APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

20-4252

[Filed: August 25, 2021]

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of August, two thousand twenty-one.

PRESENT:

RENNA RAGGI,
DENNY CHIN,
MICHAEL H. PARK,
Circuit Judges.

DONALD A. VANDERVEER,

***Plaintiff-Appellant*,**

v. **20-4252**

ZONING BOARD OF APPEALS TOWN OF EAST HAMPTON, JOHN P. WHELAN, Zoning Board of Appeals Chairperson, SAMUEL KRAMER, Zoning Board of Appeals Chairperson, ROY DALENE, Member of The Town of East Hampton Zoning Board of Appeals, THERESA BERGER, Member of The Town of East Hampton Zoning Board of Appeals, TIM BRENNEMAN, Member of The Town of East Hampton Zoning Board of Appeals, ANN M. GLENNON, Town of East Hampton Principal Building Inspector, ELIZABETH L. BALDWIN, Assistant East Hampton Town Attorney, TOWN OF EAST HAMPTON,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:

PATRICIA WEISS, Law Office of Patricia Weiss, Esq., Sag Harbor, NY.

FOR DEFENDANTS-APPELLEES:

SCOTT J. KREPPEIN, Devitt Spellman Barrett, LLP, Smithtown, NY.

Appeal from the United States District Court for the Eastern District of New York (Block, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court entered on December 2, 2020, is **AFFIRMED**.

This case concerns a land-use dispute in the Town of East Hampton, N.Y. (the "Town"), where plaintiff-appellant Donald Vanderveer owns a four-acre lot with a barn. In 2012—over fifty years after the Town enacted its first zoning ordinance and designated Vanderveer's property as residential—Vanderveer started leasing space on his property to a landscaping company. After the Town prosecuted Vanderveer for misdemeanor violations of its zoning ordinance, convictions eventually vacated, Vanderveer applied to the Town's building inspector for recognition of a pre-existing nonconforming use. *See People v. Vanderveer*, No. 2016-256 S CR, 2021 WL 1618053, at *2 (N.Y. App. Term Apr. 22, 2021). The building inspector ruled against Vanderveer, and the Town's Zoning Board of Appeals (the "ZBA") and the Suffolk County Supreme Court affirmed. Vanderveer then sued in federal court, alleging that the Town, the ZBA, and several of its

officials (together, "Defendants") violated the Takings, Equal Protection, and Due Process Clauses. *See* U.S. Const. amends. V, XIV. The district court granted Defendants' motion to dismiss for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), and denied Vanderveer's cross-motion for a preliminary injunction. On appeal, Vanderveer argues that the district court erred in dismissing each of his claims and requests that we grant him a preliminary injunction and certify questions to the New York Court of Appeals. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

"We review *de novo* a district court's dismissal of a complaint under Rule 12(b)(6)." *Mayor of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013). In so doing, "we accept all factual allegations as true and draw every reasonable inference from those facts in the plaintiff's favor." *Id.*

1. Takings Clause

First, Vanderveer contends that the Town's zoning regulations violated his rights under the Takings Clause. Where, as here, the government "imposes regulations that restrict an owner's ability to use his own property," we "generally appl[y] the flexible test developed in *Penn Central*, balancing factors such as [1] the economic impact of the regulation, [2] its interference with reasonable investment-backed expectations, and [3] the character of the government action." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071–72 (2021) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

Vanderveer's claim fails under this framework. As an initial matter, he is prohibited from using his property for commercial use, and so the ordinance likely carries at least some economic impact. Nevertheless, Vanderveer is permitted to develop the lot residentially, and it maintains significant value. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017) (finding that "the economic impact of the regulation is [not] severe" because, *inter alia*, the plaintiffs "can use the property for residential purposes"). Further, Vanderveer's $12,000 annual earnings from his commercial use are just a fraction of the value of the property, which is listed for tax purposes as exceeding $300,000 in every year he has rented it. And the Supreme Court has concluded that where regulations diminish a property's value by less than 10%, the economic impact felt by plaintiff is not sufficiently severe to constitute a taking. *Id.* at 1942 ("The expert appraisal relied upon by the state courts [which found the value of the property would be reduced by less than 10%] refutes any claim that the economic impact of the regulation is severe."). Accordingly, Vanderveer failed to plausibly allege that the economic impact of Defendants' actions could support a Takings Clause claim. Vanderveer also failed to plausibly allege that Defendants interfered with Vanderveer's reasonable, investment-backed expectations. Vanderveer submits that his "payment of taxes, and clearing growth for vehicle turn around routes, and cleared storage areas, adequately demonstrates an investment backed expectation." Appellant's Br. at 27. But the cost of clearing growth is *de minimis*, and tax payments are not an "investment." Moreover, even if they could be considered substantial investments, they would not be

"reasonable" ones in light of the zoning ordinance, which went into effect long before Vanderveer inherited the property. The third *Penn Central* factor—the character of the Town's action—likewise favors Defendants because the ordinance at issue is merely a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. Accordingly, Vanderveer has failed to state a Takings Clause claim.

