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APPELLATE DIVISION HOLDS THAT MANDATORY SECTION 8 PARTICIPATION LAW VIOLATES FOURTH AMENDMENT

By Curtis A. Johnson

In a decision that could reshape the landscape for landlords across the country, New York's Appellate Division unanimously ruled on March 5, 2026, that the State Human Rights Law violates the Fourth Amendment to the extent it mandates landlord participation in the federal Section 8 housing voucher program. The ruling marks the first time an appellate court has struck down a "source of income" statute and may affect similar laws in at least 19 states and more than 130 municipalities nationwide.

The case stems from a 2019 amendment to New York law that followed New York City's lead in creating a new category of prohibited discrimination — source of income discrimination. Under the law, landlords were barred from making tenant selection decisions based on how prospective tenants proposed to pay rent. Section 8 vouchers were specifically defined as a "lawful source of income," effectively making it illegal for landlords to decline participation in the otherwise voluntary federal Housing Choice Voucher program. Landlords who refused faced prosecution by the New York State Division of Human Rights and the Attorney General's office.

The constitutional issues arise from the requirements landlords must satisfy to participate in Section 8. Before joining the program, landlords must open their rental buildings for inspection by a Public Housing Authority (PHA). After inspections, landlords are required to sign Housing Assistance Payment (HAP) contracts, the terms of which are set by federal regulation. These contracts require landlords to give PHAs and the U.S. Department of Housing and Urban Development (HUD) access to their entire rental buildings, business records, and computers, equipment, and

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facilities containing such records — potentially exposing landlords' homes, phones, and personal computers to warrantless searches.

The constitutional defense was raised by Jason Fane's Ithaca Renting Company and its affiliates, who declined to participate in the voluntary federal Section 8 program due to privacy concerns. When the Attorney General sued Mr. Fane and the companies seeking monetary penalties, mandatory future Section 8 participation, and a requirement that the landlords set aside units exclusively for Section 8 tenants, the defendants raised several defenses, including that the State's law violates the Fourth Amendment. They relied on *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981), arguing that the government cannot compel landlords to waive their Fourth Amendment rights.

The Fourth Amendment protects citizens from unreasonable searches and seizures, including warrantless searches. In *Sokolov*, the New York Court of Appeals held that landlords could not be coerced into allowing village inspectors entry into apartments as a condition of renting them out. The court found that a law imposing penalties on landlords who rented apartments without first having them inspected violated the Fourth Amendment because it coerced landlords into waiving constitutional rights. In a companion decision, the Court of Appeals held that local inspection laws pass constitutional muster when they allow landlords to refuse consent and contain a mechanism by which inspectors can obtain a warrant. Critically, Section 8 regulations contain no such warrant mechanism.

The lower courts agreed with the landlords. In June 2023, in *People v. Commons West, LLC*, 80 Misc. 3d 447 (Sup. Ct. Tompkins Cnty. 2023), Supreme Court Justice Mark G. Masler dismissed the Attorney General's enforcement action on Fourth Amendment grounds. When the Attorney General sought to renew her arguments, Justice Masler held in December 2024 that the Human Rights Law was facially unconstitutional. *People v. Commons West, LLC*, 85 Misc. 3d 1055 (Sup. Ct. Tompkins Cnty. 2024).

Despite Justice Masler's rulings, the Division of Human Rights and housing advocacy groups such as Housing Rights Initiative continued to bring new claims and find probable cause against landlords who declined Section 8 participation — reasoning that trial court decisions carry no precedential weight outside the specific case. The Appellate Division's ruling changes that calculus: its decision applies statewide,

The decision came over the objections of advocacy groups. The ACLU, NYCLU, and several legal and housing advocates submitted amicus briefs defending the state law, largely on public policy grounds. The Appellate Division acknowledged these arguments but was not persuaded, noting that while the goals of the law were "laudable," good intentions could not overcome its constitutional deficiencies.

The New York ruling follows a similar decision from a federal court in Missouri. In *Jones v. City of Kansas City, Missouri*, 2025 U.S. Dist. LEXIS 121974 (W.D. Mo. Feb. 11, 2025), the court reached the same conclusion regarding source of income laws that compel Section 8 participation. Before that case could progress further, the State of Missouri passed legislation preempting the Kansas City law and excluding Section 8 vouchers from the definition of source of income.

