# NY CLS CPLR § 3001, Part 1 of 4

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***New York***

***Consolidated Laws Service*** **>**

***Civil Practice Law And Rules (Arts. 1 — 100)*** **>**

***Article 30 Remedies and Pleading (§§ 3001 — 3045)***

## § 3001. Declaratory judgment

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds. A party who has brought a claim for personal injury or wrongful death against another party may maintain a declaratory judgment action directly against the insurer of such other party, as provided in paragraph six of subsection (a) of section three thousand four hundred twenty of the insurance law.

## History

Add, L 1962, ch 308, § 1, eff Sept 1, 1963; amd, L 2008, ch 388, § 1, eff Jan 17, 2009.

Annotations

## Notes

**Prior Law:**

Earlier statutes and rules: CPA § 473; RCP 212; CCP §§ 1204, 1205; Code Proc § 274.

**Advisory Committee Notes:**

This section is derived from CPA § 473 and RCP 212. Although the language of the section varies slightly from the two former provisions, no change in substance is intended. The words "justiciable controversy" have been added to codify existing case law. See, e.g., Goodman & Co. v New York Tel. Co. 309 NY 258, 128 NE2d 406 (1955); Bd. of Education v Van Zandt, 204 App Div 856, 197 NY Supp 899 (4th Dept 1922), affd 234 NY 644, 138 NE 481 (1923); see also, Borchard, Declaratory Judgments 29 et seq. (2d ed 1941).

**Editor's Notes:**

**Laws 2008, ch 388, § 8,** eff Jan 17, 2009, provides as follows:

§ 8. This act shall take effect on the one hundred eightieth day after it shall have become a law, and shall apply to policies issued or delivered in this state on or after such date and to any action maintained under such a policy; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed by the superintendent of insurance on or before such effective date.

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## I. Under CPLR

### A. Procedural Matters

#### 1. In general

In a declaratory judgment action to determine the constitutionality of a statute, the factual data on which the claim of unconstitutionality is based is to be presented as evidence to the trial court, not as addenda to briefs submitted in the Court of Appeals. Board of Education v Gootnick, 49 N.Y.2d 683, 427 N.Y.S.2d 777, 404 N.E.2d 1318, 1980 N.Y. LEXIS 2191 (N.Y. 1980).

Declaratory relief is not appropriate where judgment will result in a piecemeal determination of the dispute. Rochester v Vanderlinde Electric Corp., 56 A.D.2d 185, 392 N.Y.S.2d 167, 392 N.Y.S.2d 854, 1977 N.Y. App. Div. LEXIS 10043 (N.Y. App. Div. 4th Dep't 1977).

In a declaratory judgment action brought by plaintiff Judges alleging unconstitutional disbursements of state funds pursuant to Jud Law § 39, the State Comptroller and the Chief Administrator of the Courts would be proper defendants pursuant to St Fin Law § 123-b but the

complaint against the state would be dismissed, since the state is immune from any suit except when it has specifically consented thereto by express constitutional or legislative enactment. Cass v State, 88 A.D.2d 305, 453 N.Y.S.2d 951, 1982 N.Y. App. Div. LEXIS 16619 (N.Y. App. Div. 3d Dep't 1982), modified, 58 N.Y.2d 460, 461 N.Y.S.2d 1001, 448 N.E.2d 786, 1983 N.Y. LEXIS 2940 (N.Y. 1983).

In action against insurer for judgment declaring that plaintiffs' judgment in underlying negligence action would be enforceable against underinsured provisions of automobile insurance policy issued by insurer, it was error for court to dismiss complaint on ground that plaintiffs incorrectly proceeded by order to show cause prior to service of summons and complaint; action was validly commenced where accompanying summons and complaint were also served on defendant's attorneys, who agreed by stipulation to commencement of declaratory judgment action against defendant. Staskoski v Government Employees Ins. Co., 138 A.D.2d 587, 526 N.Y.S.2d 170, 1988 N.Y. App. Div. LEXIS 3113 (N.Y. App. Div. 2d Dep't 1988).

Defendant waives any objections to procedural propriety of declaratory judgment action by failing to properly raise them before Supreme Court. Layman v County of Rockland, 162 A.D.2d 814, 557 N.Y.S.2d 723, 1990 N.Y. App. Div. LEXIS 7229 (N.Y. App. Div. 3d Dep't 1990).

In action to invalidate CLS Tax §§ 601(d) and (e) and § 651(b)(2) pertaining to taxation of nonresidents' income, court properly denied class action status since subsequent plaintiffs would be adequately protected under doctrine of stare decisis, and remaining unresolved issues as to amount of overpayment and eligibility for refund were personal to individual members of class of nonresident taxpayers, and would require initiative on part of individual taxpayer by way of protest or claim for refund. Brady v State, 172 A.D.2d 17, 576 N.Y.S.2d 896, 1991 N.Y. App. Div. LEXIS 15096 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 915, 581 N.Y.S.2d 667, 590 N.E.2d 252, 1992 N.Y. LEXIS 5035 (N.Y. 1992), aff'd, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060, 1992 N.Y. LEXIS 4241 (N.Y. 1992).

Since Article 78 proceeding may be converted into declaratory judgment action when appropriate, Appellate Division had authority to grant declaratory judgment to petitioner where

Supreme Court had transferred Article 78 proceeding to Appellate Division to review administrative determination, but petitioner had also sought declaratory judgment, and Supreme Court had not addressed declaratory judgment aspects of case. Penny Lane/E. Hampton, Inc. v County of Suffolk, 191 A.D.2d 19, 598 N.Y.S.2d 806, 1993 N.Y. App. Div. LEXIS 6093 (N.Y. App. Div. 2d Dep't 1993).

Property owners, whose properties were either adjacent to or in close proximity to parcel where plaintiff's mining operations might take place, should have been allowed to intervene as party defendants where issue in instant declaratory judgment action was validity of local laws, one of which placed severe restrictions on plaintiff's mining operations, and proposed intervenors had made various claims as to deleterious effects surface mining would have on their property. Patterson Materials Corp. v Town of Pawling, 221 A.D.2d 608, 634 N.Y.S.2d 709, 1995 N.Y. App. Div. LEXIS 12388 (N.Y. App. Div. 2d Dep't 1995).

Declaratory judgments are not provisional remedies and may not be obtained in motion prior to joinder of issue. Durkin v Durkin Fuel Acquisition Corp., 224 A.D.2d 574, 639 N.Y.S.2d 716, 1996 N.Y. App. Div. LEXIS 1399 (N.Y. App. Div. 2d Dep't 1996).

Court properly granted defendants' motion to dismiss complaint for failure to join Indian Nation as necessary party in action seeking judgment declaring town resolution null and void, inter alia, since matter involved determination of rights and powers of Indian Nation to consent to water service on its reservation, and judgment in plaintiffs' favor would challenge power of Indian Nation. Anderson v Town of Lewiston, 244 A.D.2d 965, 665 N.Y.S.2d 164, 1997 N.Y. App. Div. LEXIS 12374 (N.Y. App. Div. 4th Dep't 1997), app. dismissed, 91 N.Y.2d 920, 669 N.Y.S.2d 262, 692 N.E.2d 131, 1998 N.Y. LEXIS 206 (N.Y. 1998).

In action for declaratory judgment as to proper interpretation of document concerning how parties would share maintenance costs of shopping center, court properly struck certain portions of testimony of plaintiff's principal witness where stricken testimony concerned statements or impressions of out-of-court declarants that were not products of direct discussions with witness, were inadmissible hearsay, and were also irrelevant. Brook Shopping Ctrs. v Allied Stores Gen.

Real Estate Co., 245 A.D.2d 480, 666 N.Y.S.2d 483, 1997 N.Y. App. Div. LEXIS 13235 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 810, 670 N.Y.S.2d 404, 693 N.E.2d 751, 1998 N.Y. LEXIS 877 (N.Y. 1998).

In declaratory judgment action to interpret and apply Medicaid law to underlying controversy, concerning legality of 18 NYCRR § 360-7.5(a)(5) and violation of plaintiffs' notice rights, it was appropriate to grant class certification to class defined as all New York City Medicaid recipients whose applications for reimbursement of medical and other expenses incurred during period commencing on first day of third month prior to month of their applications for Medicaid and continuing until time they receive their valid Medicaid identification cards were denied after January 1, 1988 based on their failure to obtain services from Medicaid-enrolled providers, whether expressly or impliedly, and whose denials were affirmed after administrative hearing. Chalfin v Sabol, 247 A.D.2d 309, 669 N.Y.S.2d 45, 1998 N.Y. App. Div. LEXIS 1602 (N.Y. App. Div. 1st Dep't 1998).

Where subscribers to health care policy offered by defendant insurers sought declaratory and injunctive relief on theories of breach of contract, negligent misrepresentation, promissory estoppel, waiver, common-law fraud and deceptive trade practices, court properly determined that action should be prosecuted as class action because (1) all policyholders were affected by question of whether defendants' general practice of terminating policies for nonpayment of premiums without notice violated policies, and (2) any questions relating to individual reliance, causation and damages were relatively insignificant in view of essentially declaratory nature of relief sought. Makastchian v Oxford Health Plans, Inc., 270 A.D.2d 25, 704 N.Y.S.2d 44, 2000 N.Y. App. Div. LEXIS 2581 (N.Y. App. Div. 1st Dep't 2000).

New York, not Florida, law applied to loss allocation issues in consolidated actions for injuries from asbestos exposure, even though plaintiffs' decedents were residents of Florida when they were diagnosed with mesothelioma, when they died, and when actions were commenced, where plaintiffs' decedents were residents of New York when they were exposed to asbestos there, and interrelationship of parties was centered in New York. Chrabas v A.P. Green Indus.

(In re Eighth Judicial Dist. Asbestos Litig.), 273 A.D.2d 863, 709 N.Y.S.2d 284, 2000 N.Y. App. Div. LEXIS 6876 (N.Y. App. Div. 4th Dep't), app. denied, 715 N.Y.S.2d 206, 2000 N.Y. App. Div. LEXIS 9716 (N.Y. App. Div. 4th Dep't 2000).

Trial court properly denied children's motion seeking to establish the parent's status as a nonparty by way of a declaratory judgment or through judicial notice; the trial court properly ruled that it would not entertain an application for declaratory relief where there was no genuine controversy requiring judicial determination. J.G. v Zachman, 34 A.D.3d 1277, 825 N.Y.S.2d 621, 2006 N.Y. App. Div. LEXIS 16008 (N.Y. App. Div. 4th Dep't 2006).

Action for declaratory judgment establishes a plaintiff's rights, and enables him subsequently to seek compensation from anyone who has violated such rights. Dale Renting Corp. v Bard, 39 Misc. 2d 266, 240 N.Y.S.2d 488, 1963 N.Y. Misc. LEXIS 1998 (N.Y. Sup. Ct.), aff'd, 19 A.D.2d 799, 243 N.Y.S.2d 420, 1963 N.Y. App. Div. LEXIS 6124 (N.Y. App. Div. 2d Dep't 1963).

In a special proceeding for corporate dissolution there would be no basis for provisional relief by way of a declaratory judgment pendente lite, i.e., a "reverse injunction" declaring that petitioners' proposed competitive conduct was permissible, since CPLR § 3001 permits only final declaratory judgment and not an interim declaratory judgment in a pending proceeding, and since a grant of interim relief would result in a de facto dissolution of the corporation before the issues could be heard. Tigler v Peskin, 113 Misc. 2d 1077, 450 N.Y.S.2d 358, 1981 N.Y. Misc. LEXIS 3491 (N.Y. Sup. Ct. 1981).

Declaratory judgment action is proper vehicle not only to review validity of legislative act, but also for invalidating unconstitutional application of statutory provision. New York Horse & Carriage Ass'n v New York, Dep't of Consumer Affairs, 144 Misc. 2d 883, 545 N.Y.S.2d 439, 1989 N.Y. Misc. LEXIS 494 (N.Y. Sup. Ct. 1989).

Insured's motion for attorney's fees would be denied in action for declaratory judgment against insurer, since such fees may only be recovered when insured is cast in defensive position. Don

Clark, Inc. v United States Fidelity & Guaranty Co., 145 Misc. 2d 218, 545 N.Y.S.2d 968, 1989 N.Y. Misc. LEXIS 618 (N.Y. Sup. Ct. 1989).

In declaratory judgment action challenging constitutionality of CLS Tax §§ 171-d and 171-f, which created Statewide Offset Program whereby Department of Taxation and Finance can offset taxpayers' state income tax refunds against debts owed by taxpayers to state agencies, plaintiffs were granted class certification to represent taxpayers who had or would have their state income tax refunds applied to debts allegedly owed to state agencies; court denied numerous motions to intervene, as unnecessary, because proposed intervenors were members of certified class. Butler v Wing, 177 Misc. 2d 779, 677 N.Y.S.2d 216, 1998 N.Y. Misc. LEXIS 349 (N.Y. Sup. Ct. 1998), rev'd, 275 A.D.2d 273, 713 N.Y.S.2d 33, 2000 N.Y. App. Div. LEXIS 8974 (N.Y. App. Div. 1st Dep't 2000).

Department of Correctional Services (DOCS) employee who was discharged from his position, allegedly in violation of federal Family and Medical Leave Act, 29 USCS § 2601 et seq., was not precluded by Tenth and Eleventh Amendments from suing DOCS in Supreme Court for declaratory judgment, reinstatement and money damages. McGregor v Goord, 180 Misc. 2d 945, 691 N.Y.S.2d 875, 1999 N.Y. Misc. LEXIS 242 (N.Y. Sup. Ct. 1999).

Where a claimant had filed a statutorily revived suit against the State for assault and battery by state troopers, the Court of Claims did not have jurisdiction over challenges to the constitutionality of statutes, even if such determination was necessary to resolve a claim for money damages against the State as such challenges had to be brought by an action for declaratory judgment, which must be brought in Supreme Court under CPLR 3001. Chapman v State, 193 Misc. 2d 216, 748 N.Y.S.2d 465, 2002 N.Y. Misc. LEXIS 1295 (N.Y. Ct. Cl. 2002).

In a declaratory judgment action by plaintiffs, insurers, against defendants, insureds, concerning defense obligations in underlying actions against the insureds, the trial court erred in failing to dismiss insureds' counterclaim for bad faith denial of coverage by the insurers pursuant to N.Y. C.P.L.R. 3211(a)(7); allegations that an insurer had no basis to deny coverage were redundant to a claim for breach of contract based on denial of coverage, and it did not assist the insureds

that New York law recognized a cause of action against a liability insurer for breach of the duty of good faith in the defense or settlement of a claim, since it was undisputed that the insurers had never exercised any control over the defense or settlement of the underlying claims for which the insureds sought coverage. Royal Indem. Co. v Salomon Smith Barney, Inc., 308 A.D.2d 349, 764 N.Y.S.2d 187, 2003 N.Y. App. Div. LEXIS 9341 (N.Y. App. Div. 1st Dep't 2003).

States are free as matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy more stringent requirement of CLS US Const Art III § 2 that actual case or controversy be presented for resolution. N.Y. State Club Ass'n v City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1, 1988 U.S. LEXIS 2861 (U.S. 1988).

**2. Court's discretion**

Whether declaratory judgment will have effect of resolving genuine dispute before any breach or violation has occurred and before there is any need or right to resort to coercive measures is generally for court to decide in exercise of sound discretion. New York Public Interest Research Group, Inc. v Carey, 42 N.Y.2d 527, 399 N.Y.S.2d 621, 369 N.E.2d 1155, 1977 N.Y. LEXIS 2403 (N.Y. 1977).

Where the legal efficacy of available defenses should not be predetermined on the record of a prior trial, Special Term should have declined to entertain jurisdiction of a declaratory judgment action brought under CPLR § 3001. Ithaca Textiles, Inc. v Waverly Lingerie Sales Co., 24 A.D.2d 133, 264 N.Y.S.2d 581, 1965 N.Y. App. Div. LEXIS 2945 (N.Y. App. Div. 3d Dep't 1965), aff'd, 18 N.Y.2d 885, 276 N.Y.S.2d 624, 223 N.E.2d 34, 1966 N.Y. LEXIS 1004 (N.Y. 1966).

The granting of a declaratory judgment rests in the sound discretion of the court. Park Avenue Clinical Hospital v Kramer, 26 A.D.2d 613, 271 N.Y.S.2d 747, 1966 N.Y. App. Div. LEXIS 3824 (N.Y. App. Div. 4th Dep't 1966), aff'd, 19 N.Y.2d 958, 281 N.Y.S.2d 359, 228 N.E.2d 411, 1967 N.Y. LEXIS 1436 (N.Y. 1967).

Court should have dismissed action for declaratory judgment invalidating assessment on plaintiffs' real property, as plaintiffs' challenge was properly brought under CLS RPTL Art 7, and their alleged oral complaints to assessor were insufficient to satisfy condition precedent to judicial review that they exhaust their administrative remedies. Lavoie v Assessor of Town of Kent, 222 A.D.2d 561, 635 N.Y.S.2d 97, 1995 N.Y. App. Div. LEXIS 12983 (N.Y. App. Div. 2d Dep't 1995).

It was error for court to issue declaration construing terms of policy issued by automobile insurance carrier in action where that carrier had not been joined as party defendant. Wrobel v La Ware, 229 A.D.2d 861, 646 N.Y.S.2d 391, 1996 N.Y. App. Div. LEXIS 7992 (N.Y. App. Div. 3d Dep't 1996).

In dispute over entitlement to distributions from 11 real estate limited partnerships of which decedent was general partner at time of his death, court abused its discretion in denying executor's motion to transfer declaratory judgment actions to Surrogate's Court, because plaintiff's actions respecting partnerships affected administration of decedent's estate, which was pending in Surrogate's Court, and Surrogate's Court could grant all relief requested, albeit not necessarily in form of declaratory judgment. Carmel v Shor, 250 A.D.2d 475, 672 N.Y.S.2d 866, 1998 N.Y. App. Div. LEXIS 6188 (N.Y. App. Div. 1st Dep't 1998).

Where the facts involved are undisputed and pure questions of law are presented, the Supreme Court will exercise its discretion to render a declaratory judgment. However, where there are disputed questions of fact the Court in the exercise of a sound discretion may decline to do so. Anderson v Pettit, 62 Misc. 2d 763, 309 N.Y.S.2d 974, 1970 N.Y. Misc. LEXIS 1664 (N.Y. Sup. Ct. 1970).