2. Equal Protection Clause

Second, Vanderveer claims that the district court erred in dismissing his equal protection claim. To plausibly state that an otherwise valid law was applied in a manner that violated the Equal Protection Clause, Vanderveer must allege "that []he has been intentionally treated differently from others similarly situated" and either (1) "there is no rational basis for the difference in treatment," *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 140 (2d Cir. 2010) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)) (describing a "class of one" claim), or (2) "that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person," *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 40 (2d Cir. 2018) (internal quotation marks omitted) (describing a "selective-enforcement" claim). Vanderveer's claim fails under either standard because he has not identified any reasonably similar comparators. Vanderveer focuses on 38 School Street, but that property is distinguishable. It runs adjacent to

commonly owned parcels for which the owners obtained a certificate for a pre-existing "residence and tool shed" over fifty years before Vanderveer applied for his permit. App'x at 256.

Vanderveer also avers that the district court erred by dismissing his equal protection claim without granting him leave to amend. He submits that he could be more "specific in describing the [property located at 38 School Street] as [a] 'roughly equivalent'" comparator. Appellant's Br. at 34. But the lack of detail is not why that property is an inadequate comparator. Vanderveer has not "identified [any] additional facts or legal theories—either on appeal or to the District Court—[that he] might assert if given leave to amend," and so the district court did not err in dismissing his suit without granting him leave to amend. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014); *see also, e.g.*, *Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied.").

3. Due Process Clause

Finally, Vanderveer raises two Due Process Clause claims, neither of which is availing. First, Vanderveer contends that the Town violated his due process rights by "fail[ing] to afford [him] an opportunity for cross-examination of adverse witnesses" at the ZBA's administrative hearing. Appellant's Br. at 41. In evaluating whether a procedure violates due process, we consider: (1) "the private interest that will be

affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Here, even construing the facts in Vanderveer's favor, the second and third factors weigh against Vanderveer and outweigh his private interest. Vanderveer's application was subject to three levels of review: (1) submission of a written application and evidence to the Town Building Inspector, (2) administrative review by the ZBA, which held a hearing at which Vanderveer and others were permitted to speak and present evidence, and (3) judicial review under Article 78 in the Suffolk County Supreme Court. These procedures greatly reduced the likelihood of erroneous deprivation. *See, e.g.*, *Bens BBQ, Inc. v. County of Suffolk*, No. 20-3254, 2021 WL 1748480, at *3 (2d Cir. May 4, 2021) ("In the circumstances of this case, the written appeal process in addition to the availability of the Article 78 proceeding reduces the risk of erroneous deprivation such that the *Mathews* test does not require additional procedures."). In any event, Vanderveer's complaint about the lack of cross-examination at the ZBA's administrative hearing is unwarranted. The ZBA did not rely on a credibility determination, and there is no reason to believe that cross-examination would have affected its result. To the contrary, the ZBA based its

decision on "extremely compelling" evidence that Vanderveer did not clear his property or use it for outdoor storage (or any nonconforming use) until 2013, including aerial photographs of the property. *See* App'x at 81.

Second, Vanderveer argues that the lack of defined terms for "'Commercial' & 'Abandonment'" renders the Town Code unconstitutionally vague. Appellant's Br. at 35. We disagree that the Code "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Cunney v. Bd. of Trs.*, 660 F.3d 612, 621 (2d Cir. 2011) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). The Town Code provides a clear definition for "abandonment." *See* East Hampton Town Code § 255-1-40(d). And the term "commercial" is commonly used and sufficiently definite in this context. *Cf. Cunney*, 660 F.3d at 620 ("The relevant inquiry . . . is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." (internal quotation marks omitted)). Moreover, it is obvious that leasing property to a landscaping company to store its lawn mowers, trucks, and trailers is a "commercial" use. *See* App'x at 501-02.

Thus, we conclude that the district court correctly dismissed Vanderveer's claims and did not abuse its discretion in denying him a preliminary injunction. Further, because he has not raised any unsettled issues of state law, we deny his motion to certify questions to the New York Court of Appeals.

We have considered Vanderveer's remaining arguments and conclude that they are without merit. For the foregoing reasons, we **DENY** Vanderveer's motion for certification to the New York Court of Appeals and **AFFIRM** the district court's judgment.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No. 2:19-cv-3833-FB-CLP

[Filed: December 1, 2020]

DONALD A. VANDERVEER

Plaintiff,

-against-

ZONING BOARD OF APPEALS, TOWN OF EAST HAMPTON et al.

Defendants.

MEMORANDUM AND ORDER

Appearances:
For the Plaintiff:
PATRICIA A. WEISS, ESQ.
78 Main St., Suite 14
Sag Harbor, NY 11963

For the Defendants:
SCOTT J. KREPPEIN
DEVITT SPELLMAN BARRETT, LLP
50 Route 111, Suite 314
Smithtown, NY 11787

BLOCK, Senior District Judge:

Donald Vanderveer alleges that the Town of East Hampton ("the Town"), its Zoning Board of Appeals

("ZBA") and several Town officials violated the Takings, Due Process and Equal Protection Clauses when they denied his application for recognition of his nonconforming use.[1] The Town moves to dismiss Vanderveer's claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), while Vanderveer cross-moves for a preliminary injunction. On November 17, 2020, the Court heard oral argument on both motions. For the reasons below, the Town's Rule 12(b)(6) motion is granted, Vanderveer's motion for a preliminary injunction denied, and this case dismissed.[2]

I. Background

All facts referenced in this decision are drawn from the Complaint, its attachments and judicially noticeable records of the New York state courts and the Town's ZBA.

The Vanderveer family owns three parcels of land in the vicinity of East Hampton, New York, including one

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[1] The Town officials are the ZBA's five members, Principal Building Inspector Ann Glennon and Assistant Town Attorney Elizabeth Baldwin.

