her at [mschlosser@nypf.org](mailto:mschlosser@nypf.org).*

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## Book Review: Now That You're on Board

Reviewed by Lael Locke

This good-natured and informative introduction to life on a planning board is subtitled “*How to Survive...and Thrive...as a Planning Commissioner.*” Written by Elaine Cogan and playfully illustrated by Marc Hughes, the 52-page book is published by the Planning Commissioner’s Journal in Burlington, VT.

The soft-cover book is divided into five sections – “New to the Board;” “Reaching Out;” “Improving your Commission’s Effectiveness;” “The 3P’s of Being a Commissioner;” and “Staff, Customer Service, Burnout.” Numerous subheadings under each section cover everything from controversial issues, setting an agenda, dealing with difficult people, working effectively with elected officials (the two topics are not mutually exclusive), how to gauge public opinion, media relations and partnering with schools.

The book’s important and welcome message, as seen through its focus, is both on the need for planning boards to reach out to the public in order to be understood (and appreciated), and to create an atmosphere at meetings that respects all board members. For example:

*“Speak in well understood words and phrases. Even lay planning commissioners...can start talking in ‘plannerese.’ Avoid jargon whenever you can, but if you must use words or acronyms such as infill, density bonuses, PUDs, or others particular to your location, explain what they mean...the message is most powerful when citizens such as yourselves talk to other citizens.”*

The New York Planning Federation receives several calls a month from planning board or ZBA members asking how they can effectively deal with the public and with one another. Reading “*Now That You’re On Board*” and taking some of its easy-to-follow suggestions to heart is a good place to start. ❖

*“Now That You’re On Board” may be ordered directly from the publisher by visiting [www.plannersweb.com/onboard.html](http://www.plannersweb.com/onboard.html) or calling 802 864 9083. The book costs \$23.00 plus shipping and handling.*

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**Save the Date!**  
 NYPF’s Annual Planning &  
 Zoning Conference will be in  
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 October 8<sup>th</sup>-10<sup>th</sup>.



## NEW YORK PLANNING FEDERATION PUBLICATIONS

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✓ **The Short Course: A Basic Guide for Planning**

**Boards and Zoning Boards of Appeals in NYS** by Harry J. Willis, David Church, and James W. Hotaling (83 pg.) Updated in 2006. A review of the full range of knowledge and skills needed by planning or zoning officials. Awarded the 1996 Public Education Award by the American Planning Association Upstate New York Chapter. \$18.00 (M) / \$20.00 (NM) + \$3.00 s/h. Bulk rates for 5+ copies.

✓ **A Practical Guide to Comprehensive Planning**

David Church & Cori Traub. Updated 2002. (88 pg. illustrated). An overview of the importance of planning and the steps involved in preparing a comprehensive plan. Includes case studies. \$16.00 (M) / \$18.00 (NM) + \$3 s/h. Bulk rates for 5+ copies.

✓ **Land Use Training and Certification School** Hard copy with CD of the nine on-line training courses developed by Pace University Land Use Law Center. Recommended as part of requisite new four-hour training bill. \$50.00 (M), \$60.00 (NM) plus \$5.00 s/h.

✓ **Rural Development Guidelines, Hamlet Design**

**Guidelines, & Building Form Guidelines** 3-volume set by Joel Russell, Anne Tate w/ Dutchess Co. Dept. of Planning, et.al., 1994. Helpful principles and numerous illustrations demonstrate better design in development. \$15.00 for 3-volume set, +\$3.00 s/h. Single volumes available for \$6.00 + \$1.50 s/h.

✓ **Model Cell Tower Ordinance** by Federation staff. A short article and model ordinance. Free to members, \$5.00 non-member. May be downloaded from [www.nypf.org](http://www.nypf.org).

✓ **Adult Entertainment Tech Memo** a 12-page brochure prepared by Lydia R. Marola, Esq. Village of Scotia attorney, and Rebecca Lubin, AICP. Free to members, \$5.00 non-members. May be downloaded from [www.nypf.org](http://www.nypf.org).

✓ **The Interaction of Commercial Forestry with Town Government in New York State** NYS Forest Resources Development Council, 1995. Results and analysis of a survey on local attitudes and regulations addressing timber harvesting. \$6.00 + \$3.00 s/h

✓ **A Municipal Official's Guide to Forestry in New York State** by Katherine H. Daniels, AICP (28 pg. illustrated). A joint publication of NYPF, NYS Dept. of Environmental Conservation and Empire State Forest Products Assn. Free with \$3.00 s/h.

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