In special proceeding to enforce attorney's lien under CLS Jud § 475 by directing New York City Support Collection Unit (SCU) to turn over outstanding attorney's fees from collected child support arrears, court had discretion to render declaratory judgment on SCU's claim that it had no legal duty or power to collect or disburse attorney fee payments in addition to support, inasmuch as CLS CPLR § 103(c) allows court to correct actions initiated in wrong form, and any

procedural differences between special proceedings and declaratory judgment actions were not significant in this case. Shipman v City of New York Support Collection Unit, 183 Misc. 2d 478, 703 N.Y.S.2d 389, 2000 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 2000).

### 3. Statute of limitations; laches

In order to determine statute of limitations applicable to particular declaratory judgment action, court must examine substance of that action to identify relationship out of which claim arises and relief sought; if court determines that underlying dispute can be or could have been resolved through form of action or proceeding for which specific limitation period is statutorily provided, that period governs declaratory judgment action. Save the Pine Bush, Inc. v Albany, 70 N.Y.2d 193, 518 N.Y.S.2d 943, 512 N.E.2d 526, 1987 N.Y. LEXIS 17997 (N.Y. 1987).

Where proceeding wherein county and others sought judgment declaring that a regulation promulgated by the Commissioner of Health was invalid and directing the State Department of Health to reimburse county for certain employee fringe benefit expenses incurred in connection with general public health work and a ghetto medicine program was instituted within four months of the issuance of reimbursement checks for the health work and the Department’s final determination denying recovery for the fringe benefits, action was timely. Erie County v Whalen, 57 A.D.2d 281, 394 N.Y.S.2d 747, 1977 N.Y. App. Div. LEXIS 10957 (N.Y. App. Div. 3d Dep't 1977), aff'd, 44 N.Y.2d 817, 406 N.Y.S.2d 453, 377 N.E.2d 984, 1978 N.Y. LEXIS 2014 (N.Y. 1978).

Since plaintiffs were challenging constitutionality of legislative enactments rather than particular administrative conduct taken pursuant thereto, declaratory judgment action was proper procedural vehicle to accomplish that challenge, and thus 4-month limitation period of CLS CPLR § 217 was inapplicable. Brookhaven v State, 142 A.D.2d 338, 535 N.Y.S.2d 773, 1988 N.Y. App. Div. LEXIS 13235 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 74 N.Y.2d 714, 543 N.Y.S.2d 399, 541 N.E.2d 428, 1989 N.Y. LEXIS 841 (N.Y. 1989).

Causes of action challenging procedures employed in adoption of town resolution were barred by 4-month statute of limitations of CLS CPLR § 217 inasmuch as each claim could have been resolved through Article 78 proceeding; plaintiffs asserted that town failed to comply with State Environmental Quality Review Act, town code, and CLS Town § 130(17)(2), and underlying dispute involving such claims was directed at review procedures followed in enactment of resolution. Clempner v Southold, 154 A.D.2d 421, 546 N.Y.S.2d 101, 1989 N.Y. App. Div. LEXIS 12515 (N.Y. App. Div. 2d Dep't 1989).

Four-month statute of limitations accorded to Article 78 proceedings was applicable to action for judgment declaring that plaintiff's constitutional rights were violated by county judge's practice and policy of placing durational limits on pistol licenses, and by practice and policy of denying applicants unrestricted use licenses when reason proffered was stated to be "personal protection" or "self defense," since plaintiff could have raised these claims in proceeding under CLS CPLR § 7803(3) challenging judge's previous issuances of restricted pistol license as arbitrary and capricious or as abuse of discretion. Bitondo v State, 182 A.D.2d 948, 582 N.Y.S.2d 819, 1992 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 3d Dep't 1992).

Four-month statute of limitations accorded to Article 78 proceedings was applicable to action for judgment declaring that county judge was not authorized by CLS Penal § 400.00 to attach use restrictions and durational limitations on renewed pistol license issued to plaintiff, since plaintiff could have challenged initial issuance of restricted pistol license as "affected by an error of law" in proceeding under CLS CPLR § 7803(3). Bitondo v State, 182 A.D.2d 948, 582 N.Y.S.2d 819, 1992 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 3d Dep't 1992).

Declaratory judgment action to set aside results of May 1989 voter referendum approving school building project and bus garage project, on ground that school district failed to comply with State Environmental Quality Review Act (SEQRA), was not time-barred on basis of alleged failure to comply with 4-month statute of limitations of CLS CPLR § 217 where Department of Education had reopened SEQRA review process after referendum was conducted and then issued positive declarations and directed preparation of final environmental impact statement for both projects

within one month of filing of action; reopening constituted fresh and complete examination into environmental significance of projects, thereby providing plaintiffs with new opportunity to challenge any declaration or SEQRA violation resulting therefrom. Chase v Board of Educ. of Roxbury Cent. School Dist., 188 A.D.2d 192, 593 N.Y.S.2d 603, 1993 N.Y. App. Div. LEXIS 1094 (N.Y. App. Div. 3d Dep't 1993).

Since there is no specified statute of limitations applicable to declaratory judgment actions, it is necessary to examine nature of underlying relief sought, and to apply period of limitations applicable to that cause of action, and if underlying cause of action does not fall within any specific limitations period, 6-year “catchall” provision of CLS CPLR § 213(1) applies. 145 Kisco Ave. Corp. v Dufner Enters., 198 A.D.2d 482, 604 N.Y.S.2d 963, 1993 N.Y. App. Div. LEXIS 11050 (N.Y. App. Div. 2d Dep't 1993).

Action seeking, inter alia, declaration that tax warrant was null and void was governed by 4-month statute of limitations applicable to Article 78 proceedings inasmuch as Tax Commission’s issuance of warrant was administrative act in furtherance of its legislatively imposed duty to collect personal income taxes (CLS Tax § 692(a)). Davidoff v State Tax Comm'n, 208 A.D.2d 1095, 617 N.Y.S.2d 915, 1994 N.Y. App. Div. LEXIS 9812 (N.Y. App. Div. 3d Dep't 1994).

Action seeking declaration that collection warrants issued by Division of Taxation were null and void could have been brought as Article 78 proceeding, and thus was governed by 4-month limitation period of CLS CPLR § 217. Heron v Division of Taxation of the Dep't of Taxation & Fin., 209 A.D.2d 989, 619 N.Y.S.2d 454, 1994 N.Y. App. Div. LEXIS 12008 (N.Y. App. Div. 4th Dep't 1994), reh'g denied, 1995 N.Y. App. Div. LEXIS 2072 (N.Y. App. Div. 1st Dep't Feb. 3, 1995), app. denied, 85 N.Y.2d 809, 628 N.Y.S.2d 52, 651 N.E.2d 920, 1995 N.Y. LEXIS 1495 (N.Y. 1995).

In action, inter alia, to declare parties’ rights to proceeds of sale of marital property, 6-year statute of limitations began to run from date of entry of equitable distribution judgment, which determined plaintiff’s rights in property. Yecies v Sullivan, 221 A.D.2d 433, 633 N.Y.S.2d 797, 1995 N.Y. App. Div. LEXIS 12014 (N.Y. App. Div. 2d Dep't 1995).

Four-month statute of limitations (CLS CPLR § 217) governed sewerage-works corporation's action against town for judgment declaring that it was entitled to rate increase, higher rates for industrial and commercial users, and application of same rates charged by town in sewer district to owners of unimproved property, as such claims could have been asserted in Article 78 proceeding and were plainly encompassed within grounds for mandamus to review under CLS CPLR § 7803(3). Bennett Rd. Sewer Co. v Town Bd., 243 A.D.2d 61, 672 N.Y.S.2d 587, 1998 N.Y. App. Div. LEXIS 4980 (N.Y. App. Div. 4th Dep't 1998).

Six-year limitations period under CLS CPLR § 213(2), rather than 4-month period under CLS CPLR § 217, governed action by plaintiff sewerage-works corporation for judgment declaring its right to tap-in fees which town was required to collect on its behalf for each unit that tapped into its sewer lines, as such claim involved obligation under plaintiff's agreement with town and was therefore action to enforce contract rather than one seeking relief under CLS CPL Art 78. Bennett Rd. Sewer Co. v Town Bd., 243 A.D.2d 61, 672 N.Y.S.2d 587, 1998 N.Y. App. Div. LEXIS 4980 (N.Y. App. Div. 4th Dep't 1998).

Irrespective of whether applicable statute of limitation was CLS CPLR § 213(3), CLS RPTL § 1020(3), or county administrative code, realty company's action to compel determination of claims to real property, set aside tax deed, and declare unconstitutional county administrative code provisions under which tax deed was issued was not time-barred where (1) at no time during prescriptive period was any agent of company given actual notice of procedures under which its title to property was extinguished, and (2) applicable rule was that announced in Campbell v City of New York, 77 NY2d 688—that statute of limitations does not bar challenge to constitutionality of notice provision where party had no timely notice. Meadow Farm Realty Corp. v Pekich, 251 A.D.2d 634, 676 N.Y.S.2d 203, 1998 N.Y. App. Div. LEXIS 7866 (N.Y. App. Div. 2d Dep't 1998), app. dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 475, 704 N.E.2d 228, 1998 N.Y. LEXIS 3670 (N.Y. 1998), app. denied, 93 N.Y.2d 802, 687 N.Y.S.2d 625, 710 N.E.2d 272, 1999 N.Y. LEXIS 171 (N.Y. 1999), app. denied, 1999 N.Y. LEXIS 172 (N.Y. Feb. 16, 1999).

Cause of action alleging that local law was void and that it did not adhere to statutory requirements of enabling legislation set forth in CLS Gen Mun Art 14-F was proper subject of declaratory judgment action and was thus governed by 6-year statute of limitations rather than 4-month limitation period applicable to Article 78 proceedings. Frontier Ins. Co. v Town Bd., 252 A.D.2d 928, 676 N.Y.S.2d 298, 1998 N.Y. App. Div. LEXIS 8683 (N.Y. App. Div. 3d Dep't 1998).

Article 78 proceeding to review village's tax assessment on owners' real property, which proceeding was converted into action for judgment declaring parties' rights under contract fixing owners' obligation to contribute funds for expansion of village's sewage treatment plant, was timely where, looking at nature rather than form of action, 6-year limitation period under CLS CPLR § 213(2), rather than 4-month period under CLS CPLR § 217, applied. CKC, Inc. v Kleiman, 255 A.D.2d 286, 679 N.Y.S.2d 637, 1998 N.Y. App. Div. LEXIS 11558 (N.Y. App. Div. 2d Dep't 1998).

Cause of action seeking declaration of invalidity of town board's authorizing resolution and implementing agreement regarding debris landfill was time barred where (1) plaintiffs' challenge was directed not to substance of resolution and agreement but to town's failure to hold permissive referendum on resolution and to town's lack of authority to make agreement, (2) those procedural claims could have been brought in proceeding under CLS CPLR § 7803(2), and (3) thus, 4-month limitations period in CLS CPLR § 217, not 6-year period in CLS CPLR § 213, applied. Atkins v Town of Rotterdam, 266 A.D.2d 631, 697 N.Y.S.2d 780, 1999 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 3d Dep't 1999).

In combined Article 78 proceeding and declaratory judgment action challenging decision of city's design review commission (DRC) which approved department of public works (DPW) project for construction of open air community pavilions in park situated within historic district, 30-day limitations period under CLS Gen City § 82(1) began to run when DRC issued negative declaration of environmental significance and filed its written notice of decision; DRC's imposition of requirement that DPW submit detailed design for restroom, stairway, signs and landscaping did not undermine finality of approval because those matters were ancillary to

DPW’s primary request. J.B. Realty Enter. v City of Saratoga Springs, 270 A.D.2d 771, 704 N.Y.S.2d 742, 2000 N.Y. App. Div. LEXIS 3096 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1802 (N.Y. 2000).

In combined Article 78 proceeding and action for declaratory judgment commenced less than 2 months after city respondents approved construction of 3 open air community pavilions and attendant structures in park situated within historic district, petitioner’s claims asserting that project violated restrictions contained in deeds and letters patent conveying subject property to city were governed by 2-year statute of limitations under CLS RPAPL § 2001 and, accordingly, were not time barred. J.B. Realty Enter. v City of Saratoga Springs, 270 A.D.2d 771, 704 N.Y.S.2d 742, 2000 N.Y. App. Div. LEXIS 3096 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 758, 713 N.Y.S.2d 522, 735 N.E.2d 1287, 2000 N.Y. LEXIS 1802 (N.Y. 2000).

Combined Article 78 proceeding and declaratory judgment action challenging State Department of Health’s denial of Medicaid reimbursement claims was untimely as to those claims that were not resubmitted after department agreed to reexamine them where proceeding was commenced over 4 months after denial. Quantum Health Resources v De Buono, 273 A.D.2d 730, 710 N.Y.S.2d 422, 2000 N.Y. App. Div. LEXIS 7469 (N.Y. App. Div. 3d Dep't), app. dismissed, 95 N.Y.2d 927, 721 N.Y.S.2d 603, 744 N.E.2d 138, 2000 N.Y. LEXIS 3542 (N.Y. 2000).

In combined Article 78 proceeding and declaratory judgment action challenging State Department of Health’s denial of Medicaid reimbursement claims, petitioner was entitled to administrative review of those claims that were resubmitted after State Department of Health agreed to reexamine them where record was unclear as to disposition of those claims, and thus department failed to prove that proceeding was untimely as to those claims. Quantum Health Resources v De Buono, 273 A.D.2d 730, 710 N.Y.S.2d 422, 2000 N.Y. App. Div. LEXIS 7469 (N.Y. App. Div. 3d Dep't), app. dismissed, 95 N.Y.2d 927, 721 N.Y.S.2d 603, 744 N.E.2d 138, 2000 N.Y. LEXIS 3542 (N.Y. 2000).

Article 78 was proper procedural vehicle for challenging validity of county resolution that was limited to one particular tax year, did not result in statutory provision, and applied to only one

taxpayer, and thus declaratory judgment action not brought within 4 months of resolution's enactment was untimely. Caputo v County of Suffolk, 275 A.D.2d 294, 712 N.Y.S.2d 564, 2000 N.Y. App. Div. LEXIS 8577 (N.Y. App. Div. 2d Dep't 2000).

Six-year limitation period applicable to declaratory judgment actions governed suit challenging validity of county law where challenged enactment was of general applicability and indefinite duration, and had been formally adopted. Caputo v County of Suffolk, 275 A.D.2d 294, 712 N.Y.S.2d 564, 2000 N.Y. App. Div. LEXIS 8577 (N.Y. App. Div. 2d Dep't 2000).

In declaratory judgment action alleging that plaintiff was beneficial owner of condominium apartment based on oral agreement whereby defendant executed mortgage and took legal title to apartment and plaintiff provided down payment and agreed to make mortgage payments while he resided there, 6-year statute of limitations for imposition of constructive trust did not begin to run until defendant attempted to evict plaintiff from apartment for purpose of selling it. Size v Size, 276 A.D.2d 329, 714 N.Y.S.2d 266, 2000 N.Y. App. Div. LEXIS 10527 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 712, 729 N.Y.S.2d 439, 754 N.E.2d 199, 2001 N.Y. LEXIS 1072 (N.Y. 2001).

Two-year statute of limitations set forth in CLS RPTL § 1137 did not apply to declaratory judgment action seeking adjudication that rights under 1988 judgment of foreclosure, which were assigned to plaintiff in 1998 by receiver of mortgagee bank, were not extinguished by 1995 tax sale, as declaratory judgment action was not proceeding to set aside tax deed but rather was commenced for purpose of adjudicating plaintiff's rights to property under judgment of foreclosure as compared to rights of defendant county, purchasers at tax sale and their transferees. CDS Recoveries, L.L.C. v Davis, 277 A.D.2d 567, 715 N.Y.S.2d 517, 2000 N.Y. App. Div. LEXIS 11124 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 130, 746 N.E.2d 185, 2001 N.Y. LEXIS 222 (N.Y. 2001).

Six-year statute of limitations under CLS CPLR § 213(4) did not bar action seeking declaratory judgment that rights under 1988 judgment of foreclosure, assigned to plaintiff in 1998 by Federal Deposit Insurance Company (FDIC) as receiver of mortgagee bank, were not

extinguished by 1995 tax sale, where FDIC was appointed receiver in 1992 during pendency of bankruptcy proceeding commenced by mortgagor in 1989, bankruptcy proceeding effectively tolled limitations period, and plaintiff commenced action in March 1999, within 6 years of termination of bankruptcy proceeding in CDS Recoveries, L.L.C. v Davis, 277 A.D.2d 567, 715 N.Y.S.2d 517, 2000 N.Y. App. Div. LEXIS 11124 (N.Y. App. Div. 3d Dep't 2000), app. denied, 96 N.Y.2d 704, 723 N.Y.S.2d 130, 746 N.E.2d 185, 2001 N.Y. LEXIS 222 (N.Y. 2001).

In hybrid Article 78 proceeding/declaratory judgment action to compel payment of city school district taxes that allegedly were collected or should have been collected by respondents, and for interest on delinquent and unpaid taxes, court should have applied 4-month limitations period under CLS CPLR § 217 rather than 6-year period applicable to claims for money had and received, as relief sought was to compel respondents to perform statutory responsibilities. Bd. of Educ. v Russo, 283 A.D.2d 490, 724 N.Y.S.2d 468, 2001 N.Y. App. Div. LEXIS 5025 (N.Y. App. Div. 2d Dep't), app. denied, 97 N.Y.2d 653, 737 N.Y.S.2d 54, 762 N.E.2d 932, 2001 N.Y. LEXIS 3469 (N.Y. 2001).

Action seeking declaration that area variance was invalid was time-barred, even though plaintiffs were unaware that town zoning board of appeals had granted variance to defendants before tower in question was built, since plaintiffs were required, but failed, to challenge decision to grant variance within 30 days of filing of decision in office of town clerk (CLS Town § 267-c(1)); 6-year limitations period of CLS CPLR § 213(1) did not apply. Sirianno v N.Y. RSA No. 3 Cellular P'ship, 284 A.D.2d 913, 727 N.Y.S.2d 568, 2001 N.Y. App. Div. LEXIS 5782 (N.Y. App. Div. 4th Dep't 2001).

Trial court properly granted an owner’s motion for a preliminary injunction restraining the its president and a women’s institute from continuing with the prosecution of a holdover proceeding, and denied their cross-motion to dismiss the owner’s declaratory action as time-barred because the owner established that, absent the preliminary injunction, the president would evict students who were residing in the premises, in contravention of the owner’s mission, a balancing of the equities likewise favored the granting of preliminary injunctive relief to

maintain the status quo pending the resolution of the action, but, there was no evidence in the record that the trial court fixed an amount for the requisite undertaking. Chana v Machon Chana Women's Inst., Inc., 162 A.D.3d 635, 80 N.Y.S.3d 61, 2018 N.Y. App. Div. LEXIS 3953 (N.Y. App. Div. 2d Dep't 2018).