[2] The Court rejects the Town's alternate 12(b)(1) theory, which asks it to abstain from ruling on the constitutional questions in Vanderveer's complaint. *See* ECF No. 33, Ex. 2 at 28-29. Although federal courts do not sit as "zoning boards of appeal to review nonconstitutional land use determinations," they routinely weigh in "when a landowner's constitutional rights are infringed by local zoning actions." *Sullivan v. Town of Salem*, 805 F.2d 81, 81 (2d Cir. 1986) (collecting cases involving constitutional claims and land use).

located at 580 Three Mile Harbor Hog Creek Highway ("the Property"). Two of these parcels of land are "low lying" properties, on which the Vanderveers built a commercial marina and a residential home. The third (the Property) is a residentially zoned 4-acre lot containing a barn. The Vanderveers acquired the Property in 1949, eight years before the enactment of the Town's first zoning ordinance. Vanderveer uses the Property—which he inherited from his mother—to store items for his friends and for himself. He uses some of the stored items at his commercial marina. Since 2012, Vanderveer has leased space on the Property to a landscaping company for $1,000 per month. Since at least 2010, the Suffolk County Tax Assessor has used Code 440, "Storage, Warehouse," to describe the Property. ECF No. 13, Ex. 1.

In June of 2015, the Town filed a misdemeanor information, accusing Vanderveer of violating the Town zoning ordinance. He contested the charges but was convicted on several counts, including Count 2, which alleged that he unlawfully changed the use of the Property from residential to commercial. In July of 2017, Vanderveer applied to the Town Building Inspector (Defendant Ann Glennon) for a "determination that the use of the Property for indoor and outdoor storage is a legally preexisting nonconforming use." ECF No. 13, Ex. 3. In support of this application, Vanderveer submitted (1) many years of tax records; (2) a letter dated December 15, 1954, which designates the Property's only structure a "barn" for tax purposes; (3) several affidavits; and (4) aerial photographs of the Property. In addition, the Building Inspector considered letters submitted by some of

Vanderveer's neighbors in opposition to his applications, legal arguments made by counsel his neighbors had retained, and aerial photos which they claimed showed the absence of commercial use between 1957 and 2010.

In November of 2017, the Building Inspector wrote a letter to Vanderveer, which states: "It is my opinion that there was no evidence of a pre-existing outdoor storage use on [the Property]. The [Property] does have evidence of a pre-existing, non-conforming barn. . . but that does not change the pre-existing residential use of the [Property]." ECF No. 13, Ex. 5. Vanderveer appealed to the ZBA, which adopted the Building Inspector's determination after a public hearing. The ZBA found that (1) Vanderveer did not provide adequate proof that the Property had a nonconforming use when the zoning ordinance was adopted in 1957; and (2) even if such a use had existed, Vanderveer abandoned it by leaving the Property vacant for many decades; and (3) even if Vanderveer had continually used the Property for commercial storage, his decision to rent space to a landscaping company terminated that use as a matter of law. ECF No. 33, Ex. 4 at 3-7. The ZBA did not, however, decide whether the barn on the Property could be used for indoor storage.

Judge Leis of the Suffolk County Supreme Court affirmed the ZBA's decision on Article 78 Review. In a detailed bench ruling, Judge Leis rejected Vanderveer's contention that he was "denied a constitutionally sufficient opportunity to be heard. . . as he was not permitted to question adverse witnesses nor his witnesses." ECF No. 33, Ex. 11 at 3. He reasoned that,

because land-use agencies are "quasi-legislative, quasi-administrative bodies," the hearings they conduct "are informational in nature and do not involve receiving sworn testimony" or require "the cross examination of witnesses." *Id*. at 4 (*citing Halperin v. City of New Rochelle*, 809 N.Y.S. 2d 98, 103-04 (2d Dept. 2005)). He also found the evidence in the record sufficient to support the ZBA's findings, although he stated that he was "bothered" by the Town's failure to provide a clear definition of the term "commercial use." *Id*.

II. Legal Standard

To survive a 12(b)(6) motion to dismiss, a complaint "does not need detailed factual allegations," but "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead, when taken as true, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id*. "In ruling on a 12(b)(6) motion ... a court may consider the complaint as well as any written instrument attached to [the complaint] as well as any statements or documents incorporated in it by reference. ... Moreover, on a motion to dismiss, a court may consider matters of which judicial notice may be taken, [and] documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Kalyanaram v. American Ass'n of University Professors at New York Institute of Technology*, 742 F.3d 42, 44 n.1 (2d Cir. 2014) (internal citations and quotations omitted).

III. Discussion

Vanderveer alleges that (1) the denial of his application resulted in an unconstitutional taking; (2) the Town, ZBA, and state court deprived him of constitutional due process by acting without jurisdiction and refusing to allow cross-examination at a ZBA hearing; (3) the Town violated the Equal Protection Clause by adjudicating his application in a discriminatory manner; (4) the Town deliberately failed to train its personnel not to violate the constitution and (5) as a matter of substantive due process, portions of the Town zoning law are unconstitutionally vague. The Court considers each of these claims in turn.