The matter is now on appeal to the New York Court of Appeals. The Attorney General filed a motion seeking confirmation of an automatic stay of enforcement or, alternatively, a discretionary stay. While each Appellate Division has ruled that declaratory judgment decisions are not subject to the state's automatic stay under CPLR 5519(a)(1), the Court of Appeals recently denied the Attorney General's motion as unnecessary with a single citation to a 1985 decision which acknowledged in dicta that the automatic stay applied to a law that had been struck down by the Appellate Division, essentially holding that the automatic stay applies here.

For now, enforcement activity has paused. The Division of Human Rights has voluntarily placed pending Section 8 discrimination cases on hold awaiting either a ruling that the Third Department's decision is stayed

or a final decision from the Court of Appeals. The Attorney General's office also appears to have halted litigation threats against parties accused of Section 8-based source of income discrimination.

Landlords and real estate attorneys should continue to monitor developments as the Court of Appeals considers the appeal. The outcome will have significant implications for property owners throughout New York State and may influence the trajectory of similar laws across the country.

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DEVELOPMENT

QUESTIONS OF FACT REMAIN ABOUT APPLICATION OF SPECIAL FACTS EXCEPTION

Matter of Stewart Hill, LLC v. Town of New Windsor
2026 WL 681634 and 2026 WL681616
AppDiv, Second Department.
(memorandum opinions)

In two separate proceedings by landowner challenging a local law, the town appealed from Supreme Court determinations denying the town's motions for summary judgment and holding that landowner's site plan application was exempt from the town's moratorium. The Appellate Division affirmed the judgment directing that the site plan was exempt, and modified Supreme Court's decision to dismiss some of the challenges to the local law, while holding that questions of fact remained about whether the special facts exception required courts to evaluate landowner's application under the zoning laws in effect at the time the application was submitted.

In 2017, landowner submitted a site plan application to develop a business park. In 2019, the town planning board adopted a negative declaration under SEQRA regarding the project. Then, in February 2020, the town board established a moratorium on development approvals, with an exception for approval of a subdivision application that has already received a negative SEQRA declaration. (Landowner did not need subdivision approval, and its project was not encompassed by the exception). In 2021, the town updated its zoning ordinance to rezone certain areas, including landowner's parcel, from light industrial use to residential use. Landowner then brought these proceedings challenging the moratorium and the rezoning. In one proceeding, Supreme Court invalidated the moratorium. In the other proceeding, Supreme Court denied the town's motion for summary judgment on landowner's claims that it had acquired vested rights, that the town had failed to comply with SEQRA, that some of the new zoning definitions were unconstitutionally vague, and that the amendment did not bear a substantial relation to the community's health, welfare, and safety. The town appealed from both determinations.

In affirming the order holding the project exempt from the moratorium, the Appellate Division held that there was no rational basis for the moratorium to include an exception for subdivision applications that had

received negative SEQRA determinations while denying a similar exemption for other applications that had received negative SEQRA determinations. In modifying the Appellate Division's other order, the court rejected landowner's claim that the ordinance was an invalid exercise of the police power, that the amendment was unconstitutionally vague, and that the town failed to comply with SEQRA. But the court upheld denial of the town's motion with respect to the vested rights claim, concluding that questions of fact remained about whether the "special facts exception" required the court to apply the law in effect at the time of landowner's application. The court concluded that the landowner had raised questions of fact about whether, in light of the town's delays, landowner should be entitled to have its application adjudicated under the zoning resolution I effect at the time the ordinance was enacted.

COMMENT

Although New York courts typically apply the zoning ordinance in effect at the time of their decision, the Court of Appeals in *Pokoik v. Silsdorf*, 40 N.Y.2d 769 (1976) held that where a municipality engages in "dilatory tactics" to deny a petitioner a building permit to which he was otherwise entitled by right under the then-existing ordinance, the court should apply the zoning ordinance in effect at the time the application was submitted. The court held the "special facts exception" applicable because landowner's proposed addition of a fifth bedroom, bathroom, den and deck to his house would have been fully within the confines of the then-existing ordinance, but the zoning board of appeals, fearing that landowner would rent out the new addition in violation of the zoning ordinance, delayed action on an appeal of a building permit denial until the town passed a new ordinance permitting a maximum of four bedrooms per home in the district. *Id.* at 770–71.