Property owners' declaratory judgment action was not time-barred because direct, definitive notice of the village's position regarding the easement agreement was given by the September 24, 2014 letter of the village attorney, and it was undisputed that the action was timely commenced when measured from that accrual date. Anson v Inc. Vil. of Freeport, 193 A.D.3d 799, 148 N.Y.S.3d 158, 2021 N.Y. App. Div. LEXIS 2429 (N.Y. App. Div. 2d Dep't 2021).

Plaintiff housing corporation's action for a judgment declaring the parties' respective rights to a certain cooperative apartment was timely filed because the action accrued when defendants submitted the transfer application to plaintiff in October 2016, and was therefore timely commenced less than two years thereafter. Trump Vil. Section 4, Inc. v Young, 217 A.D.3d 711, 191 N.Y.S.3d 438, 2023 N.Y. App. Div. LEXIS 3025 (N.Y. App. Div. 2d Dep't 2023).

Inasmuch as plaintiffs were time barred from bringing Article 78 proceeding to review village's approval of road construction, and were seeking to void village's action through declaratory judgment action, they would be relegated to claim that village was without power or jurisdiction to act, since jurisdictional defect would render village's approval void and toll statute of limitations. Nager v Saddle Rock, 140 Misc. 2d 644, 530 N.Y.S.2d 966, 1988 N.Y. Misc. LEXIS 423 (N.Y. Sup. Ct. 1988), aff'd, 160 A.D.2d 785, 555 N.Y.S.2d 614, 1990 N.Y. App. Div. LEXIS 4195 (N.Y. App. Div. 2d Dep't 1990).

In declaratory judgment action challenging constitutionality of CLS Civ S §§ 50(7) and 50-a, 4-month statute of limitations under CLS CPLR § 217 applied to plaintiff's request for creation of special eligible list since, even if statutes were unconstitutional, plaintiffs would have to establish that their answers on civil service examination were equally correct to ones chosen. Mancuso v Levitt, 154 Misc. 2d 252, 585 N.Y.S.2d 164, 1992 N.Y. Misc. LEXIS 254 (N.Y. Sup. Ct. 1992),

app. dismissed, 201 A.D.2d 386, 607 N.Y.S.2d 353, 1994 N.Y. App. Div. LEXIS 1359 (N.Y. App. Div. 1st Dep't 1994).

In declaratory judgment action arising from actions of test validation board in regard to civil service examination, challenge to constitutionality of CLS Civ S §§ 50(7) and 50-a was not subject to 4-month statute of limitations for Article 78 proceedings, since Article 78 proceeding is not appropriate method to challenge constitutionality of statutes. Mancuso v Levitt, 154 Misc. 2d 252, 585 N.Y.S.2d 164, 1992 N.Y. Misc. LEXIS 254 (N.Y. Sup. Ct. 1992), app. dismissed, 201 A.D.2d 386, 607 N.Y.S.2d 353, 1994 N.Y. App. Div. LEXIS 1359 (N.Y. App. Div. 1st Dep't 1994).

Laches barred declaratory judgment action commenced in 1993 by citizen taxpayers, challenging constitutionality of 1991 statutory financing mechanisms authorizing Metropolitan Transportation Authority and Thruway Authority to issue special “appropriation-risk” bonds for financing of mass transportation, bridge and highway projects from dedicated funds backed by revenue from monies collected from state-wide taxes and fees, and subject to annual appropriation by legislature, since localities, in reliance on improvement projects in question, had expended funds and committed themselves to projects with expectation that they would be reimbursed. Schulz v State, 156 Misc. 2d 169, 601 N.Y.S.2d 239, 1993 N.Y. Misc. LEXIS 284 (N.Y. Sup. Ct.), aff'd, 193 A.D.2d 171, 606 N.Y.S.2d 916, 1993 N.Y. App. Div. LEXIS 9836 (N.Y. App. Div. 3d Dep't 1993).

Solid waste management corporation was not barred by 4-month limitation period as to Article 78 proceedings from bringing declaratory judgment for construction of CLS Pub A § 2048-e(4) to determine whether solid waste disposal authority was empowered to collect waste from commercial and institutional generators. Waste-Stream Inc. v St. Lawrence County Solid Waste Disposal Auth., 167 Misc. 2d 542, 636 N.Y.S.2d 602, 1995 N.Y. Misc. LEXIS 596 (N.Y. Sup. Ct. 1995).

Declaratory judgment action brought by solid waste collection corporation against solid waste disposal authority for usurping its statutory power and engaging in collection of solid waste was not barred by laches where authority failed to show delay occasioned by corporation, which

immediately commenced action on discovery that authority's actions might be ultra vires; authority's capital investment in equipment was irrelevant. Waste-Stream Inc. v St. Lawrence County Solid Waste Disposal Auth., 167 Misc. 2d 542, 636 N.Y.S.2d 602, 1995 N.Y. Misc. LEXIS 596 (N.Y. Sup. Ct. 1995).

Four-month limitation period of CLS CPLR § 217 did not apply to declaratory judgment action challenging validity of local law; "catch-all" provision of CLS CPLR § 213(1) and 6-year Statute of Limitations contained therein was applicable. Mantello v City of Troy, 172 Misc. 2d 664, 656 N.Y.S.2d 826, 1997 N.Y. Misc. LEXIS 61 (N.Y. Sup. Ct. 1997).

Where petitioner Comptroller of the City of New York's request for a declaratory judgment that New York City, N.Y., Charter § 362(a), applied to intellectual property, and that a contract between respondents, a vendor, the Mayor of the City of New York, the New York City Marketing Development Corporation, and the New York City Department of Citywide Administrative Services, was void, and respondents asserted the action was barred by the statute of limitations, the last actions that the Comptroller challenged were the filing of the contract with him on February 20, 2004, and the Mayor's overruling of the Comptroller's objections and directing that the contract be registered on April 12, 2004, that was when the municipal respondents' actions regarding the agreement became final for purposes of the statute of limitations, and since the proceeding was commenced by the filing of the verified petition on April 21, 2004, under N.Y. C.P.L.R. 304, the proceeding was commenced within the four month statute of limitations, which applied to the claim and to the declaratory judgment claim which grew out of the N.Y. C.P.L.R. art. 78 cause of action. Comptroller v Mayor, 783 N.Y.S.2d 237, 5 Misc. 3d 190, 2004 N.Y. Misc. LEXIS 1138 (N.Y. Sup. Ct. 2004), aff'd, dismissed, 19 A.D.3d 230, 797 N.Y.S.2d 465, 2005 N.Y. App. Div. LEXIS 6788 (N.Y. App. Div. 1st Dep't 2005).

Property owners' claims that sought a declaratory judgment that their properties were prior legal existing uses was procedurally defective because their challenge to the constitutionality of the former definition of "family" in the zoning ordinance was time-barred. Atlas Henrietta, LLC v

Town of Henrietta Zoning Bd. of Appeals, 995 N.Y.S.2d 659, 46 Misc. 3d 325, 2013 N.Y. Misc. LEXIS 6666 (N.Y. Sup. Ct. 2013).

**4. Right to jury trial**

The court has no power to extend a referee's authority to make a recommendation as to whether the respondent insurance company properly disclaimed coverage to the petitioner since the respondent insurance company is entitled to a jury trial to determine the validity of its disclaimer because public policy and substantial authority support the conclusion that a jury trial is appropriate and desirable when the issue is a substantial question which will conclude the controversy; the respondent insurance company, otherwise entitled to a jury trial, is not to be deprived thereof because the action is one for declaratory judgment. In re Allcity Ins. Co., 96 Misc. 2d 864, 409 N.Y.S.2d 934, 1978 N.Y. Misc. LEXIS 2693 (N.Y. Sup. Ct. 1978).

The commencement of an action for declaratory relief does not constitute a bar to a jury trial if the action would otherwise have been triable by a jury as of right. Ripple's of Clearview, Inc. v Le Havre Associates, 111 Misc. 2d 263, 443 N.Y.S.2d 824, 1981 N.Y. Misc. LEXIS 3258 (N.Y. Sup. Ct.), aff'd, 85 A.D.2d 660, 445 N.Y.S.2d 219, 1981 N.Y. App. Div. LEXIS 16478 (N.Y. App. Div. 2d Dep't 1981).

**5. Res judicata**

An action to recover damages for the alleged taking of property by the city without just compensation, and to declare the unconstitutionality of a resolution and map that were adopted by the city's board of estimate, would be barred by the doctrine of res judicata where the claims had been determined previously in an Article 78 proceeding. Chesterfield Homes, Inc. v New York, 92 A.D.2d 578, 459 N.Y.S.2d 463, 1983 N.Y. App. Div. LEXIS 16827 (N.Y. App. Div. 2d Dep't 1983).

Res judicata did not bar declaratory judgment action regarding executive order which imposed affirmative action requirements on state agencies, even though plaintiff had brought earlier actions alleging discrimination in scoring of civil service examinations, since declaratory judgment action related to distinct events that occurred subsequent to events pertinent to earlier actions. Hase v New York State Civil Service Dep't, 148 A.D.2d 68, 544 N.Y.S.2d 387, 1989 N.Y. App. Div. LEXIS 9398 (N.Y. App. Div. 3d Dep't), app. dismissed, 74 N.Y.2d 944, 550 N.Y.S.2d 277, 549 N.E.2d 479, 1989 N.Y. LEXIS 3329 (N.Y. 1989).

Petitioner who was removed as city court judge for misconduct was properly denied relief in declaratory judgment action challenging validity of constitutional and statutory provisions underlying Court of Appeals' removal determination, since Court of Appeals has subject matter jurisdiction under CLS NY Const Art VI §§ 22 and 36-a to extensively review determinations of Commission on Judicial Conduct respecting performance of official duties by any judge or justice of Unified Court System, and Court of Appeals' determination was therefore final as to all matters which petitioner could have raised, thus barring her from relitigating all issues concerning her removal. Sims v Wachtler, 156 A.D.2d 212, 548 N.Y.S.2d 474, 1989 N.Y. App. Div. LEXIS 15456 (N.Y. App. Div. 1st Dep't 1989).

Prior jury verdict restoring plaintiff to possession, which determined solely that he was not subtenant, was not res judicata in action for declaratory judgment and money damages alleging that plaintiff had right to occupy apartment that was leased solely in defendant's name, since prior action regarding issue of subtenancy did not address rights of parties inter se. Langhorst v Guzzardo, 156 A.D.2d 272, 548 N.Y.S.2d 662, 1989 N.Y. App. Div. LEXIS 15758 (N.Y. App. Div. 1st Dep't 1989).

While res judicata prevents litigation of matter that could have been raised and decided in previous suit, exception to rule exists in declaratory judgment actions, in that preclusive effect of declaratory judgment is limited to subject matter of declaratory relief sought. Jefferson Towers, Inc. v Public Serv. Mut. Ins. Co., 195 A.D.2d 311, 600 N.Y.S.2d 41, 1993 N.Y. App. Div. LEXIS 7119 (N.Y. App. Div. 1st Dep't 1993).

Action for judgment declaring that plaintiff possessed life estate in certain real property was barred by res judicata where he contended that transfer of property from himself to defendant was in name only and that he was to maintain control of property and receive all income therefrom, which constituted gravamen of wrong as in plaintiff's prior constructive trust action, which was dismissed as time-barred. Land v Wesley, 214 A.D.2d 540, 625 N.Y.S.2d 236, 1995 N.Y. App. Div. LEXIS 3525 (N.Y. App. Div. 2d Dep't 1995).

In combined proceeding under CLS CPLR Article 78 and action for declaratory judgment challenging method by which water district had assessed taxes for construction of new water treatment facility, petitioners' due process claim was not barred by doctrine of res judicata based on dismissal of prior, related case, even though they were parties to proceedings in that case, since only tax assessments for 2 particular years were at tissue in that case, and those assessments were levied at point in time well before alleged confiscatory nature of tax could have been established. Schulz v New York State Legislature, 230 A.D.2d 578, 660 N.Y.S.2d 155, 1997 N.Y. App. Div. LEXIS 7244 (N.Y. App. Div. 3d Dep't 1997), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3819 (N.Y. 2000).

Insurer, which provided its insured with defense to underlying action, was not collaterally estopped, in context of instant declaratory judgment action, from relitigating issue of whether insured's conduct was intentional or negligent since insurance company, which was not party to underlying action, could not be said to have been in privity with insured, and insurance company could not have fully and fairly litigated issue of insured's conduct in underlying action without breaching both insurance contract and fiduciary duty to its insured. Failla v Nationwide Ins. Co., 267 A.D.2d 860, 701 N.Y.S.2d 161, 1999 N.Y. App. Div. LEXIS 13575 (N.Y. App. Div. 3d Dep't 1999).

Correction officers and their union were collaterally estopped from bringing action for judgment declaring that job assignment practice of Department of Correctional Services violated CLS Labor § 168 where they were seeking to invoke judicial review to relitigate precise issue that arbitrator had revolved against them on merits in context of grievance process, their collective

bargaining agreement stated that arbitrator's decision was "final and binding upon the parties," they did not move to vacate decision, and unconfirmed status of decision did not preclude its collateral estoppel effect. McMenemy v Goord, 273 A.D.2d 665, 709 N.Y.S.2d 683, 2000 N.Y. App. Div. LEXIS 7214 (N.Y. App. Div. 3d Dep't 2000).

In declaratory judgment action against Long Island Power Authority (LIPA) commenced in Suffolk County, res judicata and doctrine of "law of the case" barred plaintiffs' claim that LIPA's proposed takeover of Long Island Lighting Company (LILCO) violated CLS Pub A § 1020-q(3), where Nassau County Supreme Court had concluded, in prior Article 78 proceeding in which plaintiffs had successfully intervened, that § 1020-q(3) did not bar LIPA from compensating LILCO for judgments and only precluded it from obtaining property tax refunds from 1976 to 1987. Initiative for Competitive Energy v Long Island Power Auth., 178 Misc. 2d 979, 683 N.Y.S.2d 391, 1998 N.Y. Misc. LEXIS 553 (N.Y. Sup. Ct. 1998).

**6. Burden of proof**

Action to declare invalidity of Nevada divorce decree was a matrimonial action under Civil Practice Law and Rules §§ 105(m) and 3215(b) and fact that defendant withdrew answer did not relieve plaintiff of burden of proving every essential allegation of her complaint. Satenstein v Satenstein, 24 A.D.2d 422, 260 N.Y.S.2d 459, 1965 N.Y. App. Div. LEXIS 3959 (N.Y. App. Div. 1st Dep't 1965).

**7. Disclosure**

In action seeking declaration that insurer was not obligated to defend or indemnify insureds' son and others in underlying personal injury action arising from incident which resulted in son having been adjudicated youthful offender after having been charged with third degree assault following minor automobile accident, insurer could not utilize any disclosure devices to compel son to divulge contents of his otherwise confidential youthful offender records; requiring such disclosure would undermine grant of confidentiality under CLS CPL § 720.35(2). State Farm Fire

& Cas. Co. v Bongiorno, 237 A.D.2d 31, 667 N.Y.S.2d 378, 1997 N.Y. App. Div. LEXIS 12886 (N.Y. App. Div. 2d Dep't 1997).

In declaratory judgment action involving plaintiff disability insurer and simple claim for insurance by defendant insured, court properly directed out-of-state nonparty witness depositions sought by plaintiff to be conducted by videoconferencing at plaintiff's expense, where defendant had supplied voluminous discovery but plaintiff refused to file note of issue and instead repeatedly waited until eve of court conferences before sending out copious new discovery demands, including more than 50 nonparty witness depositions of individuals and entities throughout United States, including defendant's former clients, supervisors and business associates. Provident Life & Cas. Ins. Co. v Brittenham, 283 A.D.2d 629, 725 N.Y.S.2d 84, 2001 N.Y. App. Div. LEXIS 5484 (N.Y. App. Div. 2d Dep't 2001).

CLS Men Hyg § 33.13 did not apply to disclosure sought by plaintiffs in class action on behalf of city jail inmates treated for mental illness; § 33.13 applies only to facilities licensed or operated by office of mental health or office of mental retardation and developmental disabilities, and city jails are not so operated. Brad H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

CLS Men Hyg § 33.16, and through it by reference CLS CPLR Art 31, applied to disclosure sought by plaintiffs in class action on behalf of persons with mental illness who were treated on outpatient or inpatient basis both in city jails and while incarcerated in hospital psychiatric wards where (1) § 33.16 controls access to clinical records of facilities, (2) "[f]acility" is defined in CLS Men Hyg § 1.03(6) as "any place in which services for the mentally disabled are provided and includes but is not limited to a psychiatric center, developmental center, institute, clinic, ward, institution, or building," (3) CLS Men Hyg § 1.03(3) defines "[m]entally disabled" as including person with "mental illness," and (4) CLS Men Hyg § 33.16(i) provides that "[n]othing contained in this section shall restrict, expand or in any way limit the disclosure of any information pursuant to article[]...thirty-one...of the civil practice law and rules." Brad H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

In class action on behalf of persons with mental illness who were treated on outpatient or inpatient basis both in city jails and while incarcerated in hospital psychiatric wards, claiming inadequate discharge planning in violation of CLS Men Hyg § 29.15(f) and 14 NYCRR §§ 587.1 et seq., documents sought by plaintiffs—mental health/discharge planning records of 500 former inmates of city jails who were likely class members, divided according to whether individuals were HIV positive or negative—would be material and necessary to prosecution of their motion to hold defendants in contempt for failure to comply with preliminary injunction where it was difficult for plaintiffs' attorneys to determine who were members of plaintiff class and to find and communicate with them regarding contempt motion. Brad H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

In class action on behalf of persons with mental illness who were treated on outpatient or inpatient basis both in city jails and while incarcerated in hospital psychiatric wards, claiming inadequate discharge planning in violation of CLS Men Hyg § 29.15(f) and 14 NYCRR §§ 587.1 et seq., plaintiffs were entitled to disclosure of mental health/discharge planning records of 500 former inmates of city jails who were likely class members, divided according to whether individuals were HIV positive or negative, where confidentiality of class members regarding their HIV status and possible substance abuse was protected by law, parties' confidentiality agreement, sensitive order proposed by plaintiffs' attorneys, and court's decision and order. Brad H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

In class action on behalf of persons with mental illness who were treated on outpatient or inpatient basis both in city jails and while incarcerated in hospital psychiatric wards, claiming inadequate discharge planning in violation of CLS Men Hyg § 29.15(f) and 14 NYCRR §§ 587.1 et seq., sealing provision in CLS CPL § 160.50 did not bar, by analogy, plaintiffs from obtaining disclosure of mental health/discharge planning records of 500 former inmates of city jails who were likely class members, divided according to whether individuals were HIV positive or negative, where § 160.50 applies only to court records of criminal actions or proceedings. Brad

H. v City of New York, 188 Misc. 2d 470, 729 N.Y.S.2d 348, 2001 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 2001).