A. Takings Claim

The Takings Clause of the Fifth Amendment provides that private property "shall [not] be taken for public use, without just compensation." U.S. Const., Amend. V. Under the Takings Clause, the government must compensate a landowner if it effects a "permanent physical occupation" of his property, or if a regulatory action forces him to "sacrifice *all* economically beneficial uses in the name of the common good." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original). In rare cases, government action that merely "impede[s] the use of property without depriving the owner of all beneficial use" may constitute a regulatory taking "based on a complex of factors" enunciated in *Penn Central Transp. Co. v. City of New York*, "including [1] the regulation's economic effect on the landowner, [2] the extent to which the regulation interferes with reasonable investment-backed expectations; and [3] the character

of the government action." *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) (citing *Penn Cent. Transp. Co.*, 438 U.S. 104, 124 (1978)).

Vanderveer does not claim that the Town's denial of his application resulted in a "physical occupation of his property," nor can he plausibly argue that a four acre residentially zoned lot containing a barn has no "economically beneficial use." *See Murr*, 137 S.Ct. at 1949 (finding no "compensable taking" where a landowner "can use the property for residential purposes"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("A regulation permitting a landowner to build a substantial residence. . . does not leave the property 'economically idle'"). Consequently, Vanderveer can only succeed on his Takings claim if he establishes a "non-categorical [regulatory] taking under the. . .Supreme Court's framework in *Penn Central*." *Lebanon Valley Auto Racing Corp. v. Cuomo*, 2020 WL 4596921, at *7 (N.D.N.Y. Aug. 11, 2020) (internal citations omitted).

The first *Penn Central* factor—"economic effect on the landowner"—is also the one on which Vanderveer makes his strongest showing. In the Complaint, Vanderveer alleges that the Town's denial of his application deprived him of "the ability to store and warehouse his own chattels and property needed for his marina business. . . [and resulted in the] loss of financial compensation derived from warehousing others' chattels."[3] ECF No. 13 at 20-21. Read together

[3] Vanderveer further alleges that the denial of his application would expose him to "repeated. . . charges for town violations

with the record in the light most favorable to Vanderveer, these allegations suggest that the Town's refusal to allow storage on the Property costs Vanderveer $12,000 per year in rent plus an unspecified amount in costs associated with commercial storage. This is a real economic impact. Nonetheless, because Vanderveer does not allege that the Town's denial of his application "effectively prevented [him] from making any economic use of the [Property]," this factor bears less weight in the Court's analysis than it might otherwise. *Cf. Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014) (weighing "economic effect" factor in favor of a taking where a town planning board "effectively prevented" a developer from developing a vacant property for almost 10 years). On the contrary, the record shows and the parties conceded at oral argument that Vanderveer may still construct a residence on the Property, a use the Supreme Court has found to be economically significant.[4] *See Murr*,

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(misdemeanors), which can lead to fines and imprisonment in the county jail." ECF No. 13 at 21. However, these effects are remote from the regulatory takings analysis, which focuses on the harm *complying with a regulation* would cause to a landowner's property, not the harm that might result from noncompliance. *See*, *e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (regulation that caused mining corporation to lose 2% of its raw materials was not a regulatory taking); *Elmsford Apartment Associates, LLC v. Cuomo*, 2020 WL 3498456, at *9 (S.D.N.Y. Jun. 29, 2020) (regulation that prohibited collection of rent from an unspecified percentage of tenants on a property was not a regulatory taking).

[4] Because "[the] use of the barn on the [Property] for commercial indoor storage [was] not. . .before the [ZBA]," the ZBA's ruling affects the use of the Property for outdoor commercial storage *only*.

137 S.Ct. at 1949 (no "compensable taking" where a landowner "can use the property for residential purposes"); *Palazzolo*, 533 U.S. at 631 ("A regulation permitting a landowner to build a substantial residence. . . does not leave the property 'economically idle'").

By contrast, the second *Penn Central* factor—"interfere[nce] with reasonable, investment-backed expectations"—strongly supports a finding that no taking occurred. Vanderveer does not allege that he invested time or money in the Property and provides no caselaw to support his claim that there is no difference between an "inheritance backed expectation" and an "investment-backed expectation." *See* ECF No. 34 at 11. Moreover, even if Vanderveer is correct that the common-law concept of tacking—which ordinarily applies in the context of adverse possession—somehow permits him to take credit for the investments his ancestors made in the Property, he has not alleged that his ancestors invested in the Property. Vanderveer therefore fails to establish any "investment backed expectation" related to the Property, let alone one that transforms the Town's actions into a regulatory taking. *Cf. Sherman*, 752 F.3d at 565 (developer who invested 5.5 million dollars to build a residential complex in a residentially zoned area had a "reasonable, investment-backed expectation").

ECF No. 13, Ex. 2 at 2 *see also* ECF No. 13, Ex. 5 (explaining that the Property's "pre-existing, non-conforming barn. . . would be able to exist" under the current zoning scheme). The Property therefore retains at least some economic value as a storage site.

Finally, the "character of [the Town's] action" supports a finding that no taking occurred. In *Penn Central*, the Supreme Court explained that a taking "may more readily be found when the interference with property can be characterized as a physical invasion. . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common-good." *Penn Central*, 438 U.S. at 124. Both Vanderveer and the Town agree that a zoning law which eliminates nonconforming uses is a public program to promote the common-good. *Compare* ECF No. 13 at 35 (acknowledging valid public purpose of alleged taking) *with* ECF No. 33, Ex. 2 at 12 (arguing that "public policy" favors the elimination of nonconforming uses); *see also Matter of 550 Halstead Corp.*, 1 N.Y.3d 561, 561 (N.Y. 2003) ("Because nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination"). Accordingly, the Court finds that the Town and ZBA's adjudication of Vanderveer's application was part of a "program. . . to promote the common-good." *Penn Central*, 438 U.S. at 123. Its "character" was not that of a "physical invasion," so this factor supports a finding that no regulatory taking occurred.