If landowner does not have an entitlement to the permit under the zoning ordinance in effect at the time of application, the exception does not apply. For example, in *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 21 N.Y.3d 729 (2013), the court, in upholding the Appellate Division's refusal to apply the exception, held that the exception was inapplicable because Landowner, who was seeking to build a Lowe's Home Improvement store on the 17-acre parcel could not demonstrate that it was entitled to a building permit as a matter of right, given that its proposed building plan would not have been compliant with the zoning ordinance in place at the time, which prohibited commercial buildings on sites of five acres or more.

Even when landowner has a clear right under the original ordinance, the exception does not apply if the municipality has a legitimate reason for delay. For example, in *Preble Aggregate, Inc. v. Town of Preble*, 263 A.D.2d 849 (3d Dep't. 1999), the court, in upholding the Supreme Court's refusal to apply the exception for a mining company that sought a special use permit to allow it to mine below the water table, found that the town had not engaged in bad faith conduct or unjustifiable delay in considering the application. The town had appealed a court order determining that the zoning ordinance at issue had been preempted by state law, and, during the pendency of that appeal, the town passed a new zoning ordinance that prohibited all mining in a geographic area that included the mining company's parcel. The court acknowledged that the town fought landowner's petition but that "[its] action in invoking the legal rights of its residents in order to contest plaintiff's application was not the product of malice, oppression, manipulation or corruption." *Id.* at 850-51. By contrast, in *Hamptons LLC v. Rickenbach*, 98 A.D.3d 736 (2d Dep't 2012), the Second Department, in upholding an application of the exception, found that sufficient evidence had been proffered to demonstrate the municipality's unjustifiable delay in processing the application because the municipality used the delay as a stall tactic in order to pass a new ordinance that would have made the proposed use noncompliant. The court also noted in its decision that credible evidence of a "virtually identical" special use permit being granted to a similarly situated property in the same zoning district had been granted without issue. *Id.*

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USE VARIANCE UPHELD BASED ON ADEQUATE DOLLARS-AND-CENTS PROOF

Matter of Nemeth v. K-Tooling
2026 WL 616300
AppDiv, Third Dept.
(Opinion by Garry, P.J.)

In neighbors' article 78 proceeding challenging grant of a use variance, landowner appealed from Supreme Court's partial grant of the petition. The Appellate Division reversed and dismissed the proceeding, holding that landowner had established the dollars-and-cents proof necessary to sustain the grant of the variance.

Landowner owns a parcel with several structures, including a building used for both residential and manufacturing purposes, and a newer building used solely for manufacturing. The newer building was built in 2001, nearly twenty years after the village enacted a zoning law limiting the parcel to residential use. Despite the zoning ordinance, landowner obtained a building permit for the new building. In 2008, residential neighbors brought an action contending that the manufacturing use constituted a nuisance. In dismissing the nuisance claim, the Appellate Division held that the new building violated the zoning ordinance and enjoined use for manufacturing purposes. After obtaining a stay of the injunction, landowner obtained a use variance, prompting an article 78 proceeding by neighbors. The Appellate Division granted the petition in that proceeding, finding that landowner had not established the requisite hardship. Landowner then brought yet another variance application, but Supreme Court denied the petition, concluding that the ZBA's analysis of self-created hardship was inadequate. The court remitted to the ZBA, and landowner appealed.

In reversing, the Appellate Division concluded that the ZBA's conclusion that the hardship was not self-created was rational in light of the building permit landowner had obtained, even if that permit was issued in error. The court then concluded that landowner had offered sufficient dollars and cents proof that relocating a portion of its manufacturing facility to another building would be cost-prohibitive. As a result, the court held that the ZBA properly granted the use variance.

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QUESTIONS OF FACT ABOUT WHETHER BOARD ACTION REQUIRED A SUPERMAJORITY

Matter of Flatley v. Town of Southold
2026 WL 681627
AppDiv, Second Dept.
(memorandum opinion)

In neighbors' article 78 proceeding challenging the town board's rezoning and subdivision of a parcel of land, neighbors appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division modified to reinstate the neighbors' claims, holding that neighbors had raised questions of fact about whether board action required a three-fourths majority.