In declaratory judgment challenging New York City Board of Health's 1999 amendment to New York City Health Code (24 RCNY) § 161.01, which established list of prohibited wild animals that included ferrets, court denied motion to depose members of board of health and general counsel of Department of Health where plaintiffs failed to identify any area of inquiry that was not barred by legislative immunity privilege. Humane Soc'y of N.Y. v City of New York, 188 Misc. 2d 735, 729 N.Y.S.2d 360, 2001 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 2001).

**8. Jurisdictional matters**

Special Term had jurisdiction of subject matter of proceeding wherein county and others sought judgment declaring that a regulation promulgated by the Commissioner of Health was invalid and directing the State Department of Health to reimburse county for certain expenditures incurred for general public health work and a ghetto medicine program or, in the alternative, directing the Department to remit to the county an amount of aid allegedly erroneously denied because of an accounting error. Erie County v Whalen, 57 A.D.2d 281, 394 N.Y.S.2d 747, 1977 N.Y. App. Div. LEXIS 10957 (N.Y. App. Div. 3d Dep't 1977), aff'd, 44 N.Y.2d 817, 406 N.Y.S.2d 453, 377 N.E.2d 984, 1978 N.Y. LEXIS 2014 (N.Y. 1978).

A petition seeking relief in the nature of a declaratory judgment must be filed in Supreme Court and not in the Appellate Division. Steiner v Supreme Court of Ulster County, 87 A.D.2d 703, 450 N.Y.S.2d 441, 1982 N.Y. App. Div. LEXIS 16040 (N.Y. App. Div. 3d Dep't 1982).

In action for injunction and declaratory judgment, Supreme Court properly denied defendant's motion for summary judgment, even though separate suit was pending between same parties in Civil Court of City of New York, since relief sought by plaintiff could only issue from Supreme Court and not Civil Court. Abed v Zach Associates, 124 A.D.2d 531, 507 N.Y.S.2d 676, 1986 N.Y. App. Div. LEXIS 61862 (N.Y. App. Div. 2d Dep't 1986).

Supreme Court erred in transferring to Village Justice Court action by commercial tenants seeking declaratory judgment that amount demanded by landlord as tenants' share of liability insurance premium increase was improper since CLS CPLR § 3001 confers jurisdiction over declaratory judgment actions exclusively on Supreme Court. Suarez v El Daro Realty, Inc., 156 A.D.2d 356, 548 N.Y.S.2d 313, 1989 N.Y. App. Div. LEXIS 15408 (N.Y. App. Div. 2d Dep't 1989).

County Court did not lack subject matter jurisdiction to hear action for declaratory judgment brought under CLS RPAPL Art 15 where property to which action related was located within county. Dowd v Ahr, 168 A.D.2d 763, 563 N.Y.S.2d 917, 1990 N.Y. App. Div. LEXIS 15271 (N.Y. App. Div. 3d Dep't 1990), rev'd, 78 N.Y.2d 469, 577 N.Y.S.2d 198, 583 N.E.2d 911, 1991 N.Y. LEXIS 4791 (N.Y. 1991).

In action by general liability insurer for judgment declaring that it was not obligated to cover insured for costs associated with closure of hazardous waste landfill in New York, dismissal was not warranted on forum non conveniens grounds since environmental offense originated in New York, regulatory agency connected with offense was located in New York, majority of witnesses resided in New York, and insured would not suffer extreme hardship because it was incorporated in New York and proof necessary for litigation was mainly in New York. Price v Brown Group, 206 A.D.2d 195, 619 N.Y.S.2d 414, 1994 N.Y. App. Div. LEXIS 11916 (N.Y. App. Div. 4th Dep't 1994), app. denied, 1995 N.Y. App. Div. LEXIS 3992 (N.Y. App. Div. 4th Dep't Mar. 17, 1995).

Supreme Court had jurisdiction over action seeking declaration that collection warrants issued by Division of Taxation were null and void; thus, court erred in dismissing action on that ground. Heron v Division of Taxation of the Dep't of Taxation & Fin., 209 A.D.2d 989, 619 N.Y.S.2d 454, 1994 N.Y. App. Div. LEXIS 12008 (N.Y. App. Div. 4th Dep't 1994), reh'g denied, 1995 N.Y. App. Div. LEXIS 2072 (N.Y. App. Div. 1st Dep't Feb. 3, 1995), app. denied, 85 N.Y.2d 809, 628 N.Y.S.2d 52, 651 N.E.2d 920, 1995 N.Y. LEXIS 1495 (N.Y. 1995).

Plaintiff's claims were more suited to declaratory disposition as opposed to action for damages under breach of contract theory where claims for services reimbursement on services rendered prior institution of instant action had been settled, and remaining issues involved extent of coverage and which insurer, if any, was responsible for payment; thus, limited declaratory judgment authority granted to New York City Civil Court under CLS NYC Civil Ct Act § 212 was inapplicable, and Supreme Court should have granted plaintiff's motion to remove action from New York City Civil Court to Supreme Court. Bury v Cigna Healthcare, 254 A.D.2d 229, 679 N.Y.S.2d 305, 1998 N.Y. App. Div. LEXIS 11395 (N.Y. App. Div. 1st Dep't 1998).

Court erred in dismissing without prejudice plaintiff landlord's complaint seeking declaratory and injunctive relief relating to defendant tenant's violation of no-pet provision of her lease, finding that appropriate course for plaintiff to pursue was to bring proceeding in Civil Court for possession of defendant's apartment, since Civil Court could not afford "complete relief" to plaintiff, which sought equitable relief available only in Supreme Court; further, lease provision at issue specified that plaintiff could seek precisely remedy it sought in Supreme Court, and NYC Admin Code § 27-2009.1(b) expressly provided plaintiff with option of pursuing "action to enforce a lease provision prohibiting the keeping of ... pets." North Waterside Redevelopment Co., L.P. v Febbraro, 256 A.D.2d 261, 682 N.Y.S.2d 202, 1998 N.Y. App. Div. LEXIS 13939 (N.Y. App. Div. 1st Dep't 1998), app. dismissed, 93 N.Y.2d 888, 689 N.Y.S.2d 430, 711 N.E.2d 644, 1999 N.Y. LEXIS 730 (N.Y. 1999).

In action seeking declaration that insurer was not obligated to defendant insureds in underlying action, court erred in dismissing complaint based on forum non convenience where parties' principal places of business were in New York, they resided and litigated here, insurance contract incorporated mandatory New York policy language and was brokered, negotiated, paid for, and breached here, and only California nexus was that underlying action arose, was litigated, and was settled there. Seneca Ins. Co. v Lincolnshire Mgmt., 269 A.D.2d 274, 703 N.Y.S.2d 127, 2000 N.Y. App. Div. LEXIS 2046 (N.Y. App. Div. 1st Dep't 2000).

Supreme Court, rather than Civil Court, was appropriate forum for action seeking declaration that plaintiff's apartment was subject to rent control, where no summary proceeding was pending in Civil Court at time action was commenced. Eckstein v New York Univ., 270 A.D.2d 208, 705 N.Y.S.2d 51, 2000 N.Y. App. Div. LEXIS 3286 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 760, 714 N.Y.S.2d 710, 737 N.E.2d 952, 2000 N.Y. LEXIS 3442 (N.Y. 2000).

In action arising out of mix-up at fertility clinic through which woman became "gestational mother" to another couple's embryo when their embryo was mistakenly implanted into her uterus, Supreme Court had subject matter jurisdiction to issue declaratory judgment as to parties' rights, obligations and relationships, as gestational mother might have enforceable legal rights despite being "genetic stranger" to child. Perry-Rogers v Fasano, 276 A.D.2d 67, 715 N.Y.S.2d 19, 2000 N.Y. App. Div. LEXIS 10716 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 712, 729 N.Y.S.2d 439, 754 N.E.2d 199, 2001 N.Y. LEXIS 1067 (N.Y. 2001).

No specific jurisdictional requirements are contained in this section for the bringing of a declaratory judgment action, even where it concerns the matrimonial status of the parties. Glendon v Glendon, 45 Misc. 2d 855, 258 N.Y.S.2d 20, 1964 N.Y. Misc. LEXIS 1308 (N.Y. Sup. Ct. 1964), modified, 24 A.D.2d 492, 261 N.Y.S.2d 443, 1965 N.Y. App. Div. LEXIS 3883 (N.Y. App. Div. 2d Dep't 1965).

Supreme Court had jurisdiction of action for declaratory judgment that apportionment system applicable to board of supervisors of Sullivan County was unconstitutional. Shilbury v Board of Supervisors, 46 Misc. 2d 837, 260 N.Y.S.2d 931, 1965 N.Y. Misc. LEXIS 1734 (N.Y. Sup. Ct. 1965), aff'd, 25 A.D.2d 688, 267 N.Y.S.2d 1022, 1966 N.Y. App. Div. LEXIS 4826 (N.Y. App. Div. 3d Dep't 1966).

Special Term has jurisdiction to entertain a suit by the City of New York challenging the validity of an administrative regulation issued by the State Department of Social Services (18 NYCRR 381.9) which limits the share of aid to dependent children assistance reimbursable by the State, as being inconsistent with a statute either under CPLR 3001 or 7803 (subd 3); petitioners' standing can be grounded either in their status as officials of a municipality affected by State

action or as taxpayers and the absence of jurisdiction to award monetary damages in the proceeding (CPLR 7806) has no bearing on standing or other jurisdictional questions and does not provide a basis for the dismissal of the entire petition. New York v Blum, 98 Misc. 2d 373, 414 N.Y.S.2d 960, 1979 N.Y. Misc. LEXIS 2084 (N.Y. Sup. Ct. 1979).

The Supreme Court has the power to entertain a declaratory judgment action as to the jurisdiction of the State Labor Relations Board. Greenblatt v New York State Labor Relations Bd., 110 Misc. 2d 911, 443 N.Y.S.2d 143, 1981 N.Y. Misc. LEXIS 3184 (N.Y. Sup. Ct. 1981).

Declaratory judgment action against state would be allowed to proceed in Supreme Court where no monetary judgment was sought against state, state might have interest in proceeding, and other remedies were not readily available. Planet Ins. Co. v Gunther, 152 Misc. 2d 494, 587 N.Y.S.2d 523, 1992 N.Y. Misc. LEXIS 339 (N.Y. Sup. Ct. 1992).

Where declaratory judgment, determining rights of parties, will dispose of genuine controversy and provide course to guide their future jural relations, court will assume jurisdiction since granting of such relief is not only useful but necessary. St. James Church v Board of Educ., 163 Misc. 2d 471, 621 N.Y.S.2d 486, 1994 N.Y. Misc. LEXIS 587 (N.Y. Sup. Ct. 1994).

In lessee’s action for judgment declaring that his failure to pay defendant cooperative’s yearly “sublet fee” for subletting his apartment did not constitute default that would permit termination of proprietary lease, failure to secure immediate “Yellowstone” injunction during 30-day cure period provided by lease did not divest court of jurisdiction to enjoin termination of lease or otherwise consider relief sought by lessee, as Yellowstone does not create provisional remedy statute of limitations, and lessee met his burden of demonstrating irreparable harm, that equities were in his favor by threat of foreclosure of his share interest as well as need to maintain status quo, and that he was entitled to permanent injunction based on defendant’s failure to comply with notice provisions of proprietary lease. Troiano v 55 Ehrbar Tenants Corp., 168 Misc. 2d 906, 645 N.Y.S.2d 975, 1996 N.Y. Misc. LEXIS 236 (N.Y. Sup. Ct. 1996).

Supreme Court had subject matter jurisdiction over action brought by officers and residents of Mitchell-Lama residential housing development to determine whether development would be subject to New York' rent regulatory system once it was removed from Mitchell-Lama program; doctrine of primary jurisdiction was inapplicable since issues were not within Department of Housing and Community Renewal's specialized experience and did not involve that agency's technical expertise. Davis ex rel. residents of Waterside Plaza v Waterside Housing Co., 182 Misc. 2d 851, 701 N.Y.S.2d 260, 1999 N.Y. Misc. LEXIS 542 (N.Y. Sup. Ct. 1999), rev'd, dismissed, 274 A.D.2d 318, 711 N.Y.S.2d 4, 2000 N.Y. App. Div. LEXIS 7761 (N.Y. App. Div. 1st Dep't 2000).

New York City Civil Court lacked jurisdiction to decide merits of action for judgment declaring that tenant unlawfully sublet portion of his loft unit in excess of legal regulated rent, although Supreme Court had jurisdiction when action was initially commenced and action was subsequently transferred to Housing Part under CLS CPLR § 325(d), where matter was treated throughout by both parties as declaratory judgment action, it was not possessory proceeding, and no notice of petition and petition were ever served. BLF Realty Holding Corp. v Kasher, 183 Misc. 2d 953, 707 N.Y.S.2d 793, 2000 N.Y. Misc. LEXIS 142 (N.Y. App. Term 2000).

Supreme court had jurisdiction to make a ruling on the pending motions when taxpayers sought to enjoin the expenditure of monies from the New York State cannabis revenue fund to build turn-key marihuana dispensaries. In turn, the court also had jurisdiction to determine the merits as the constitutionality of the State of New York's statutory structure to legalize and fund the construction of facilities for ultimate use as cannabis dispensaries was squarely at issue and was justiciable. Cannabis Impact Prevention Coalition, LLC v New York State Cannabis Control Bd., 229 N.Y.S.3d 854, 2025 N.Y. Misc. LEXIS 904 (N.Y. Sup. Ct. 2025).

**9. —Court's lack of jurisdiction**

Where zoning board of appeals was not made a party to action by property owner seeking, among other things, declaration that use of premises was a valid nonconforming use which illegally could be transferred, court was without jurisdiction to make an adjudication that determination of zoning board of appeals denying extension of variance was void. Phillips v Oriskany, 57 A.D.2d 110, 394 N.Y.S.2d 941, 1977 N.Y. App. Div. LEXIS 10932 (N.Y. App. Div. 4th Dep't 1977).

Where owner and intended purchaser of land instituted declaratory judgment action in nature of a collateral attack on variance which limited nonconforming use to the personal use of owner, and special term ruled that ordinance was unconstitutional because of a provision not invoked by village, court did not rule and had no jurisdiction to rule on validity and extent of variance; failure to join zoning board of appeals as a party to action deprived court of jurisdiction to grant judgment that use of premises was a valid nonconforming use which could be transferred. Phillips v Oriskany, 57 A.D.2d 110, 394 N.Y.S.2d 941, 1977 N.Y. App. Div. LEXIS 10932 (N.Y. App. Div. 4th Dep't 1977).

City Court had no subject matter jurisdiction to entertain order to show cause seeking relief in nature of mandamus or declaratory judgment as to constitutionality of CLS Sup Ct R § 1022.12, actions which, in either case, must be commenced in Supreme Court. Byrnes v County of Monroe, 122 A.D.2d 549, 505 N.Y.S.2d 473, 1986 N.Y. App. Div. LEXIS 59820 (N.Y. App. Div. 4th Dep't 1986).

Court lacked jurisdiction to grant declaratory relief where neither summons, notice of petition, nor order to show cause commencing action or special proceeding was served on defendant. Caruso v Alside Supply Co., Div. of Alside, Inc., 140 A.D.2d 981, 529 N.Y.S.2d 725, 1988 N.Y. App. Div. LEXIS 6042 (N.Y. App. Div. 4th Dep't 1988).

Supreme Court should have dismissed action seeking judgment declaring that procedures followed by Department of Civil Service were not within scope of consent decree entered in settlement of federal civil rights action since collateral attack on consent decree raised specter of inconsistent or contradictory proceedings, promoted uncertainty, and undermined concept of

final judgment and policy of promoting settlement of actions brought under Title VII of Civil Rights Act; federal court which entered consent decree was proper tribunal to determine matter. Civil Service Employees Asso. Local 1000, AFSCME v New York Civil Service Dep't, 142 A.D.2d 326, 536 N.Y.S.2d 185, 1988 N.Y. App. Div. LEXIS 13438 (N.Y. App. Div. 3d Dep't 1988), app. denied, 73 N.Y.2d 706, 539 N.Y.S.2d 299, 536 N.E.2d 628, 1989 N.Y. LEXIS 148 (N.Y. 1989).

Action for declaratory judgment initiated in first instance in Appellate Division, seeking declaration of right to assigned counsel for indigent defendants facing summary eviction proceedings in Housing Court, would be transferred to Supreme Court on ground that Appellate Division lacked jurisdiction. Donaldson v State, 156 A.D.2d 290, 548 N.Y.S.2d 676, 1989 N.Y. App. Div. LEXIS 15856 (N.Y. App. Div. 1st Dep't 1989), app. denied, 75 N.Y.2d 1003, 557 N.Y.S.2d 308, 556 N.E.2d 1115, 1990 N.Y. LEXIS 1077 (N.Y. 1990).

Court lacked jurisdiction in action seeking declaration that if paternity proceeding wee to be brought in New York by defendant against plaintiff it would be dismissed for failure to comply with requirement of CLS Family Ct Act § 517 that such proceeding be brought before child reached age of 21; in rem jurisdiction under CLS CPLR § 314(2) did not exist by reason of plaintiff’s assets in New York to which defendant could assert claim in event paternity was shown. Bongiorno v Hayden, 233 A.D.2d 211, 649 N.Y.S.2d 684, 1996 N.Y. App. Div. LEXIS 11796 (N.Y. App. Div. 1st Dep't 1996).

Court properly dismissed action for judgment declaring that defendant insurer had duty to defend and indemnify plaintiff with regard to action brought against it by employee of subcontractor which was covered by general liability policy issued by defendant, where subcontractor and defendant were both New Jersey corporations, subcontractor’s employee was injured on worksite in New York, defendant insurer was not licensed to do business in New York and never knowingly insured New York corporations or businesses, and plaintiff failed to show that insurer transacted business in New York or contracted anywhere to provide goods or

services in New York. Appollon Waterproofing & Restoration Corp. v Kodiak Ins. Co., 237 A.D.2d 552, 655 N.Y.S.2d 635, 1997 N.Y. App. Div. LEXIS 3047 (N.Y. App. Div. 2d Dep't 1997).