For the foregoing reasons, although Vanderveer plausibly alleges economic harm, he has not pleaded facts sufficient to establish a regulatory taking.[5]

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[5] The Supreme Court's holding in *Knick v. Township of Scott, Pennsylvania* does not alter this conclusion. 139 S. Ct. 2162, 2162 (2019). Despite Vanderveer's suggestion to the contrary, *Knick* did

B. Constitutional Due Process Claims

Vanderveer next argues that the Town and ZBA denied him substantive and procedural due process by, *inter alia*, acting without jurisdiction, refusing to allow cross examination before the ZBA and adjudicating his application according to arbitrary standards, ECF No. 13 at 40-42. In order to state a claim for violation of his due process rights (either substantive or procedural), Vanderveer must first establish the existence of a valid property or liberty interest. *See Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995) ("To state a substantive due process claim, a party must first establish that he had a valid property interest in a benefit that was entitled to constitutional protection at the time he was deprived of [it]"); *Galgiardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) ("The deprivation of a procedural right to be heard, however, is not actionable when there is no protected right at stake"). Here, Vanderveer asserts protected property interests in "the continuing commercial use of [the Property] for storage and warehouse" and "a certificate of occupancy to reflect such a commercial use." ECF No.

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not "broaden the term takings" in any way relevant to this case. ECF No. 34 at 12. As the trial court opinion in *Knick* makes clear, that case involved a physical taking. *See Knick v. Township*, 2016 WL 4701549, at *4 (M.D. Pa. Sept. 8, 2016) ("Because Plaintiff's [Second Amended Complaint] alleges a physical taking, this Court need not review the elements of a regulatory taking") *(rev'd on other grounds*, *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162, 2162 (2019)). By contrast, the present case involves a *regulatory* taking.

34 at 19.[6] The Town responds that Vanderveer has no "vested right" to an outdoor storage use under New York law and therefore no protected interest. *See* ECF No. 33, Ex. 2 at 8.

Vanderveer adequately alleges a property interest in the continued use of the Property for outdoor storage. In determining whether a viable property interest has been established for purposes of due process analysis, the Court looks to "existing rules or understandings that stem from an independent source such as state law." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 130 (2d Cir. 1998). Under New York law, a landowner has a protectable "vested interest" in a nonconforming use if "enforcement of the [zoning] ordinance would, by rendering valueless substantial improvements *or businesses* built up over the years, cause serious financial harm to the property owner." *People v. Miller*, 304 N.Y. 105, 108-09 (N.Y. 1952) (emphasis added). The Complaint sufficiently alleges that (1) Vanderveer's has a business of renting the Property to third parties; (2) that business will be rendered "valueless" if the Town fails to acknowledge his nonconforming use; and (3) he will suffer financial

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[6] Vanderveer does not have a viable "liberty interest" in the ZBA's recognition of his nonconforming use. Although Vanderveer alleges that the ZBA's ruling harms his marina business, he does not demonstrate that it "effectively prohibits [him] from engaging in [his] profession or pursuing any job in a given field." *Cityspec, Inc. v. Smith*, 617 F.Supp.2d 161, 169 (E.D.N.Y. 2009). At most, the ZBA ruling is a form of regulation that impacts Vanderveer's marina without depriving him of the ability to earn a living. *See id*. ("[An] unconstitutional deprivation does not occur any time the State regulates a profession").

harm from the loss of his rental business. It therefore alleges a protectable property interest.

1. Procedural Due Process

Because Vanderveer sufficiently alleges a property interest in his nonconforming use, procedural due process requires that the Town provide "an opportunity to be heard in a meaningful manner at a meaningful time" before withdrawing its recognition of that use. *Kaur v. New York State Urban Development Corp.*, 15 N.Y. 3d 235, 260 (N.Y. 2010) (citing *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)). Vanderveer received (1) an opportunity to present evidence to the Building Inspector as required in East Hampton Town Code § 255-1-240(E); (2) a hearing before the ZBA where he and others had the opportunity to speak and present evidence; and (3) an Article 78 hearing before the Suffolk County Supreme Court. Nonetheless, he argues that he was denied a meaningful opportunity to be heard because: (1) the ZBA lacked jurisdiction to review the Town Building Inspector's "opinion," and (2) cross-examination was not permitted at the ZBA hearing.

As for the first argument, East Hampton Town Code § 255-1-40(E) states that "The Building Inspector shall make a determination as to the application [for a nonconforming use]," and § 255-8-30 gives the ZBA jurisdiction to review "applications brought by aggrieved persons from interpretations of provisions of this chapter made by the Building Inspector or for review of other ... determinations made by him." Vanderveer submitted an "application for a determination," the Building Inspector denied it in an

"opinion," and the ZBA reviewed the denial. There is no meaningful difference between an "opinion" under § 255-1-40(E) and a "determination" under the same section.