In 2018, the town purchased the subject real property and financed the purchase by issuing bonds. The bond resolution stated that the property was to be used for future town recreational purposes. Later, the town board proposed a resolution to subdivide and rezone a portion of the parcel for affordable housing uses. A number of town residents, including one who owned land adjacent to the parcel submitted protests to the resolution, but the board nevertheless approved the resolution by a vote of 4-2. Neighbors then brought this article 78 proceeding challenging the resolution as inconsistent with Town Law section 265(1)(b), which

requires a three-fourths vote to make a zoning change when written protects have been made by the owners of 20% of the area of land immediately adjacent to the affected parcel. Supreme Court dismissed the proceeding and declared the town board's vote valid. Neighbors appealed.

In modifying, the Appellate Division noted that the petition alleged that one of the neighbors who had filed a protest owned more than 20% of the adjacent land. Because the town's submissions did not utterly refute that factual allegation, Supreme Court should not have dismissed the proceeding. The court also held that the petition had set forth sufficient facts alleging that the property had been designated as parkland. If those facts proved true, the public trust doctrine would require state legislative approval to alienate the land.

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NEIGHBOR'S FAILURE TO JOIN LANDOWNER REQUIRES DISMISSAL OF ARTICLE 78 PROCEEDING

Matter of 2214 Rt. 208, LLC v. Town of Montgomery Zoning Board of Appeals
2026 WL 452259
AppDiv, Second Dept.
(memorandum opinion)

In neighbor's hybrid article 78 proceeding and declaratory judgment action challenging the ZBA's determination with respect to landowner's need for an area variance, neighbor appealed from Supreme Court's dismissal of the action and the article 78 proceeding. The Appellate Division affirmed, holding that neighbor's failure to join landowner in the proceeding required dismissal.

In response to landowner's application for a special permit use permitting a gasoline station and convenience store, the ZBA determined that the proposed convenience store could be separated from the remainder of the complex in determining the scope of a needed area variance. Neighbor brought an article 78 proceeding and declaratory judgment action against the ZBA but not the landowner. Supreme Court dismissed for failure to join landowner. Neighbor then filed a second and amended petition and complaint naming both the ZBA and the landowner. Supreme Court dismissed the action and proceeding and neighbor appealed.

In affirming, the Appellate Division first held that landowner was a necessary party in the proceeding, justifying Supreme Court's initial dismissal. The court then held that the second article 78 proceeding was untimely because not brought within 30 days of the ZBA's action. The court then noted that although the statute of limitations on declaratory judgment action is generally six years, when the claim could have been brought in another proceeding with a shorter statute of limitations, the claim is subject to that shorter statute. As a result, neighbor's claims were time-barred.

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APPELLATE DIVISION IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE ZONING BOARD OF APPEALS

Matter of Williams v. Town of Lake Luzerne Zoning Board of Appeals
2026 WL 375019
(Court of Appeals)

In landowner's article 78 proceeding challenging denial of an area variance, the town appealed from the Appellate Division's reversal of Supreme Court's denial of the petition. The Court of Appeals reversed, holding that the Appellate Division had improperly substituted its judgment for that of the zoning board of appeals.

Landowner acquired a home from her parents in 2012, and then acquired an adjoining lot in 2018. She demolished the home on the adjoining lot and built a three-story metal garage on the lot without obtaining a building permit. When the town informed her that the garage violated the zoning ordinance, which prohibits an accessory structure without a principal residence, landowner consolidated the two lots so that the garage would be accompanied by a principal residence. However, the garage was taller than the residence in violation of the zoning ordinance. When landowner sought an area variance to legalize the garage, the zoning board of appeals denied the variance, noting that there were no other accessory structures in the neighborhood that were taller than the principal structure and that the hardship was self-created. Supreme Court then denied landowner's article 78 petition, but a divided Appellate Division reversed, concluding that the ZBA had failed to properly apply the statutory balancing test. The town appealed.

In reversing, the Court of Appeals concluded that denial of the application was not arbitrary and that the board had rationally considered and applied the statutory factors.

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EMINENT DOMAIN LAW

PARKING LOT IMPROPERLY VALUED FOR COMMERCIAL DEVELOPMENT

Matter of Acquisition of Real Property by the City of Albany Industrial Development Agency, PSC, LLC
2026 WL 467436
AppDiv, Third Dept.
(Opinion by Mackey, J.).

In landowner's proceeding to determine compensation due as a result of condemnation of 11 parcels, the city's industrial development agency (IDA) appealed from Supreme Court's determination, after non-jury trial, that landowner was entitled to $5,393,000 in compensation. The Appellate Division modified to reduce compensation to $2,660,000, holding that valuing the property for commercial development was erroneous.