Town was entitled to dismissal of landowner's action to declare null and void stipulation of settlement in landowner's action for illegal dumping by town on his property where court lacked jurisdiction over town, which not property served under CLS CPLR § 311(a)(5), and landowner lacked standing because he was debtor in bankruptcy liquidation proceeding under which only bankruptcy trustee could pursue claims on behalf of estate. Gache v Town/Village of Harrison, 251 A.D.2d 624, 676 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 7873 (N.Y. App. Div. 2d Dep't 1998).

Action alleging that city ordinance was null and void because it was enacted without proper compliance with CLS Gen Mun § 239-m was improperly dismissed on ground that such challenge "should have been brought in a proceeding pursuant to CPLR article 78, which is now time-barred," since alleged failure to comply with referral provisions of statute was not mere procedural irregularity but was rather jurisdictional defect involving validity of legislative act and thus reviewable in declaratory judgment action, and court, in deciding motion to dismiss, was bound, under doctrine of law of case, by prior order of Justice of coordinate jurisdiction, as to timeliness of declaratory judgment action. Ernalex Constr. Realty Corp. v City of Glen Cove, 256 A.D.2d 336, 681 N.Y.S.2d 296, 1998 N.Y. App. Div. LEXIS 13142 (N.Y. App. Div. 2d Dep't 1998).

Village and other defendants were not entitled to summary judgment dismissing action for judgment declaring that religious organization had right to use its property in village for cemetery where organization raised triable issue of fact as to whether it proposed to use property as religious cemetery, which would entitle it to additional consideration and accommodation, or for commercial purposes. McGann v Inc. Vill. of Old Westbury, 273 A.D.2d 285, 709 N.Y.S.2d 858, 2000 N.Y. App. Div. LEXIS 6453 (N.Y. App. Div. 2d Dep't 2000).

A lower court of limited jurisdiction, such as the District Court, has no authority to grant a declaratory judgment declaring a statute unconstitutional. Babylon v Conte, 61 Misc. 2d 626, 305 N.Y.S.2d 553, 1969 N.Y. Misc. LEXIS 1024 (N.Y. Sup. Ct. 1969).

Jurisdiction over declaratory judgment actions is vested exclusively in Supreme Court; a lower court of limited jurisdiction has no authority to render declaratory judgment. Voccola v Shilling, 88 Misc. 2d 103, 388 N.Y.S.2d 71, 1976 N.Y. Misc. LEXIS 2637 (N.Y. Sup. Ct. 1976), aff'd, 57 A.D.2d 931, 394 N.Y.S.2d 577, 1977 N.Y. App. Div. LEXIS 12186 (N.Y. App. Div. 2d Dep't 1977).

Civil court lacked jurisdiction to grant either declaratory judgment or Article 78 relief, jurisdiction to grant which is limited solely to the Supreme Court. Housing & Development Administration v Community Housing Improv. Program, Inc., 90 Misc. 2d 813, 396 N.Y.S.2d 125, 1977 N.Y. Misc. LEXIS 2162 (N.Y. App. Term), aff'd, 59 A.D.2d 773, 398 N.Y.S.2d 997, 1977 N.Y. App. Div. LEXIS 13819 (N.Y. App. Div. 2d Dep't 1977).

In action for injunctive and declaratory relief, court lacked jurisdiction to litigate issues raised by fictitious plaintiff purporting to represent certain class of individuals, since plaintiff must be person in law to maintain civil action, and thus claims asserted by “John Doe” would be dismissed; by naming “John Doe” as plaintiff, real individual plaintiff was attempting to subvert purpose of class action statute in order to represent class of which he was not member. Goldberg v Corcoran, 136 Misc. 2d 213, 518 N.Y.S.2d 81, 1987 N.Y. Misc. LEXIS 2413 (N.Y. Sup. Ct. 1987), modified, 153 A.D.2d 113, 549 N.Y.S.2d 503, 1989 N.Y. App. Div. LEXIS 16555 (N.Y. App. Div. 2d Dep't 1989).

New York City Civil Court does not have jurisdiction to issue declaratory judgment as to insured’s obligation to defend and indemnify insured for counterclaim asserted against it which exceeds $25,000; thus, insured’s third-party action against insurer seeking declaratory judgment as to insured’s obligation to defend and indemnify insured as to 3 counterclaims against insured, each for $50,000, would be severed and transferred to Supreme Court. Apollon Waterproofing &

Restoration Corp. v Brandt, 172 Misc. 2d 888, 659 N.Y.S.2d 694, 1997 N.Y. Misc. LEXIS 197 (N.Y. Civ. Ct. 1997).

**10. —Court of Claims**

In an action by a contractor against the State to recover damages due to interference by the State resulting in extraordinary delay, a counterclaim by the State seeking a declaratory judgment concerning the State's rights against claimant is stricken, since the Court of Claims does not have the authority to render a declaratory judgment. Fehlhaber Corp. & Horn Constr. Co. v State, 69 A.D.2d 362, 419 N.Y.S.2d 773, 1979 N.Y. App. Div. LEXIS 11818 (N.Y. App. Div. 3d Dep't 1979).

The Court of Claims does not have authority to render a declaratory judgment. Wikarski v State, 91 A.D.2d 1174, 459 N.Y.S.2d 143, 1983 N.Y. App. Div. LEXIS 16521 (N.Y. App. Div. 4th Dep't 1983).

New York Court of Claims correctly dismissed a distributor's challenges to the constitutionality of the Alcoholic Beverage Control Law and the liquor authority's regulations because the Court of Claims was not the appropriate forum in which to seek declaratory relief. Shelton v New York State Liquor Auth., 61 A.D.3d 1145, 878 N.Y.S.2d 212, 2009 N.Y. App. Div. LEXIS 2626 (N.Y. App. Div. 3d Dep't 2009).

Court of Claims was not divested of jurisdiction to grant declaratory judgment pursuant to CLS Ct C Act § 9(9-a) on issue of insurer's obligation to defend State of New York, as insured, in pending Court of Claims action since insurer would have right to jury trial divesting Court of Claims of declaratory judgment jurisdiction only if there existed disputed questions of fact, and there were no disputed questions of fact as to insurer's duty to defend underlying action. Sangirardi v State, 152 Misc. 2d 423, 577 N.Y.S.2d 751, 1991 N.Y. Misc. LEXIS 660 (N.Y. Ct. Cl. 1991).

**11. Standing, generally**

In determining whether party who seeks declaratory judgment has standing to sue, it must be shown that plaintiff's personal or property rights will be directly and specifically affected. Wein v New York, 47 A.D.2d 367, 366 N.Y.S.2d 885, 1975 N.Y. App. Div. LEXIS 9248 (N.Y. App. Div. 1st Dep't), modified, 36 N.Y.2d 610, 370 N.Y.S.2d 550, 331 N.E.2d 514, 1975 N.Y. LEXIS 1859 (N.Y. 1975).

Mere assertion of claim to particular sum of money does not create proprietary interest needed for standing in action by political subdivision of state to challenge constitutionality of state statute which restricts subdivision's governmental power. Moreau v County of Saratoga, 142 A.D.2d 864, 531 N.Y.S.2d 61, 1988 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 3d Dep't 1988).

In combined declaratory judgment action and Article 78 proceeding initiated by town to challenge agreement pursuant to CLS Tax § 1262(c) between county and cities for allocation of sales and use tax revenues, town lacked standing, and its complaint and petition were properly dismissed, notwithstanding town's argument that standing existed because it claimed entitlement to specific fund, since town had no proprietary interest in county tax revenues, which could have been properly expended without any allocation to town under CLS Tax § 1262. Moreau v County of Saratoga, 142 A.D.2d 864, 531 N.Y.S.2d 61, 1988 N.Y. App. Div. LEXIS 7939 (N.Y. App. Div. 3d Dep't 1988).

Plaintiffs who were citizens, residents, taxpayers and registered voters of state lacked standing to maintain declaratory judgment action challenging constitutionality of Local Government Assistance Corporation Act (CLS Pub A § 3231 et seq.) on grounds that it violated, inter alia, CLS NY Const Art VII §§ 11 and 8 by authorizing issuance of long-term, tax-supported state debt for multiple purposes which were not distinctly specified, without voter approval, and by permitting lending of state's credit to Corporation, and that it violated CLS NY Const Art X § 5. Schulz v State, 185 A.D.2d 596, 586 N.Y.S.2d 428, 1992 N.Y. App. Div. LEXIS 9107 (N.Y. App. Div. 3d Dep't 1992), app. dismissed, app. denied, 81 N.Y.2d 336, 599 N.Y.S.2d 469, 615 N.E.2d 953, 1993 N.Y. LEXIS 1172 (N.Y. 1993).

A person with a genuine interest may seek a declaratory judgment as to the validity of a contested statute, ordinance, rule, or regulation. Jones v Banner Moving & Storage, Inc., 78 Misc. 2d 762, 358 N.Y.S.2d 885, 1974 N.Y. Misc. LEXIS 1489 (N.Y. Sup. Ct. 1974), aff'd in part, modified, 48 A.D.2d 928, 369 N.Y.S.2d 804, 1975 N.Y. App. Div. LEXIS 10208 (N.Y. App. Div. 2d Dep't 1975).

Trial court properly granted summary judgment dismissing a cause of action for a declaratory judgment since the rights of the parties could not have been affected by the trial court's determination. Koehler v Town of Smithtown, 305 A.D.2d 550, 759 N.Y.S.2d 392, 2003 N.Y. App. Div. LEXIS 5649 (N.Y. App. Div. 2d Dep't 2003).

**12. —Particular plaintiffs**

Plaintiff, as member of state assembly who voted with majority in favor of budget legislation, suffered injury in fact with respect to alleged unconstitutional nullification of his vote, sufficient to confer standing to seek declaratory judgment that legislation relating to budget which does not appropriate money is not subject to line-item veto power, and that governor's vetoes of items in such "non-appropriation" bills violated CLS NY Const Art IV § 7; mere availability of possible "supermajority override," which is political remedy for validly imposed vetoes, was insufficient to defeat standing. Silver v Pataki, 96 N.Y.2d 532, 730 N.Y.S.2d 482, 755 N.E.2d 842, 2001 N.Y. LEXIS 1989 (N.Y. 2001).

In construction site personal injury action, various defendants had standing to bring third-party declaratory judgment action against workers' compensation insurer of codefendant general contractor, seeking judgment declaring that insurer owed defense and coverage to general contractor on their cross claims against general contractor in underlying personal injury action; although not privy to insurance policy, defendants would nevertheless stand to profit from it, and controversy was particularly appropriate for declaratory judgment where insurer had disclaimed coverage and plaintiff in underlying action had made conflicting contentions regarding his status

as employee or independent contractor. Reliance Ins. Co. v Garsart Bldg. Corp., 122 A.D.2d 128, 505 N.Y.S.2d 160, 1986 N.Y. App. Div. LEXIS 59186 (N.Y. App. Div. 2d Dep't 1986).

Request for writ of mandate or declaratory relief brought by several contractors and contractors' associations to challenge Commissioner of Labor's administration of CPL Labor $220 was properly dismissed; plaintiffs lacked standing to bring suit since they did not demonstrate any injury or harmful effect on themselves stemming from alleged misadministration, and they pleaded no justicable controversy since they presented no specific set of facts for court to consider. Associated General Contractors, New York State Chapter, Inc. v Roberts, 122 A.D.2d 406, 505 N.Y.S.2d 220, 1986 N.Y. App. Div. LEXIS 59719 (N.Y. App. Div. 3d Dep't 1986).

Prostitute and patron of prostitutes lacked standing to challenge constitutionality of CLS Penal §§ 230.00 and 230.03, which criminalize prostitution, where only injury set forth was that they found statutes personally offensive and were upset that statutes criminalized activities in which they allegedly engaged; plaintiffs had not been arrested or prosecuted, and likelihood of prosecution was remote since prostitute was apparently no longer practicing and last specific time it was alleged that male plaintiff patronized prostitute was 1980. Cherry v Koch, 126 A.D.2d 346, 514 N.Y.S.2d 30, 1987 N.Y. App. Div. LEXIS 41241 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 603, 518 N.Y.S.2d 1026, 512 N.E.2d 552, 1987 N.Y. LEXIS 17435 (N.Y. 1987).

Individual plaintiff did not have standing to bring declaratory judgment action regarding validity of option provision of lease, where only names of parties included in lease were corporate landlord and corporate tenant, and plaintiff offered no documentary proof or other written evidence to substantiate her assertion that corporate tenant was merely acting as her "nominee"; in order for agent to exercise its authority to perform or execute lease of real property for period of longer than one year, agent must have written authority from principal. Baker v Latham Sparrowbush Associates, 129 A.D.2d 667, 514 N.Y.S.2d 426, 1987 N.Y. App. Div. LEXIS 45351 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 606, 519 N.Y.S.2d 1030, 514 N.E.2d 388, 1987 N.Y. LEXIS 18556 (N.Y. 1987).

Majority stockholder of corporate tenant did not have standing in her individual capacity to bring declaratory judgment action regarding validity of lease where only names of parties to lease were corporate landlord and corporate tenant, since stockholder has no right to bring action in his or her own name for wrong committed against corporation. Baker v Latham Sparrowbush Associates, 129 A.D.2d 667, 514 N.Y.S.2d 426, 1987 N.Y. App. Div. LEXIS 45351 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 606, 519 N.Y.S.2d 1030, 514 N.E.2d 388, 1987 N.Y. LEXIS 18556 (N.Y. 1987).

Corporate supplier of materials and services, as both general contractor and subcontractor for public improvement projects, had standing to challenge affirmative action programs implemented by state to give disadvantaged business enterprises (DBE) greater share of state construction contracts, since (1) contractor was seeking to preserve its equal protection right to compete for public contracts on same terms as others, (2) contractor had sufficiently alleged the DBE programs could have harmful effect on its ability to obtain contracts because of preference to be given DBEs, (3) there was no legislative intent to bar review of DBE programs, and (4) judicial review of DBEs might otherwise be avoided. Rex Paving Corp. v White, 139 A.D.2d 176, 531 N.Y.S.2d 831, 1988 N.Y. App. Div. LEXIS 14868 (N.Y. App. Div. 3d Dep't 1988).

Action by members of New York State Teachers' Retirement System to declare residency requirement of CLS Educ § 503(10) unconstitutional, and to obtain statutory right to purchase retirement credits for military service, would be dismissed for lack of standing since plaintiffs would have no right to credit sought even if residency requirement were invalidated where they had not applied for it in within statutory time period, nor were they excused from making timely application on theory that it would have been futile due to judicial decision upholding comparable residency requirement in another statute; application would not have been futile if coupled with constitutional challenge to residency requirement, and plaintiffs did not even commence instant action until 2 years after overruling of decision which had upheld comparable residency requirement. Axelrod v New York State Teachers' Retirement System, 154 A.D.2d 827, 546 N.Y.S.2d 489, 1989 N.Y. App. Div. LEXIS 12689 (N.Y. App. Div. 3d Dep't 1989).

Members of New York State Assembly had standing to bring declaratory judgment action against Governor challenging his failure to timely submit to legislature all of his budget bills simultaneously with Executive Budget. Winner v Cuomo, 176 A.D.2d 60, 580 N.Y.S.2d 103, 1992 N.Y. App. Div. LEXIS 1496 (N.Y. App. Div. 3d Dep't 1992).

Public administrator, as legal representative of certain victims of fire at insured's premises, did not have standing to bring action for declaration that insurers had duty to defend insured in underlying tort actions commenced as result of fire since administrator had no legally cognizable interest in insurance contracts at issue, and his standing was contingent on happening of future events which were beyond control of parties and might never occur. Clarendon Place Corp. v Landmark Ins. Co., 182 A.D.2d 6, 587 N.Y.S.2d 311, 1992 N.Y. App. Div. LEXIS 9086 (N.Y. App. Div. 1st Dep't), app. dismissed, app. denied, 80 N.Y.2d 918, 589 N.Y.S.2d 303, 602 N.E.2d 1119, 1992 N.Y. LEXIS 3373 (N.Y. 1992).

State Comptroller had standing to bring action to challenge constitutionality of CLS Pub A § 381, which authorized Thruway Authority to issue bonds and notes, and obligated state to fund debt service on such bonds or notes, even though he sued without authorization of Attorney General, since comptroller's position as chief financial officer of state gave him actual legal stake in matter. Regan v Cuomo, 182 A.D.2d 1060, 583 N.Y.S.2d 41, 1992 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 3d Dep't 1992).

Resident of town containing landfill, use of which was intensified by solid waste consolidation plan approved by Department of Environmental Conservation (DEC), lacked standing to challenge DEC's compliance with approval procedures under State Environmental Quality Review Act (SEQRA) since (1) he alleged only that he frequented restaurant that got water from aquifer underlying landfill and that there would be increased traffic and odor in area where he lived due to trucks carrying garbage to landfill, and (2) conferral of standing to challenge government actions involving land use (on SEQRA grounds or otherwise) requires showing that challenger would suffer direct harm; thus, court properly dismissed combined Article 78 proceeding, declaratory judgment action, and action under CLS Gen Mun § 51. Schulz v New

York State Dep't of Environmental Conservation, 186 A.D.2d 941, 589 N.Y.S.2d 370, 1992 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 3d Dep't 1992).

Decedent's father lacked standing to bring action seeking declaration that insurance policy issued on decedent's life, naming his estranged wife as beneficiary, had been canceled, since letters of administration had not been issued to father; further, father was not entitled to have payment of insurance proceeds stayed until his application for letters of administration was resolved, for even if father were to be eventually appointed administrator of estate, relief sought served neither to increase estate's assets nor to decrease its liabilities, so that no conceivable benefit could accrue to estate from action. Palladino v Metropolitan Life Ins. Co., 188 A.D.2d 708, 590 N.Y.S.2d 601, 1992 N.Y. App. Div. LEXIS 13533 (N.Y. App. Div. 3d Dep't 1992).

Contractor and school district had standing to seek declaratory judgment regarding duty of insurance company to defend and indemnify them since both contractor and school district were insureds under policy issued by insurance company that provided coverage for claims asserted against them, and both established genuine dispute as to whether insurance company had duty to defend and indemnify that would not be resolved in underlying action; contrary result was not required by fact that both contractor and school district already had benefit of defense provided by other insurers. AAC Contracting v United Coastal Ins. Co., 193 A.D.2d 1085, 599 N.Y.S.2d 203, 1993 N.Y. App. Div. LEXIS 5715 (N.Y. App. Div. 4th Dep't 1993).