Vanderveer further argues that "he. . . should have been able to cross-examine any person who did any speaking to the ZBA members at the ZBA hearing in May 2018." ECF No. 40 at 2. Under New York law, "the [ZBA's] actions are to be distinguished from quasi-judicial determinations reached upon a hearing involving sworn testimony." *Sasso v. Osgood*, 86 N.Y. 2d 374, 384 n.2 (N.Y. 1995). Thus, "while parties before a quasi-legislative agency, *such as a zoning board*, have a right to be heard, the forum in which they do so is not a quasi-judicial proceeding involving cross-examination of witnesses and the making of a record."[7] *Francello v. Mendoza*, 87 N.Y.S. 3d 361, 363-65 (3d Dept. 2018) (internal quotations and citations omitted, emphasis added); *Halperin*, 809 N.Y.S. 2d at 103-04.

Nonetheless, Vanderveer claims that he is entitled to a "judicial proceeding" under the Due Process Clause of the federal Constitution. In evaluating his argument, the Court is guided by the well-known *Matthews v. Eldridge* test for "identification of the specific dictates of due process," which weighs: "[1] the private interest that will be affected by the official action; [2] the risk of

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[7] *Knight v. Amelkin*, the case on which Vanderveer relies, is not to the contrary. There, the Court of Appeals simply held that when a ZBA performs a "quasi-judicial function," it must "adhere to its own precedent [or] indicate [its] reason for reaching a different result on essentially the same facts." 68 N.Y.2d 975, 977 (N.Y. 1986).

erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail." 424 U.S. at 335 (internal quotations and citations omitted).

The first factor—Vanderveer's private interest—is entitled to little weight. Although Vanderveer has alleged a protected interest in his nonconforming use, it is not a substantial one. As explained above, the elimination of Vanderveer's nonconforming use does not destroy the Property's economic value and leaves Vanderveer able to use the Property for indoor storage. The "vested interest" allegedly infringed by the Town's denial of his application is thus Vanderveer's interest in renting the Property for approximately $12,000 per year.[8] ECF No. 13 at 20-21. This interest is not *de minimis*, but it cannot be fairly compared to the interests in welfare benefits, disability benefits or licenses that were at stake in cases like *Goldberg v. Kelly*, 397 U.S. 254, 254 (1970), *Matthews v. Eldridge*, 424 U.S. at 319, and *Bell v. Burson*, 402 U.S. 535, 535 (1971). Accordingly, Vanderveer's "private interest" in the nonconforming use is entitled to relatively little weight.

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[8] Because Vanderveer's "vested" property interest in the nonconforming use stems from the "businesses" he allegedly built on the Property, the Court believes the "value" of the nonconforming use is roughly equivalent to the value of the business he would allegedly lose if deprived of the use.

By contrast, the second factor—likelihood of erroneous deprivation and efficacy of additional procedure—weighs decisively against Vanderveer. In a letter submitted to the Court after oral argument, Vanderveer argues that cross examination is required "whenever reliability and credibility are issues." ECF No. 40 at 2. But the record suggests that the ZBA's decision did not rely on the statements of any particular speaker. Rather, the ZBA relied in the first instance, on deficiencies in the documentation Vanderveer provided, and in the second, on a series of "extremely compelling" aerial photographs that "showed an almost cleared property" covered in vegetation, not stored materials. ECF No. 13, Ex. 2 at 3-4 (noting the absence of documents in the record and discussing "especially persuasive" aerial photographs).

While Vanderveer makes much of Judge Leis's reference to a "horseback rider" whose statements the ZBA *could have* used to support its alternate conclusion that Vanderveer abandoned his nonconforming use, the horseback rider is not mentioned in the ZBA's decision. *Compare* ECF No. 13, Ex. 2 *with* ECF No. 33, Ex. 11. In any event, the Court is not convinced that cross-examination of this horseback rider would substantially reduce the "likelihood of an erroneous deprivation," where (1) the ZBA's decision rests primarily on a finding that Vanderveer failed to submit adequate documentary evidence; and (2) Vanderveer was previously convicted of changing the Property's use *after a trial that permitted cross-examination*.

Moreover, the availability of Article 78 review greatly reduces the likelihood of an erroneous

deprivation. *See Brady v. Town of Colchester*, 863 F.2d 205, 210 (2d. Cir. 1988) (rejecting procedural due process challenge where the state courts "[provided] a state forum to review the constitutionality of the defendant's actions"); *Campo v. New York City Employees Retirement System*, 843 F.2d 96, 102-03 (2d Cir. 1988) (holding that an Article 78 proceeding satisfied the requirements of procedural due process).

Finally, the public interest in zoning enforcement is significant. As stated above, "nonconforming uses are viewed as detrimental to zoning schemes, [and] public policy favors their reasonable restriction and eventual elimination." *Matter of 550 Halstead Corp.*, 1 N.Y.3d at 561. Additionally, state guidance documents identify the risk that a large public hearing will "get out of hand and degenerate into a name-calling session" as a reason to "limit" the right of cross-examination at zoning board hearings. New York State Division of Local Government Services, *Zoning Boards of Appeals: James A. Coon Local Government Technical Series*, 1, 32 (2015). The state therefore claims a secondary interest in conducting zoning board hearings in a relatively informal manner.