The IDA secured a grant to acquire and redevelop an eight acre parcel in a blighted area of Albany. Landowner owned 11 parcels, 10 of which were used as parking lots and the last of which was overgrown, covering .88 acres in the project area. Landowner accepted the IDA's advance offer of $2,650,000 as just compensation, but retained the right to seek additional compensation. Landowner then sought additional compensation, contending that the total value of landowner's parcels was $7,200,000 if valued for commercial development. Supreme Court agreed that the properties' highest and best use was commercial development, but valued the property at $5,292,000. The IDA appealed.

In reducing the award to $2,660,000 (only $10,000 more than the advance payment), the Appellate Division concluded that landowner had not demonstrated that it was reasonably probably that the property would be developed for commercial purposes, noting the property's long-term use for parking. The court further noted that in computing compensation, it was not appropriate to consider the effect of the remainder of the project, even if the project as a whole increased the probability of commercial development. The court

noted that landowner was only entitled to what it had lost as a result of the condemnation, not some share of an increase in value that the condemnation project as a whole might generate.

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LANDOWNER NOT ENTITLED TO COMPENSATION FOR BILLBOARDS OPERATED IN VIOLATION OF ZONING ORDINANCE

Elite Promotion Systems, Inc. v. State of New York
2026 WL 886289
AppDiv, Second Dept
(memorandum opinion)

In landowner's action seeking compensation for a taking, landowner appealed from the Court of Claims' award of $3,400,000. The Appellate Division affirmed, holding that landowner was not entitled to compensation for loss of billboards operated in violation of the zoning ordinance.

Landowner owned a 20,167 square foot parcel occupied by two industrial buildings and two blllboards. When the state department of transportation acquired the parcels for expansion of the Brooklyn-Queens Expressway landowner bought an action seeking just compensation a taking. The Court of Claims awarded damages for loss of the industrial buildings but declined to award damages for the billboards. In affirming, the Appellate Division cited expert testimony that prior accessory use of the billboards had violated the zoning ordinance and in any event been lost due to their size and the owners failure to continually use them as accessory signs. In addition, the expert testimony indicated that there was no reasonable probability that zoning regulations would be changed to permit use of the signs for advertising. As a result, the Court of Claims' denial of compensation for the billboards was supported by the record.

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REAL PROPERTY LAW

QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT ON CLAIM TO ENJOIN NUISANCE

Coden v. Oyster Bay Management Co., LLC
2026 WL 848417
AppDiv, Second Dept.
(memorandum opinion)

In neighbors' action to enjoin a private nuisance, neighbors and landowners both appealed from Supreme Court's denial of their respective summary judgment motions. The Appellate Division affirmed, holding that questions of fact remained about whether an injunction would be necessary.

Neighbors own property in a residential district, while landowners operate a business in a split-zoned property adjacent to neighbors' property. Neighbors brought a nuisance action contending that landowners were operating their business in violation of the zoning ordinance. Supreme Court denied the parties' respective summary judgment motions.

In affirming, the Appellate Division started by stating that when continuing use of property violates a zoning ordinance it must be enjoined unconditionally. But the court then went on to indicate that permanent injunctions are a drastic remedy requiring a showing of irreparable harm. In this case, the court held that the evidence did not eliminate questions of fact about whether an injunction was necessary.

*****

INSUFFICIENT EVIDENCE OF EASEMENT TO WARRANT VACATUR OF PRELIMINARY INJUNCTION

Zwickel v. Underhill Land LLC
2026 WL 530377
AppDiv, Third Dept.
(Opinion by Fisher, J.)

In landowner's action to enjoin a trespass by developer, developer appealed from Supreme Court's denial of its motion to vacate a preliminary injunction and to increase the undertaking to $1,000,000. The Appellate Division affirmed, holding that developer had not established enough evidence of an easement over landowner's parcel to warrant vacatur of the preliminary injunction.

Landowner's parcel and developer's parcel both front on a public street, but the topography of developer's four-lot parcel makes it challenging to obtain access to several of the lots by using developer's own parcel to reach that public street. Developer owns a narrow strip of land that lies between the public street and landowner's property, and developer began using that strip to avoid the challenging topography as developer began to develop the interior parcels. Landowner then brought an action asserting that the work associated with using the narrow strip constituted a trespass, causing damages. Supreme Court granted landowner a preliminary injunction against making roadway improvements that encroached on landowner's parcel, and required landowner to post an undertaking of $2,500, with a provision allowing developer to seek an increased undertaking if the preliminary injunction prevented developer from obtaining certificates of occupancy. The town later denied developer certificates of occupancy due to the inadequacy of road access. Developer then sought to vacate or modify the preliminary injunction, seeking to increase the undertaking to $1,000,000. Supreme Court declined to vacate the injunction but increased the undertaking to $165,000. Developer appealed.