Party who is not privy to insurance contract but would nevertheless stand to benefit from insurance policy may bring declaratory judgment action to determine whether insurer owed defense or coverage under policy. Costa v Colonial Penn Ins. Co., 204 A.D.2d 591, 612 N.Y.S.2d 617, 1994 N.Y. App. Div. LEXIS 5535 (N.Y. App. Div. 2d Dep't), app. dismissed, 84 N.Y.2d 966, 621 N.Y.S.2d 513, 645 N.E.2d 1213, 1994 N.Y. LEXIS 4372 (N.Y. 1994).

Employee subject to collective bargaining agreement lacked standing to bring action against employer for breach of contract and for judgment declaring his rights pursuant to arbitration provisions of agreement, even though union refused to proceed to arbitration on employee's underlying grievance claim by withdrawing claim after third step in grievance procedure, where

employee failed to adduce evidence of discrimination, arbitrariness or invidious or hostile treatment on part of union. Ponticello v County of Suffolk, 225 A.D.2d 751, 640 N.Y.S.2d 169, 1996 N.Y. App. Div. LEXIS 3119 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff, as contract-vendee of easement of way across property burdened by conservation easement granted to defendant, had standing to challenge construction of conservation easement and its application to easement of way that plaintiff had contracted to purchase. Redwood Constr. Corp. v Doornbosch, 238 A.D.2d 329, 655 N.Y.S.2d 655, 1997 N.Y. App. Div. LEXIS 3416 (N.Y. App. Div. 2d Dep't 1997).

Plaintiffs lacked standing under CLS St Fin § 123-b to seek judgment invalidating Public Service Commission order which exempted nonutility natural gas marketers and aggregators from requirements of Home Energy Fair Practices Act (CLS Pub Ser article 2) because their challenge was directed at allegedly unlawful agency action having essentially nothing to do with unauthorized expenditure of funds; also, individual plaintiffs lacked common-law standing because none of them were customers of gas marketers and thus they suffered no direct injury different from public at large, and organizational plaintiff failed to show that any of its members would have standing to sue. Public Util. Law Project of N.Y., Inc. v New York State PSC, 252 A.D.2d 55, 681 N.Y.S.2d 396, 1998 N.Y. App. Div. LEXIS 13343 (N.Y. App. Div. 3d Dep't 1998).

Contract vendees of shares allocated to cooperative apartment lacked standing to invoke rights of sellers of apartment where contract vendees remained strangers to cooperative corporation’s proprietary lease. Pober v Columbia 160 Apts. Corp., 266 A.D.2d 6, 697 N.Y.S.2d 619, 1999 N.Y. App. Div. LEXIS 11178 (N.Y. App. Div. 1st Dep't 1999).

Plaintiffs were entitled to class certification in their action for judgment declaring that certain membership campground contracts were unenforceable as contrary to public policy under CLS Gen Bus § 659 where class action was superior method for securing redress for all state residents who might have been aggrieved by defendants’ conduct. Meachum v Outdoor World Corp., 273 A.D.2d 209, 709 N.Y.S.2d 449, 2000 N.Y. App. Div. LEXIS 6252 (N.Y. App. Div. 2d Dep't 2000).

Plaintiffs lacked common-law standing as citizens (as opposed to taxpayers) to challenge constitutionality of CLS St Fin § 123-b(1) where (1) there was plethora of cases in which citizens (as well as taxpayers) had been denied both statutory and common-law standing by effect of exception contain in § 123-b(1), and (2) plaintiffs did not show that they had suffered injury-in-fact that had not been suffered by citizenry at large. Schulz v N.Y. State Legislature, 281 A.D.2d 682, 721 N.Y.S.2d 686, 2001 N.Y. App. Div. LEXIS 2039 (N.Y. App. Div. 3d Dep't), app. dismissed, 96 N.Y.2d 853, 729 N.Y.S.2d 668, 754 N.E.2d 771, 2001 N.Y. LEXIS 1830 (N.Y. 2001).

Tenant presented a justiciable controversy sufficient to constitute standing to maintain a declaratory judgment action because the tenant demonstrated a threatened injury to his protected right to his tenancy in the owner's house, claiming the definition of “family” contained in the village code rendered his tenancy illegal; the allegations in the converted complaint adequately alleged the existence of an actual controversy between the tenant and the village. Tomasulo v Village of Freeport, 151 A.D.3d 1100, 58 N.Y.S.3d 440, 2017 N.Y. App. Div. LEXIS 5182 (N.Y. App. Div. 2d Dep't 2017).

Where an applicant denied a liquor license chose not to review that decision, plaintiff, who had a contractual relationship with the applicant, was not an “aggrieved party” and could not maintain an action for a declaratory judgment that defendant had exceeded its authority in refusing to issue the license. Gross v New York State Liquor Authority, 60 Misc. 2d 413, 303 N.Y.S.2d 126, 1969 N.Y. Misc. LEXIS 1626 (N.Y. Sup. Ct.), aff'd, 33 A.D.2d 894, 307 N.Y.S.2d 838, 1969 N.Y. App. Div. LEXIS 6118 (N.Y. App. Div. 2d Dep't 1969).

Manager of shopping center who received compensation based on total sales made by each retail store in the center had status to bring action for declaratory judgment that city charter provision requiring certain of the stores to be closed on Labor Day was null and void. Wilcox v Utica, 80 Misc. 2d 998, 364 N.Y.S.2d 665, 1974 N.Y. Misc. LEXIS 1936 (N.Y. Sup. Ct. 1974).

Unsuccessful applicant for position of Housing Judge in New York City Civil Court had standing to bring declaratory judgment action to assert unconstitutionality of method of appointing

Housing Judges, even though applicant may not have been personally aggrieved and constitutionality of challenged statute might not be of general public interest, because failure to accord standing to applicant would, in effect, erect impenetrable barrier to any judicial scrutiny of method of appointing judges. Babigan v Wachtler, 133 Misc. 2d 111, 506 N.Y.S.2d 506, 1986 N.Y. Misc. LEXIS 2976 (N.Y. Sup. Ct. 1986), aff'd, 126 A.D.2d 445, 510 N.Y.S.2d 473, 1987 N.Y. App. Div. LEXIS 41599 (N.Y. App. Div. 1st Dep't 1987).

Plaintiffs, who were allegedly disqualified as adoptive parents solely because of biological parents' stated religious preference for placement, had standing to bring action for judgment declaring that child care agencies' administration of religious matching provisions of CLS Family Ct Act § 116(3) was unconstitutional. Orzechowski v Perales, 153 Misc. 2d 464, 582 N.Y.S.2d 341, 1992 N.Y. Misc. LEXIS 72 (N.Y. Sup. Ct. 1992).

Plaintiffs lacked standing to seek judgment declaring that Fourth and Fourteenth Amendments to federal constitution, and parallel articles of New York Constitution, were violated by provisions of city ordinance that required blood or alcohol testing of persons who possessed firearms, rifles, shotguns or air guns in public places; plaintiffs, who advocated safe use of firearms, were type of individuals who would be appalled by use of guns or other weapons by intoxicated persons, and thus they did not have "matured legally protectable interest in the outcome of the case." Citizens for a Safer Community v City of Rochester, 164 Misc. 2d 822, 627 N.Y.S.2d 193, 1994 N.Y. Misc. LEXIS 671 (N.Y. Sup. Ct. 1994).

Solid waste collection corporation had standing to bring declaratory judgment action against solid waste disposal authority, established under CLS Pub A § 2048-e(4), to determine whether statute empowered authority to "collect" solid waste in direct competition with corporation. Waste-Stream Inc. v St. Lawrence County Solid Waste Disposal Auth., 167 Misc. 2d 542, 636 N.Y.S.2d 602, 1995 N.Y. Misc. LEXIS 596 (N.Y. Sup. Ct. 1995).

Plaintiffs, comprised of students, parents, and organizations concerned with educational issues, had standing to challenge state's public school financing system as violating CLS NY Const Art XI § 1 and federal Civil Rights Act of 1964 and its implementing regulations where (1) students,

who attended public schools in New York City, suffered injury-in-fact redressable by Supreme Court, (2) under CLS CPLR § 1201, students had to appear in court via their parent or guardian, (3) lead organization, comprised of school-parent organizations, was founded to reform school funding in New York State and had members who were parents of students in New York City public schools, and (4) participation of lead organization's members was not necessary to prosecute present action or to devise remedy. Campaign for Fiscal Equity v State, 187 Misc. 2d 1, 719 N.Y.S.2d 475, 2001 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct. 2001), rev'd, 295 A.D.2d 1, 744 N.Y.S.2d 130, 2002 N.Y. App. Div. LEXIS 7252 (N.Y. App. Div. 1st Dep't 2002).

Individual chiropractors and chiropractic association did not have standing to maintain action for declaratory and injunctive relief, alleging that defendant health maintenance organizations (HMOs) violated CLS Ins § 3216(i)(21)(A) whose purpose was to secure coverage for chiropractic services to HMO enrollees, as statute was not adopted for benefit of chiropractors. Hudes v Vytra Health Plans Long Island, Inc., 187 Misc. 2d 861, 724 N.Y.S.2d 278, 2001 N.Y. Misc. LEXIS 84 (N.Y. Sup. Ct. 2001), aff'd, 295 A.D.2d 788, 744 N.Y.S.2d 80, 2002 N.Y. App. Div. LEXIS 6503 (N.Y. App. Div. 3d Dep't 2002).

Prospective female member of local Elks lodge had standing to assert that voting process relative to defendants' denial of her application for membership violated constitution, statutes, by-laws and regulations of Grand Lodge as amended in 1995 to permit women to be eligible for membership. Gifford v Guilderland Lodge, No. 2480, 178 Misc. 2d 707, 681 N.Y.S.2d 194, 1998 N.Y. Misc. LEXIS 530 (N.Y. Sup. Ct. 1998), aff'd, 272 A.D.2d 721, 707 N.Y.S.2d 722, 2000 N.Y. App. Div. LEXIS 5710 (N.Y. App. Div. 3d Dep't 2000).

**13. — —Associations**

An extensive assemblage of commercial enterprises in a municipality lacked standing to raise any First Amendment argument regarding an alleged overbreadth of a municipal sign ordinance's regulation of noncommercial speech, since they showed no direct interest in such speech and no commercial interest in others who themselves had such an interest. Syracuse

Sav. Bank v De Witt, 56 N.Y.2d 671, 451 N.Y.S.2d 713, 436 N.E.2d 1315, 1982 N.Y. LEXIS 3341 (N.Y.), app. dismissed, 459 U.S. 803, 103 S. Ct. 25, 74 L. Ed. 2d 41, 1982 U.S. LEXIS 2968 (U.S. 1982).

City trade associations had standing to bring a declaratory judgment action seeking invalidation of an executive order issued by the city mayor that mandated that 10 percent of all construction contracts awarded by the city were to be given to locally-based enterprises, since the trade associations were subject to and directly affected by the order, and since an actual controversy was presented that the courts had power to resolve in a declaratory judgment action without the need to conduct a trial, in that there were no factual questions to be confronted in deciding whether the mayor had the authority to issue such an order. Subcontractors Trade Ass'n v Koch, 62 N.Y.2d 422, 477 N.Y.S.2d 120, 465 N.E.2d 840, 1984 N.Y. LEXIS 4359 (N.Y. 1984).

Organizations that represented social workers and patients who receive social work services did not have standing to seek declaratory judgment invalidating Executive Order No. 20 (which, inter alia, gave Governor’s Office of Regulatory Reform (GORR) power to effectively block proposed rules offered by executive branch administrative agencies) based on GORR’s disapproval of proposed regulatory amendment which would have required that director of each organized social work department hold master’s degree in social work (MSW), because fact that members with MSWs merely were not given job preference over those without MSWs constituted “tenuous” and “ephemeral” harm which was insufficient to trigger judicial intervention. Rudder v Pataki, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978, 1999 N.Y. LEXIS 814 (N.Y. 1999).

Organizational plaintiffs whose members included both social workers with master’s degree in social work (MSW) and social workers without MSWs lacked standing to seek declaratory judgment against Governor’s Office of Regulatory Reform (GORR) (as established by Executive Order No. 20) after GORR blocked proposed regulatory amendment which would have given job preference to social workers with MSWs, because plaintiffs, by seeking to enhance job opportunities of only some of their members (those with MSWs), implicitly sought to diminish job

opportunities for other of their members (qualified social workers without MSWs). Rudder v Pataki, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978, 1999 N.Y. LEXIS 814 (N.Y. 1999).

Organizational plaintiffs whose members were patients receiving social work services lacked standing to seek declaratory judgment against Governor's Office of Regulatory Reform (GORR) (as established by Executive Order No. 20) after GORR blocked proposed regulatory amendment that would have required directors of organized social work departments in urban hospitals to hold master's degree in social work, where plaintiffs did not allege that any one of their members was injured by disapproval of proposed rule but rather asserted conclusorily that delivery of social work could be better if proposed rule went forward. Rudder v Pataki, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978, 1999 N.Y. LEXIS 814 (N.Y. 1999).

Plaintiff trade associations, which were directly affected by and subject to an executive order requiring a minimum of 10 percent of all construction contracts awarded by a city to be awarded to locally based enterprises, had standing to challenge the constitutionality and legality of that executive order. Subcontractors Trade Ass'n v Koch, 96 A.D.2d 774, 465 N.Y.S.2d 825, 1983 N.Y. App. Div. LEXIS 19371 (N.Y. App. Div. 1st Dep't 1983), aff'd, 62 N.Y.2d 422, 477 N.Y.S.2d 120, 465 N.E.2d 840, 1984 N.Y. LEXIS 4359 (N.Y. 1984).

Organizations concerned with care and protection of children had standing to seek declaratory and injunctive relief based on claim that city violated statutory duty to provide child protective services, although organizations' allegation that they suffered injury due to added burden on their resources was presented in general terms only; practical effect of dismissing claim would be to foreclose judicial review of city's failure to comply with statutory directives since abused children were unable to seek judicial remedy, and it was not likely that parents or caretakers, who were objects of claims of abuse, would do so. Grant v Cuomo, 130 A.D.2d 154, 518 N.Y.S.2d 105, 1987 N.Y. App. Div. LEXIS 45076 (N.Y. App. Div. 1st Dep't 1987), app. dismissed, 70 N.Y.2d 899, 524 N.Y.S.2d 428, 519 N.E.2d 339, 1987 N.Y. LEXIS 19943 (N.Y. 1987), aff'd, 73 N.Y.2d 820, 537 N.Y.S.2d 115, 534 N.E.2d 32, 1988 N.Y. LEXIS 3514 (N.Y. 1988).

Lake association had standing to challenge procedures of town zoning board in combined action for declaratory judgment and Article 78 proceeding regarding improvement of property on lake with boat launching area. Ireland v Queensbury Zoning Bd. of Appeals, 169 A.D.2d 73, 571 N.Y.S.2d 834, 1991 N.Y. App. Div. LEXIS 9313 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 822, 580 N.Y.S.2d 201, 588 N.E.2d 99, 1991 N.Y. LEXIS 5138 (N.Y. 1991).

New York State Conference of Mayors and Other Municipal Officials (NYCOM), as unincorporated voluntary association whose membership consisted of most of New York's cities and villages, lacked standing to bring declaratory judgment action challenging constitutionality of CLS Gen Mun Art 11-A, which authorizes municipalities to provide their volunteer firefighters with certain financial incentives in form of service award programs, since NYCOM members, as political subdivisions, could not themselves raise constitutional challenges to act of state legislature. Caruso v State, 188 A.D.2d 874, 591 N.Y.S.2d 614, 1992 N.Y. App. Div. LEXIS 14337 (N.Y. App. Div. 3d Dep't 1992).

Insurance carriers and their trade association, as collectors of tax on transfer of certain insurance awards and parties allegedly faced with overpayments of tax, had standing to challenge constitutionality of CLS Tax § 341 (which changed manner in which motor vehicle damage insurance awards were paid), and to seek injunction preventing its implementation. National Ass'n of Indep. Insurers v State, 207 A.D.2d 191, 620 N.Y.S.2d 448, 1994 N.Y. App. Div. LEXIS 13204 (N.Y. App. Div. 2d Dep't 1994), aff'd, 89 N.Y.2d 950, 655 N.Y.S.2d 853, 678 N.E.2d 465, 1997 N.Y. LEXIS 87 (N.Y. 1997).

Natural Resources Defense Council (NRDC) had standing to challenge proposed sale of New York City water system to New York City Water Board for purchase price of $2.3 billion, to be financed by bonds issued by New York City Municipal Water Finance Authority, whereby $1.3 billion would be used to retire outstanding general obligation bonds, and remaining $1 billion to be diverted to City's general fund, since NRDC sufficiently showed basis for standing as ratepayers and injury in fact arising from likely future increase in rates as result of increased debt. Giuliani v Hevesi, 228 A.D.2d 348, 644 N.Y.S.2d 265, 1996 N.Y. App. Div. LEXIS 7334

(N.Y. App. Div. 1st Dep't 1996), aff'd, modified, 90 N.Y.2d 27, 659 N.Y.S.2d 159, 681 N.E.2d 326, 1997 N.Y. LEXIS 300 (N.Y. 1997).

In declaratory judgment action challenging Executive Order No. 20 (9 NYCRR § 5.20) which established position of Director of Regulatory Reform with authority to oversee review of proposed agency regulations, organizations of social workers and advocates for aged and disabled persons did not establish standing to sue where they failed to allege specific harm other than generalized statements that continuing with present rule (which required, inter alia, that director of department of social work in each covered hospital have Master's degree is social work) would somehow diminish care presently available or have deleterious effect on patients. Rudder v Pataki, 246 A.D.2d 183, 675 N.Y.S.2d 653, 1998 N.Y. App. Div. LEXIS 7989 (N.Y. App. Div. 3d Dep't 1998), aff'd, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978, 1999 N.Y. LEXIS 814 (N.Y. 1999).

Suffolk County Police Benevolent Association (PBA) lacked standing to assert that Suffolk County resolution—precluding county from selecting arbitrators who have served in labor disputes involving Nassau County within preceding 3 years to serve in disputes under collective bargaining agreements voluntarily submitted to arbitration or in binding arbitration—was arbitrary, or that Suffolk County Legislature did not possess authority to determine how Suffolk County should select its arbitrators, where Suffolk County was authorized, by both its administrative code and its collective bargaining agreement with PBA, to select arbitrators according to its own discretion. Suffolk County Police Benevolent Ass'n v County of Suffolk, 273 A.D.2d 222, 708 N.Y.S.2d 693, 2000 N.Y. App. Div. LEXIS 6289 (N.Y. App. Div. 2d Dep't 2000).