"[Due] process in the administrative setting does not always require application of the judicial model" and is less likely to do so in the absence of affirmative state action. *Dixon v. Love*, 431 U.S. 105, 115 (1977). Here, although the outcome of the ZBA hearing affects Vanderveer's property interest in his rental business, the hearing was not held for the purpose of extinguishing that interest. *Cf. Kelly*, 397 U.S. at 254 (revocation of welfare benefits); *Eldridge*, 424 U.S. at

319 (revocation of social security benefits *Burson*, 402 U.S. at 535 (revocation of driver's license); *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 790 (2d Cir. 2007) (town-initiated proceeding to revoke or modify special use permit). Rather, the process that led to this action began when Vanderveer sought a hearing for the purpose of clarifying the extent of his interest in the Property.

Vanderveer is not like a license-holder facing a revocation proceeding that could result in the complete destruction of his protected interest. His procedural due process claim is without merit.

3. Substantive Due Process

Vanderveer also makes a substantive due process argument that the ZBA employed vague and arbitrary definitions of the terms "commercial" and "change in use" when it found that "storage on the Property was not commercial in nature" or, in the alternative, that the use changed to "Service, Commercial." ECF No. 13 at 41, 55; *see also* ECF No. 13, Ex. 2. He alleges that the ZBA should have found that his use of the Property to store items for his marina was a preexisting "commercial use," which had not been discontinued or changed since 1949. ECF No. 13 at 30. Like the Suffolk County Supreme Court, this Court is troubled by the lack of an explicit definition of the term "commercial use" in the Town Code. *See* ECF No. 33, Ex. 11. Nonetheless, the absence of this definition does not, by itself, violate Vanderveer's right to substantive due process. Notably, the ZBA found that Vanderveer had abandoned his use of the outdoor space on the Property for any kind of storage, not just "commercial" storage.

See ECF 13, Ex. 2 at 6 (finding "aerial photographs [that] depict an almost cleared property" to be "extremely compelling"). *Cf. Cunney v. Board of Trustees of Village of Grand View, N.Y.*, 660 F.3d 612, 626 (2d Cir. 2011) (reversing holding that substantive due process was not violated where zoning board had relied solely on unconstitutionally vague term in ordinance). In any event, the ZBA's denial of Vanderveer's application on the theory that Vanderveer "abandoned" all nonconforming use of the Property was not "arbitrary, oppressive or conscience shocking."[9]

C. Equal Protection Claim

Vanderveer also attempts to establish a "class of one" equal protection claim. "Class of one plaintiffs must show an extremely high degree of similarity between themselves and persons to whom they compare themselves." *Ruston v. Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010). In the context of a land-use case, a plaintiff may avoid dismissal by alleging that "properties sufficiently similar to theirs were treated more favorably." *Id*. Here, Vanderveer identifies three properties as possible comparators: 13 Washington Avenue, East Hampton, NY; a property adjacent to Vanderveer's; and an unidentified property located in "The Springs" district of East Hampton. ECF No. 13 at 52.

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[9] Vanderveer also argues that the ZBA relied on an unconstitutionally vague definition of "abandonment." ECF No. 13 at 2. That term is explicitly and clearly defined in the Town Code and the ZBA's opinion. ECF No. 13, Ex. 2 at 5-6 (*citing* Town Code § 255-1-40D).

Regardless of whether the Court adopts the "extremely high degree of similarity" standard or the "reasonably similar standard" Vanderveer prefers, these properties are insufficiently similar to Vanderveer's. *Compare Ruston*, 610 F.3d at 59 *with Hu v. City of New York*, 927 F.3d 81, 91 (2d Cir. 2019) (discussing circuit split in standards applied to "class of one" equal protection claims). As to the 13 Washington property, Vanderveer admits that it is a "commercially zoned property," whereas the Property is residentially zoned. ECF No. 34 at 25. It is therefore hardly surprising that the Town has not objected to the use of that property for commerce. As to the second property, Vanderveer fails to allege that his neighbors ever applied for a determination of nonconforming use. It is therefore impossible to say whether the Town would treat them differently, or whether a rational basis for discrimination would exist. Finally, Vanderveer's allegations regarding the third property are vague and conclusory.

Without a valid comparator, Vanderveer's equal protection claim must be dismissed.

D. Other Claims

Because the Court finds no violation of Vanderveer's rights, there is no basis for an action for failure to train under 42 U.S.C. § 1983, or for entry of a judgment declaring portions of the Town Code unconstitutional. These claims are dismissed.

CONCLUSION

For the foregoing reasons, the Town's motion to dismiss is GRANTED and Vanderveer's motion for a

preliminary injunction is DENIED as moot. The case is DISMISSED.

SO ORDERED.

/S/ Frederic Block
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
November 30, 2020

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19-cv-3833-FB-CLP

[Filed: December 2, 2020]

DONALD A. VANDERVEER,

Plaintiff,

v.

ZONING BOARD OF APPEALS, TOWN OF EAST HAMPTON et al.,

Defendants.

JUDGMENT

A Memorandum and Order of the Honorable Frederic Block, United States District Judge, having been filed on December 1, 2020, granting the Town's motion to dismiss; denying Vanderveer's motion for a preliminary injunction as moot; and dismissing this case; it is

ORDERED and ADJUDGED that the Town's motion to dismiss is granted; that Vanderveer's motion for a preliminary injunction is denied as moot; and that the case is dismissed.

Dated: Brooklyn, New York
December 2, 2020

Douglas C. Palmer
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 20-4252

[Filed: October 14, 2021]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of October, two thousand twenty-one.