In affirming, the Appellate Division held that developer's easement counterclaim was insufficient to demonstrate that Supreme Court had improvidently exercised its discretion in declining to vacate the preliminary injunction. The court noted that developer's express easement claim was based on a 1911 deed between two sets of owners of what has now become developer's property, and did not involve the owner of landowner's property. With respect to developer's implied easement counterclaim, the court acknowledged a 1906 severance of a larger parcel encompassing landowner's property and part of developer's property, but noted that developer had provided no evidence of obvious use that was meant to become permanent before severance, or of necessity at the time of severance. The court then held that there was no evidence of dates and times of past use of the subject strip as a road by developer's predecessor that would support a prescriptive easement claim. The court finally held that there was no evidence of abuse of discretion in refusing to fix an undertaking at $1,000,000.

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CO-OPS AND CONDOMINIUMS

QUESTIONS OF FACT ABOUT BOARD'S PRIOR APPROVAL OF CHANGES TO UNIT

Golden Ox Realty LLC v. Board of Managers of Colden Gardens Condominium Inc.
2026 WL 739719
AppDiv, First Dept.
(memorandum opinion)

In condominium unit owner's action for breach of contract and injunctive relief, the condominium board appealed from Supreme Court's denial of its summary judgment motion. The Appellate Division affirmed, concluding that questions of fact remained about whether the board had previously approved unit owner's changes to the unit

The condominium declaration provides that units may be used only for their designated purposes and that the board must approve any structural changes. Unit owner is using the premises for a day care center, and when, in 2014, it sought a certificate of occupancy for that purpose, the condominium board denied approval of the modifications. Unit owner alleged, however, that the board had previously approved the change sin 2009, when unit's managing member was president of the condominium board. No minutes from the 2009 board meetings were available. On these facts, Supreme Court denied both parties' summary judgment motions.

In affirming, the Appellate Division held that Supreme Court correctly held that questions of fact precluded the grant of summary judgment. The court also held that Supreme Court was correct to deny dismissal of the claim for injunctive relief, noting that past damages would not make unit owner whole if the board continued to interfere with use as a day care center or preschool.

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DISMISSAL OF DERIVATIVE CLAIMS REVERSED

Etkin v. Sherwood Residential Management LLC
2026 WL 663508
AppDiv, First Dept.
(memorandum opinion)

In condominium unit owner's derivative action against the condominium's board and its management company, unit owner appealed from Supreme Court's grant of summary judgment dismissing several of unit owner's claims. The Appellate Division modified to reinstate the derivative claims, noting that the unit owner was making claims on the condominium's behalf.

Unit owner's balcony lies directly beneath a penthouse balcony purchased by the condominium's sponsor. Unit owner contends that construction defects to the penthouse balcony caused water leaks and damage to his balcony and also alleged that construction defects allowed smoke for fireplaces in other units to enter his unit. He asked the condominium board and management board to rectify these problems, and when they did not, he brought a derivative action on the condominium's behalf. Supreme Court dismissed the action,

concluding that unit owner lacked standing to bring a derivative action against the management company, and that the unit owner had not properly stated a breach of contract claim against the board for failing to perform contractual maintenance and repair responsibilities for the condominium. That court also dismissed the some-related claims. Unit owner appealed.

In modifying, the Appellate Division noted that the parties agreed that the balconies were limited condominium elements owned by the condominium, not the individual unit owners. As a result, unit owner appropriately brought a derivative action on behalf of the condominium for the balcony defects and produced evidence pertaining to the balcony repair issue that raised triable questions of fact about the management company's performance of its contract obligations. For the same reasons, the court held that the derivative action against the condominium board for not properly performing its contractual maintenance and repair obligations raised triable issues of fact. But the court held that Supreme Court had properly dismissed the smoke related claims because unit owner had only produced evidence that a smoke issue existed, and not about whether the board and management company had breached any maintenance obligation with respect to the smoke.

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