Neither Public Utility Law Project of New York, Inc. nor member of its board of directors who was also residential electric customer had standing under CLS St Fin § 123-b(1) to challenge, in Article 78 proceeding, legality of Public Service Commission's expenditure of state funds by its implementation, promotion, and facilitation of orders restructuring electric industry along with its interpretation of applicability of CLS Pub Ser Art 2 within that new regulatory scheme where thrust of such claims was challenge to nonfiscal activities rather than to expenditures of

identifiable state funds. Energy Ass'n v PSC, 273 A.D.2d 708, 710 N.Y.S.2d 662, 2000 N.Y. App. Div. LEXIS 7453 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3783 (N.Y. 2000).

Neither Public Utility Law Project of New York, Inc. (PULP) nor member of its board of directors who was also residential electric customer had common-law standing to challenge, in Article 78 proceeding, legality of Public Service Commission's (PSC's) expenditure of state funds by its implementation, promotion, and facilitation of orders restructuring electric industry along with PSC's interpretation of applicability of CLS Pub Ser Art 2 within that new regulatory scheme where individual customer's potential injury in form of increased electricity rates was too speculative, PULP was not residential electric customer and thus did not suffer injury from PSC's action, and PULP did not show that any of its members would have individual standing so as to support its standing as organizational representative. Energy Ass'n v PSC, 273 A.D.2d 708, 710 N.Y.S.2d 662, 2000 N.Y. App. Div. LEXIS 7453 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3783 (N.Y. 2000).

Organization comprised of Suffolk County commercial and residential ratepayers did not have voter standing to challenge constitutionality of Long Island Power Authority's issuance of bonds and promulgation of bifurcated rate structure in connection with acquisition of Long Island Lighting Company because (1) it did not assert that any of its members were registered to vote, nor could it be considered to represent Suffolk County voters in any case, and (2) even if individual plaintiff was voter and taxpayer, this did not give him status to challenge bond issues. Initiative for Competitive Energy v Long Island Power Auth., 178 Misc. 2d 979, 683 N.Y.S.2d 391, 1998 N.Y. Misc. LEXIS 553 (N.Y. Sup. Ct. 1998).

Organization comprised of Suffolk County business and residential ratepayers did not have standing to challenge Long Island Power Authority's authority to issue bonds and set or collect rates to consummate various proposals for acquiring Long Island Lighting Company, in absence of showing that members of organization sustained injury in fact, or that any alleged injury differed from that suffered by community at large. Initiative for Competitive Energy v Long Island

Power Auth., 178 Misc. 2d 979, 683 N.Y.S.2d 391, 1998 N.Y. Misc. LEXIS 553 (N.Y. Sup. Ct. 1998).

New York City Lawyers' Association (NYCLA) had direct, third-party and organizational standing to commence action for declaratory and injunctive relief, challenging compensation levels and limits for assigned private counsel as set by CLS County § 722-b, CLS Family Ct Act § 245 and CLS Jud § 35(3), as (1) NYCLA and its members who were panel members of Assigned Counsel Plan and/or Family Court Law Guardian Plan suffered injury in fact within zone of interest of court rules implemented to facilitate effective assistance of counsel to children and indigent persons, and their injury was different from that of public at large and substantially different from most other bar groups and associations, and (2) traditional standing principles aside, to deny NYCLA standing would exempt from judicial review state's alleged failure to comply with its statutory and constitutional obligations. N.Y. County Lawyers' Ass'n v Pataki, 188 Misc. 2d 776, 727 N.Y.S.2d 851, 2001 N.Y. Misc. LEXIS 205 (N.Y. Sup. Ct. 2001), aff'd, 294 A.D.2d 69, 742 N.Y.S.2d 16, 2002 N.Y. App. Div. LEXIS 4822 (N.Y. App. Div. 1st Dep't 2002).

Associations lacked standing to challenge N.Y. Tax Law § 480-a(2)(a)(ii) in N.Y. C.P.L.R. 3001 proceeding because the associations failed to show injury in fact to any one single retail dealer member, and did not identify or disclose any such members' gross sales to indicate how the revised fee would have forced such member to close down its business. Long Is. Gasoline Retailers Assn., Inc. v Paterson, 897 N.Y.S.2d 850, 27 Misc. 3d 914, 243 N.Y.L.J. 51, 2010 N.Y. Misc. LEXIS 611 (N.Y. Sup. Ct. 2010), app. dismissed, 83 A.D.3d 913, 920 N.Y.S.2d 718, 2011 N.Y. App. Div. LEXIS 3148 (N.Y. App. Div. 2d Dep't 2011).

**14. — —Local governmental entities**

Doctrine that municipalities generally lack capacity to sue state to invalidate state legislation is not limited to statutory restrictions on municipality's power and state-mandated compulsion to make expenditures; doctrine applies to block challenges to far wider variety of state actions having differing adverse impacts on local governmental bodies and their constituents. City of

New York v State, 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, 1995 N.Y. LEXIS 1144 (N.Y. 1995).

Fact that legislature expressly conferred power to sue on New York City and city school district in furtherance of their general statutory municipal or educational responsibilities was insufficient from which to imply capacity to bring suit against state itself to declare that public school funding scheme enacted by legislature was unconstitutional; in absence of express authority for municipality to bring suit against state to invalidate state legislation, municipality must establish legislative intent to confer such capacity to sue by inference. City of New York v State, 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, 1995 N.Y. LEXIS 1144 (N.Y. 1995).

Municipal officials and members of municipal administrative or legislative boards suffer same lack of capacity to sue state to invalidate state legislation as municipal corporate bodies they represent. City of New York v State, 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, 1995 N.Y. LEXIS 1144 (N.Y. 1995).

Municipalities generally lack capacity to bring suit to invalidate state legislation since municipal corporate bodies—counties, towns and school districts—are merely subdivisions of state, created by state for convenient carrying out of state's governmental powers and responsibilities as its agents. City of New York v State, 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, 1995 N.Y. LEXIS 1144 (N.Y. 1995).

New York City and city school district lacked proprietary interest in particular fund or property to which their claims against state related, and thus they lacked capacity to bring suit against state challenging state's method of funding schools, where they alleged merely claim to greater portion of general state funds which legislature chooses to appropriate for public education. City of New York v State, 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, 1995 N.Y. LEXIS 1144 (N.Y. 1995).

New York City and city school district lacked capacity to sue state in challenge to legislature's method of funding public schools, despite plaintiffs' allegations that scheme violated Equal

Protection Clause and state constitution's Education Article, which would allegedly force plaintiffs to violate constitutional "proscription" if they were obliged to comply with scheme, since plaintiffs could not be held accountable under either constitutional provision for alleged state underfunding over which they had absolutely no control. City of New York v State, 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, 1995 N.Y. LEXIS 1144 (N.Y. 1995).

Sole exceptions to general rule barring local governmental challenges to state legislation are: (1) express statutory authorization to bring such suit, (2) where state legislation adversely affects municipality's proprietary interest in specific fund of moneys, (3) where state statute impinges on "Home Rule" powers of municipality constitutionally guaranteed under CLS NY Const Art IX, and (4) where municipal challengers assert that, if they are obliged to comply with state statute, they will by such compliance be forced to violate constitutional proscription. City of New York v State, 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649, 1995 N.Y. LEXIS 1144 (N.Y. 1995).

Plaintiff, who was appointed chairman of the Niagara Frontier Transportation Authority and whose appointment was rejected by the State Senate on the ground that there was no vacancy, has standing to bring a declaratory judgment action to determine title to the chairmanship notwithstanding that he has not recorded with the office of the Secretary of State a commission from the Governor made with the consent of the Senate, since plaintiff has a matured legally protectible interest in the outcome of the case such as to assure concrete adverseness in the presentation of issues in that the Governor has three times attempted to appoint plaintiff to the chairmanship of the Niagara Frontier Transportation Authority and each time the Senate has refused to confirm his nomination. Dekdebrun v Hardt, 68 A.D.2d 241, 417 N.Y.S.2d 331, 1979 N.Y. App. Div. LEXIS 10544 (N.Y. App. Div. 4th Dep't), app. dismissed, 48 N.Y.2d 608 (N.Y. 1979), app. dismissed, 48 N.Y.2d 882, 1979 N.Y. LEXIS 7233 (N.Y. 1979).

County had standing to bring action against state and Metropolitan Transportation Authority (MTA) challenging constitutionality of provisions of CLS Pub A § 1277 which permit state to withhold funds appropriated to county in order to satisfy debt owed to MTA for station maintenance, since county was not challenging one of its delegated governmental duties;

furthermore, it was sufficient for standing that county be entitled to possession of fund which was in possession of another, since title in fund is not mandatory prerequisite to standing. Purcell v Regan, 126 A.D.2d 849, 510 N.Y.S.2d 772, 1987 N.Y. App. Div. LEXIS 41980 (N.Y. App. Div. 3d Dep't), app. denied, 69 N.Y.2d 613, 517 N.Y.S.2d 1029, 511 N.E.2d 88, 1987 N.Y. LEXIS 16930 (N.Y. 1987).

Counties participating in “special traffic options program for driving while intoxicated” (STOP-DWI) had standing to challenge provision in state operations budget directing state comptroller to retain up to 2 percent of moneys collected pursuant to STOP-DWI program and deposit them in state’s general fund, rather than remit all funds to counties, since counties were asserting proprietary claim of entitlement to specific fund. County of Rensselaer v Regan, 173 A.D.2d 37, 578 N.Y.S.2d 274, 1991 N.Y. App. Div. LEXIS 16808 (N.Y. App. Div. 3d Dep't 1991), aff'd, 80 N.Y.2d 988, 592 N.Y.S.2d 646, 607 N.E.2d 793, 1992 N.Y. LEXIS 3891 (N.Y. 1992).

Neither county department of social services nor county had standing to bring Article 78 proceeding or declaratory judgment action against state Commissioner of Social Services to challenge shelter allowances for county set forth in 18 NYCRR § 352.3 since applicable federal law required that Aid to Families with Dependent Children program be administered by single state agency and that local agencies must not have authority to review decisions of state agency. O'Rourke v Perales, 193 A.D.2d 802, 598 N.Y.S.2d 280, 1993 N.Y. App. Div. LEXIS 5181 (N.Y. App. Div. 2d Dep't 1993).

County department of social services lacked standing to bring Article 78 proceeding or declaratory judgment action against state Commissioner of Social Services to challenge shelter allowances for county set forth in 18 NYCRR § 352.3 since county commissioner was agent of state commissioner and was duty bound to implement decision of state commissioner. O'Rourke v Perales, 193 A.D.2d 802, 598 N.Y.S.2d 280, 1993 N.Y. App. Div. LEXIS 5181 (N.Y. App. Div. 2d Dep't 1993).

County executive lacked standing to bring Article 78 proceeding or declaratory judgment action against state Commissioner of Social Services to challenge shelter allowances for county set

forth in 18 NYCRR § 352.3 since county executive was not aggrieved party; standing was not conferred by fact that allowance might be inadequate and result in financial burden to county. O'Rourke v Perales, 193 A.D.2d 802, 598 N.Y.S.2d 280, 1993 N.Y. App. Div. LEXIS 5181 (N.Y. App. Div. 2d Dep't 1993).

Towns had standing to maintain action for declaratory judgment as to scope of insurance coverage in connection with property damage arising from allegedly negligent sewer construction work performed by defendant contractor pursuant to contracts with counties, since towns were third-party beneficiaries of construction contracts in question. Town of Islip v S. Zara & Sons Contracting Co., 207 A.D.2d 339, 615 N.Y.S.2d 428, 1994 N.Y. App. Div. LEXIS 8101 (N.Y. App. Div. 2d Dep't 1994).

Board of education lacked standing to commence combined action and special proceeding under CLS CPLR § 3001 and Article 78, challenging distribution of revenues derived from payments made in lieu of taxes (PILOT agreement) by company whose shopping mall was granted tax-exempt status pursuant to its agreement with town’s industrial development agency, as municipal entities may not sue to enforce private rights, and school board (not being taxpayer) was not aggrieved by town agency’s method of disbursing PILOT funds even if it was thereby deprived of tax revenues; aggrieved party was taxpayer who would have to shoulder any additional tax burden created by failure to disburse adequate PILOT funds to board of education or suffer decline in level of services. Board of Educ. v Town of Wallkill Indus. Dev. Agency, 222 A.D.2d 475, 635 N.Y.S.2d 244, 1995 N.Y. App. Div. LEXIS 12777 (N.Y. App. Div. 2d Dep't 1995), app. denied, 87 N.Y.2d 811, 644 N.Y.S.2d 144, 666 N.E.2d 1058, 1996 N.Y. LEXIS 1141 (N.Y. 1996).

In action for judgment declaring that housing allowance schedules set forth in 18 NYCRR § 352.3 violated plaintiffs’ constitutional and statutory rights to obtain and retain adequate housing, county executive and commissioner of county department of social services were not entitled to intervene as plaintiffs, in view of court’s prior holding that they lacked standing to maintain combined Article 78 proceeding and declaratory judgment action which raised same issues

because they were not aggrieved parties; fact that failure of state to provide adequate shelter allowances might impose extreme financial burden on county did not confer legally cognizable real and substantial interest for which county could maintain lawsuit against state. Love v Perales, 222 A.D.2d 661, 636 N.Y.S.2d 93, 1995 N.Y. App. Div. LEXIS 13981 (N.Y. App. Div. 2d Dep't 1995).

In declaratory judgment action in which school district and district taxpayers challenged constitutionality of county tax act, issue of district's standing was not properly before Appellate Division, where standing was not raised in defendants' cross motions or addressed by Supreme Court, and defendants' answers affirmatively alleged that plaintiff taxpayers lacked standing, without mentioning district. Prodell v State, 222 A.D.2d 178, 645 N.Y.S.2d 589, 1996 N.Y. App. Div. LEXIS 7865 (N.Y. App. Div. 3d Dep't 1996), app. dismissed, 88 N.Y.2d 1064, 651 N.Y.S.2d 407, 674 N.E.2d 337, 1996 N.Y. LEXIS 3334 (N.Y. 1996), app. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502, 1997 N.Y. LEXIS 229 (N.Y. 1997), cert. denied, 522 U.S. 810, 118 S. Ct. 52, 139 L. Ed. 2d 17, 1997 U.S. LEXIS 4623 (U.S. 1997).

Town was entitled to dismissal of landowner's action to declare null and void stipulation of settlement in landowner's action for illegal dumping by town on his property where court lacked jurisdiction over town, which not property served under CLS CPLR § 311(a)(5), and landowner lacked standing because he was debtor in bankruptcy liquidation proceeding under which only bankruptcy trustee could pursue claims on behalf of estate. Gache v Town/Village of Harrison, 251 A.D.2d 624, 676 N.Y.S.2d 198, 1998 N.Y. App. Div. LEXIS 7873 (N.Y. App. Div. 2d Dep't 1998).

Neighboring city lacked standing to challenge town planning board's issuance of special use permit for construction of hot mix asphalt plant where (1) CLS Town § 274-b(9) provides that review of determination issuing special use permit may be sought by any "person aggrieved" by that determination, and (2) city's averment that plant would diminish property values within its boundaries and cause excessive noise, greatly increased traffic, air pollution, and possible destruction of ecosystem did not show that it would suffer injury different from that suffered by

public at large. Dyer v Planning Bd., 251 A.D.2d 907, 674 N.Y.S.2d 860, 1998 N.Y. App. Div. LEXIS 7773 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 92 N.Y.2d 1026, 684 N.Y.S.2d 490, 707 N.E.2d 445, 1998 N.Y. LEXIS 4325 (N.Y. 1998), app. dismissed, 93 N.Y.2d 1000, 695 N.Y.S.2d 745, 717 N.E.2d 1082, 1999 N.Y. LEXIS 1977 (N.Y. 1999).

County comptroller had standing and capacity to bring declaratory judgment action contesting validity of county laws that waived interest and penalties for late payment of hospital’s real property taxes. Caputo v County of Suffolk, 275 A.D.2d 294, 712 N.Y.S.2d 564, 2000 N.Y. App. Div. LEXIS 8577 (N.Y. App. Div. 2d Dep't 2000).

Court would not deny district attorney standing in action seeking,inter alia, declaration that defense counsel in several named cases unconstitutionally used peremptory challenges to exclude prospective jurors on basis of race, even though at least 4 of 6 criminal cases cited resulted in convictions, since issue was “far-reaching” and there was likelihood of its recurrence. Holtzman v Supreme Court of State, 139 Misc. 2d 109, 526 N.Y.S.2d 892, 1988 N.Y. Misc. LEXIS 64 (N.Y. Sup. Ct. 1988), aff'd, 152 A.D.2d 724, 545 N.Y.S.2d 40, 1989 N.Y. App. Div. LEXIS 10655 (N.Y. App. Div. 2d Dep't 1989).

District attorney would be denied standing to bring action as representative of excluded potential jurors seeking, inter alia, to declare CLS CPL § 270.25 unconstitutional, to extent that statute permitted defense counselto make racially motivated peremptory challenges, since there was no “impenetrable barrier” to potential jurors themselves bringing such action on their own behalf. Holtzman v Supreme Court of State, 139 Misc. 2d 109, 526 N.Y.S.2d 892, 1988 N.Y. Misc. LEXIS 64 (N.Y. Sup. Ct. 1988), aff'd, 152 A.D.2d 724, 545 N.Y.S.2d 40, 1989 N.Y. App. Div. LEXIS 10655 (N.Y. App. Div. 2d Dep't 1989).

District attorney had standing in her own right and in her official capacity as district attorney to bring action seeking, inter alia, declaration that CLS CPL § 270.25 was unconstitutional to extent that statute permitted defense counsel to make racially motivated peremptory challenges since there was no clear legislative intent negating review, and matter was within “zone of interest” of district attorney. Holtzman v Supreme Court of State, 139 Misc. 2d 109, 526 N.Y.S.2d 892, 1988

N.Y. Misc. LEXIS 64 (N.Y. Sup. Ct. 1988), aff'd, 152 A.D.2d 724, 545 N.Y.S.2d 40, 1989 N.Y. App. Div. LEXIS 10655 (N.Y. App. Div. 2d Dep't 1989).