Donald A. Vanderveer,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
Zoning Board of Appeals Town of East Hampton, John P. Whelan, Zoning Board of Appeals Chairperson, Samuel Kramer, Zoning Board of Appeals Chairperson, Roy Dalene, Member of The Town of East Hampton Zoning Board of Appeals, Theresa Berger, Member of The Town of East Hampton Zoning Board of Appeals, Tim Brenneman, Member of The Town of East Hampton Zoning Board of Appeals, Ann M. Glennon, Town of East Hampton	)

Prinicipal Building Inspector, Elizabeth L. Baldwin, Assistant East Hampton Town Attorney, Town of East Hampton,

Defendants - Appellees.

ORDER

Docket No: 20-4252

Appellant, Donald A. Vanderveer, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8 ("Commerce Clause")

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

….."

United States Constitution, Article VI, cl. 2 ("Supremacy Clause")

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Civil Practice Law and Rules § 7803 Questions raised

The only questions that may be raised in a proceeding under this article are:

[* * *]

3. whether a determination was made in violation of lawful procedure, was affected by an error law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion are to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

[* * *]

New York Civil Practice Law and Rules § 7804 Procedures

[* * *]

(g) Hearing and determination; transfer to appellate division. Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not

terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.

Town of East Hampton Zoning Code § 255-1-40:

§ 255-1-40 (A) Nonconforming use permitted to continue. Every nonconforming use may be continued in the building or structure or upon the lot or land which it occupies after the effective date of this chapter [& amendments/revisions] unless this chapter [or amendments/revisions] includes explicit language providing for the limitation or termination of such use."

[* * *]

§ 255-1-40 (D) Abandonment. A nonconforming use which is abandoned shall be deemed to have ceased to exist for all purposes hereunder and shall not thereafter be carried on. Such abandonment of a nonconforming use shall occur … when the use is discontinued …. when the use is discontinued …. when the use is discontinued…"

[* * *]

"§ 255-1-40 (E) Determination of a nonconforming use. The following procedures must be followed prior to the determination of a legally preexisting nonconforming use by the Chief Building Inspector…"

[* * *]

New York Municipal Home Rule Law § 10
General powers of local governments to adopt and amend local laws

1. In addition to the powers granted in the constitution, the statute of local governments or in any other law,

   (i) Every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government and,

   (ii) Every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than property, affairs or government of such local government:

      a. A county, city, town or village ….

      [* * *]

      (11) The protection and enhancement of its physical and visual environment.

(12) The government, protection, order, conduct, safety, health and well-being of persons or property therein. This provision shall include but not be limited to the power to adopt local laws providing for the regulation or licensing of occupations or businesses provided, however, that: ….”

[* * *]

New York Real Property Tax Law § 305(2)
Assessment methods and standards

[* * *]

2. All real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment) except that, if the administrative code of a city with a population of one million or more permitted, prior to January first, nineteen hundred eighty-one, a classified assessment standard, such standard shall govern unless such city by local law shall elect to be governed by the provisions of this section.

New York Town Law § 136

The town board may provide by ordinance for the licensing and otherwise regulating of:

1. Auctioneers, employment agencies, collateral loan brokers, junk dealers and dealers in second hand articles; the running of public carriages, cabs, hacks, carts, drays, express wagons, automobiles or other vehicles for the transportation of persons or property over or upon the streets of a town for hire, and soliciting either on private property or on the public highway or running therefor, or for hotels, boats, lodging houses or garages; auctioneering, hawking and peddling, except the peddling of meats, fish, fruit and farm produce by farmers and persons who produce such commodities.

2. The doing of a retail business in the sale of goods of any description within the limits of the town from canal boats, in the canals, or from the lands by the side of such canals and within the boundary lines thereof, or from boats on a lake or river, except products of the farm and unmanufactured products of the forest.

3. Circuses, theatres, motion picture houses, shows or other exhibitions or performances, the keeping of billiard or pool rooms, bowling alleys, shooting galleries, skating rinks, amusement parks and other similar places of amusement, for money or hire; or the giving of exhibitions, performances or entertainments in any place within the town.

4. The use of any public hall or opera house; but such place shall not be licensed unless it has suitable and safe means of ingress and egress in case of panic or fire.

5. The running of restaurants, eating places, lunch counters, soft drink counters or similar places for the sale for consumption upon the premises of beverages of any class or description.

6. The use of any hall or place other than private homes for dancing whether in connection with some other use of the premises or otherwise, whether or not such dancing is open to the general public.

7. In a town of the first or second class, the doing of plumbing, heating, ventilating and electrical work; provided, however, that employees of public service corporations shall not require a license while engaged in the work of such corporations.

8. The collection of garbage.

9. In any town in a county having a population of more than seven hundred fifty thousand, other than a county wholly included in a city, the running, operation or conducting the business of a laundromat, launderette or other coin operated machine establishment for clothes washing, drying or dry cleaning or any combination of such operations.

10. The running of hotels, inns, boarding houses, rooming houses, lodging houses and associations

or clubs furnishing services ordinarily furnished in hotels, inns, boarding houses, rooming houses and lodging houses.

11. The running, operation or conducting business of house trailer camps, tourist camps, or similar establishments.

12. In any town in the counties of Cortland, Erie, Monroe and Suffolk, or in a county adjoining a city having a population of one million or more, or in any town adjacent to such a county, the operation and use of any lands or premises for the excavation of sand, gravel, stone or other minerals and the stripping of top soil therefrom.

13. The running, operation or conducting the business of riding stables, riding academies, or similar establishments.

14. The running, operation or conducting the business of raising mink.