District attorney and assistant district attorney had standing to bring declaratory judgment action and Article 78 proceeding against State Commission of Investigation for actions by commission during its investigation of county police department and district attorney's office, since petitioners had interest in protecting their names and defending themselves against accusation of crime where commission had virtually accused assistant district attorney of certain crimes and had made those accusations in written press releases, notwithstanding fact that commission was investigatory, rather than accusatory, body. Henry v New York State Com. of Investigation, 141 Misc. 2d 849, 535 N.Y.S.2d 859, 1988 N.Y. Misc. LEXIS 699 (N.Y. Sup. Ct. 1988).

Board of education and school superintendent lacked standing to seek judgment declaring that CLS Retire & S S § 803, governing retroactive membership in public retirement system, violated their rights to due process and equal protection under state constitution; however, they did have capacity to challenge statute on ground that their compliance therewith would require that they violate state constitution's proscription prohibiting school district from making gift (CLS NY Const Art VIII § 1). Herzog v Board of Educ., 171 Misc. 2d 22, 652 N.Y.S.2d 473, 1996 N.Y. Misc. LEXIS 465 (N.Y. Sup. Ct. 1996).

Municipal corporations had standing to challenge constitutionality of CLS Retire & S S § 803, which grants certain public employees retroactive membership in state retirement systems, on ground that statute violations CLS NY Const Art VIII §§ 1 and 2, which prohibit municipal corporations from making gifts of public funds and incurring debts without any corresponding benefits. Board of Coop. Educ. Servs. v State, 171 Misc. 2d 585, 654 N.Y.S.2d 954, 1996 N.Y. Misc. LEXIS 548 (N.Y. Sup. Ct. 1996), aff'd, 236 A.D.2d 84, 664 N.Y.S.2d 149, 1997 N.Y. App. Div. LEXIS 11473 (N.Y. App. Div. 3d Dep't 1997).

Speaker of New York City Council had legal capacity, on behalf of city council, to seek judgment declaring that New York City Health and Hospitals Corporation's surrender of use and occupancy of health care facility required prior approval of city council and application under

Uniform Land Use Review Procedure §§ 197-c and 197-d, as (1) litigation related to extent to which one branch of city government may exercise power in relation to another, (2) nothing in New York City Charter requires adoption of local law or resolution prior to authorizing general counsel to commence action on behalf of council, (3) charter does not limit speaker's power to institute action in name of council, and (4) no council members objected to action, nor would any protest be relevant in any event. Council of City of New York v Giuliani, 183 Misc. 2d 799, 705 N.Y.S.2d 801, 1999 N.Y. Misc. LEXIS 639 (N.Y. Sup. Ct. 1999).

Since the issue of whether admission of calibration and certification test results to lay a foundation for the admission of breathalyzer results in drunk driving prosecutions violated a defendant's confrontation rights, mandating dismissal of such prosecutions, was a procedural situation, based purely on legal issues, that was likely to keep recurring, it was an appropriate matter for for a declaratory judgment proceeding by a prosecutor against a local criminal court judge who had dismissed a series of such prosecutions. Green v DeMarco, 812 N.Y.S.2d 772, 11 Misc. 3d 451, 2005 N.Y. Misc. LEXIS 2776 (N.Y. Sup. Ct. 2005).

**15. — —Property owners; residents**

Where tenant-in-occupancy of rent-controlled apartment made offer (which was rejected) during her lifetime to purchase shares allocated to apartment in connection with cooperative conversion, her death following date of her tender of executed subscription for shares did not prevent her estate from maintaining action for declaration of her right to purchase shares. Weinstein v Hohenstein, 69 N.Y.2d 1017, 517 N.Y.S.2d 907, 511 N.E.2d 51, 1987 N.Y. LEXIS 16815 (N.Y. 1987).

In an action declaring a zoning ordinance to be invalid, a homeowner whose land is near rather than within the area rezoned has standing to maintain an action for declaratory judgment if he demonstrates that his land is affected by the rezoning. Haber v Board of Estimate, 33 A.D.2d 571, 305 N.Y.S.2d 520, 1969 N.Y. App. Div. LEXIS 3086 (N.Y. App. Div. 2d Dep't 1969).

In a declaratory judgment action challenging the constitutionality of a zoning ordinance which, with a limited exception for two persons 62 years of age or over, restricted occupancy of one-family homes to persons related by blood, marriage or adoption, the issues were not mooted, nor were plaintiffs deprived of standing either by plaintiff owners' contract to sell the one-family house in question, or by their tenants' move to another one-family house within the municipality, where a criminal prosecution based on the ordinance was still pending, where plaintiffs owned at least one other house within the municipality subject to the ordinance, the value of which plaintiffs claimed was adversely affected by the ordinance, and where the tenants remained in violation of the ordinance in their new home. McMinn v Oyster Bay, 105 A.D.2d 46, 482 N.Y.S.2d 773, 1984 N.Y. App. Div. LEXIS 20677 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240, 1985 N.Y. LEXIS 17940 (N.Y. 1985).

Affected property owners had standing to bring declaratory judgment action alleging that town board failed to adequately comply with State Environmental Quality Review Act (SEQRA) in adopting new zoning ordinance, notwithstanding owners' failure to allege any environmental injury within zone of interest protected by SEQRA. Magee v Rocco, 158 A.D.2d 53, 557 N.Y.S.2d 759, 1990 N.Y. App. Div. LEXIS 7477 (N.Y. App. Div. 3d Dep't 1990).

Group of apartment owner-occupiers lacked standing to bring declaratory judgment action challenging town board's adoption of Emergency Tenant Protection Act (EPTA) with amendment excepting owner-occupant units, since purpose of action was to preserve lower tax assessment to which regulated properties were subject, which was not cognizable under EPTA; where economic harm alleged is outside realm of statutory right sought to be enforced, standing is absent. Buckingham Apartments, Inc. v Doody, 165 A.D.2d 855, 560 N.Y.S.2d 318, 1990 N.Y. App. Div. LEXIS 11528 (N.Y. App. Div. 2d Dep't 1990).

Individual residents and taxpayers of town had standing to seek declaration that certain acts of town, regarding loan modification agreement between it and developers, were void. Tri-County Taxpayers Ass'n v Bolton, 165 A.D.2d 451, 567 N.Y.S.2d 940, 1991 N.Y. App. Div. LEXIS 3883

(N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 896, 581 N.Y.S.2d 659, 590 N.E.2d 244, 1992 N.Y. LEXIS 809 (N.Y. 1992).

Owner of residential property on lake near property improved as boat launching area had standing to challenge procedures of town zoning board in combined action for declaratory judgment and Article 78 proceeding based on her ownership of real property adjoining land at issue, and costs incurred by her to repair damage to her shoreline caused by boat traffic from launching area. Ireland v Queensbury Zoning Bd. of Appeals, 169 A.D.2d 73, 571 N.Y.S.2d 834, 1991 N.Y. App. Div. LEXIS 9313 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 822, 580 N.Y.S.2d 201, 588 N.E.2d 99, 1991 N.Y. LEXIS 5138 (N.Y. 1991).

Court properly dismissed declaratory judgment action by owner of restaurant and dancing establishment, alleging that village ordinance which prohibited consumption of food and beverages in any public place in village unlawfully infringed on his right to carry on lawful business because persons who were made aware of ordinance would choose not to visit village, and would not patronize his establishment, since alleged injury to plaintiff’s business was too remote or incidental to establish standing. Pokoik v Ocean Beach, 184 A.D.2d 499, 584 N.Y.S.2d 166, 1992 N.Y. App. Div. LEXIS 7683 (N.Y. App. Div. 2d Dep't 1992).

Plaintiffs who drew their water supply from well located in close proximity to proposed garage site in critical environmental area had standing to maintain declaratory judgment action to set aside results of voter referendum approving school building project and bus garage project on ground that school district failed to comply with State Environmental Quality Review Act (SEQRA), since they demonstrated injury different in kind and degree from that of public at large. Chase v Board of Educ. of Roxbury Cent. School Dist., 188 A.D.2d 192, 593 N.Y.S.2d 603, 1993 N.Y. App. Div. LEXIS 1094 (N.Y. App. Div. 3d Dep't 1993).

Purchaser of real property had standing to seek judgment declaring as invalid lien of confessed judgment which had been entered against property as security for bail bond issued by insurer at behest of seller of property; subsequent purchaser for value without actual notice may challenge

lien of judgment entered by confession. Irons v Roberts, 206 A.D.2d 683, 614 N.Y.S.2d 792, 1994 N.Y. App. Div. LEXIS 7504 (N.Y. App. Div. 3d Dep't 1994).

Plaintiffs, individuals and organizations representing New York City real property owners, lacked standing in action seeking declaration that State Division of Equalization and Assessment's special equalization ratios violated CLS NY Const Art VIII § 10 where there was no evidence tending to show that City's tax levy for fiscal year in question exceeded properly computed constitutional tax limit. Taxpayers for an Affordable N.Y. v State Bd. of Equalization & Assessment, 218 A.D.2d 848, 630 N.Y.S.2d 405, 1995 N.Y. App. Div. LEXIS 8266 (N.Y. App. Div. 3d Dep't), app. denied, 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999, 1995 N.Y. LEXIS 5001 (N.Y. 1995).

Landowner, whose right to utilize its property in furtherance of its business had potentially been adversely affected by enactment of local laws, had standing to bring declaratory judgment action challenging town boards' alleged procedural and substantive violations of State Environmental Quality Review Act; owner did not have to allege specific environmental harm. Patterson Materials Corp. v Town of Pawling, 221 A.D.2d 608, 634 N.Y.S.2d 709, 1995 N.Y. App. Div. LEXIS 12388 (N.Y. App. Div. 2d Dep't 1995).

Petitioner who owned property in village and was engaged in business of mineral extraction had standing to ask court to annul local law regulating extraction of natural products within village due to village respondents' alleged failure to comply with State Environmental Quality Review Act (SEQRA), and thus petitioner's combined Article 78 proceeding and action for declaratory judgment was improperly dismissed for failure to allege specific adverse environmental impact; property owner has legally cognizable interest in being assured that municipality satisfied SEQRA before taking action. Skenesborough Stone, Inc. v Village of Whitehall, 229 A.D.2d 780, 645 N.Y.S.2d 579, 1996 N.Y. App. Div. LEXIS 7829 (N.Y. App. Div. 3d Dep't 1996).

In combined proceeding under CLS CPLR Article 78 and action for declaratory judgment challenging method by which water district had assessed taxes for construction of new water treatment facility, those petitioners who lived outside district lacked standing. Schulz v New York

State Legislature, 230 A.D.2d 578, 660 N.Y.S.2d 155, 1997 N.Y. App. Div. LEXIS 7244 (N.Y. App. Div. 3d Dep't 1997), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3819 (N.Y. 2000).

In combined CLS CPLR Art 78 and declaratory judgment actions challenging town board's enactment of local law rezoning certain parcel, petitioner, owner of hardware store located some 2 miles north of subject property, did not have standing based on allegations that it would be adversely impacted by zoning change because proposed shopping center (which would include competing hardware store) would create traffic "bottleneck" that would make it more difficult for petitioner's customers to reach its store, that proposed shopping center would result in decreased values for properties located along specific route, and that rezoning placed petitioner at competitive disadvantage because it had had to comply with existing zoning law; such allegations were not sufficient to show that harm petitioner would suffer was different from that of public at large. McGrath v Town Bd. of N. Greenbush, 254 A.D.2d 614, 678 N.Y.S.2d 834, 1998 N.Y. App. Div. LEXIS 11191 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 803, 688 N.Y.S.2d 493, 710 N.E.2d 1092, 1999 N.Y. LEXIS 106 (N.Y. 1999).

In combined CLS CPLR Art 78 and declaratory judgment actions challenging town board's enactment of local law rezoning certain parcel, court erred in dismissing petitioner's complaint for lack of standing since she alleged that she resided "within approximately 500 feet of the site," and that she would suffer harm from "increased noise," "increased vehicle and truck traffic," and "degradation in the character of the neighborhood and style of life." McGrath v Town Bd. of N. Greenbush, 254 A.D.2d 614, 678 N.Y.S.2d 834, 1998 N.Y. App. Div. LEXIS 11191 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 803, 688 N.Y.S.2d 493, 710 N.E.2d 1092, 1999 N.Y. LEXIS 106 (N.Y. 1999).

Property owners lacked standing to maintain Article 78 proceeding and declaratory judgment action challenging construction of new town highway department garage on grounds of alleged violations of State Environmental Quality Review Act where complaint failed to identify any

specific, direct environmental harm to petitioners. Boyle v Town of Woodstock, 257 A.D.2d 702, 682 N.Y.S.2d 729, 1999 N.Y. App. Div. LEXIS 143 (N.Y. App. Div. 3d Dep't 1999).

Proximity of plaintiff's property to proposed site was not "newly discovered evidence" that would justify setting aside dismissal, for lack of standing, of Article 78 proceeding and declaratory judgment action challenging construction of new town highway department garage on grounds of alleged violations of State Environmental Quality Review Act. Boyle v Town of Woodstock, 257 A.D.2d 702, 682 N.Y.S.2d 729, 1999 N.Y. App. Div. LEXIS 143 (N.Y. App. Div. 3d Dep't 1999).

Property owners had standing to maintain action for judgment declaring invalidity of town zoning law amendments allegedly benefiting owner of "wild west" resort where they alleged that they owned property adjacent to resort, and that they would be harmed by increased noise, odor and insects from events held there. Massiello v Town Bd., 257 A.D.2d 962, 684 N.Y.S.2d 330, 1999 N.Y. App. Div. LEXIS 729 (N.Y. App. Div. 3d Dep't 1999).

Neither Public Utility Law Project of New York, Inc. nor member of its board of directors who was also residential electric customer had standing under CLS St Fin § 123-b(1) to challenge, in Article 78 proceeding, legality of Public Service Commission's expenditure of state funds by its implementation, promotion, and facilitation of orders restructuring electric industry along with its interpretation of applicability of CLS Pub Ser Art 2 within that new regulatory scheme where thrust of such claims was challenge to nonfiscal activities rather than to expenditures of identifiable state funds. Energy Ass'n v PSC, 273 A.D.2d 708, 710 N.Y.S.2d 662, 2000 N.Y. App. Div. LEXIS 7453 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3783 (N.Y. 2000).

Neither Public Utility Law Project of New York, Inc. (PULP) nor member of its board of directors who was also residential electric customer had common-law standing to challenge, in Article 78 proceeding, legality of Public Service Commission's (PSC's) expenditure of state funds by its implementation, promotion, and facilitation of orders restructuring electric industry along with PSC's interpretation of applicability of CLS Pub Ser Art 2 within that new regulatory scheme

where individual customer's potential injury in form of increased electricity rates was too speculative, PULP was not residential electric customer and thus did not suffer injury from PSC's action, and PULP did not show that any of its members would have individual standing so as to support its standing as organizational representative. Energy Ass'n v PSC, 273 A.D.2d 708, 710 N.Y.S.2d 662, 2000 N.Y. App. Div. LEXIS 7453 (N.Y. App. Div. 3d Dep't), app. denied, 95 N.Y.2d 765, 716 N.Y.S.2d 640, 739 N.E.2d 1145, 2000 N.Y. LEXIS 3783 (N.Y. 2000).

Village businessman lacked standing to challenge local law prohibiting eating, drinking or having "picnic or lunch basket party" in any public place in village; fact that law might cause people not to return to village and thus not to frequent his business establishment was insufficient to establish requisite justiciable controversy. Pokoik v Ocean Beach, 148 Misc. 2d 316, 560 N.Y.S.2d 171, 1990 N.Y. Misc. LEXIS 458 (N.Y. Sup. Ct. 1990), aff'd, 184 A.D.2d 499, 584 N.Y.S.2d 166, 1992 N.Y. App. Div. LEXIS 7683 (N.Y. App. Div. 2d Dep't 1992).

Village resident lacked standing as individual to challenge local law prohibiting eating, drinking or having "picnic or lunch basket party" in any public place in village where there was no allegation that he had been or might be ticketed or arrested because allegedly vague and confusing nature of law disabled him from knowing when he would be in violation thereof. Pokoik v Ocean Beach, 148 Misc. 2d 316, 560 N.Y.S.2d 171, 1990 N.Y. Misc. LEXIS 458 (N.Y. Sup. Ct. 1990), aff'd, 184 A.D.2d 499, 584 N.Y.S.2d 166, 1992 N.Y. App. Div. LEXIS 7683 (N.Y. App. Div. 2d Dep't 1992).

Owner of condominium had identifiable interest in justiciable controversy sufficient to seek judgment declaring that insurance company was obligated to defend and indemnify its insured in action for carbon monoxide poisoning caused by furnace installed in utility closet in condominium. Kenyon v Security Ins. Co., 163 Misc. 2d 991, 626 N.Y.S.2d 347, 1993 N.Y. Misc. LEXIS 621 (N.Y. Sup. Ct. 1993), aff'd, 206 A.D.2d 980, 616 N.Y.S.2d 133, 1994 N.Y. App. Div. LEXIS 7871 (N.Y. App. Div. 4th Dep't 1994).

In action seeking declaratory and injunctive relief, homeowners' standing as "aggrieved persons" under Fair Housing Act, 42 USCS §§ 3601 et seq., was established by allegations that county's

residential assessment system had adverse discriminatory impact on minority homeowners which inhibited their ability to own, buy, sell and rent dwellings and obtain mortgages, and that this system of assessment had impact on community such that governmental services and benefits were distributed in discriminatory manner. Coleman v Seldin, 181 Misc. 2d 219, 687 N.Y.S.2d 240, 1999 N.Y. Misc. LEXIS 83 (N.Y. Sup. Ct. 1999).

**16. — —Voters**

Plaintiffs who claimed that their vote was diluted and their franchise impaired by Executive Order No. 20 (which, inter alia, established Governor's Office of Regulatory Reform and gave it power to effectively block proposed rules offered by executive branch administrative agencies) did not have standing, as voters, to seek judgment declaring that Executive Order No. 20 violated constitutional doctrine of separation of powers, where they failed to point to any constitutional provision or statute even tangentially related to their right to vote, and they raised no claim of injury failure attributable to sphere of voting rights. Rudder v Pataki, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978, 1999 N.Y. LEXIS 814 (N.Y. 1999).

Qualified voter in city had standing to seek declaratory relief as to constitutionality of local law establishing two-year residency requirement for eligibility to hold certain city offices. Phelan v Buffalo, 54 A.D.2d 262, 388 N.Y.S.2d 469, 1976 N.Y. App. Div. LEXIS 13765 (N.Y. App. Div. 4th Dep't 1976).

Voters and taxpayers who resided in district had standing under CLS St Fin § 123-b to challenge constitutionality of austerity budget passed by central school district board in combined Article 78 proceeding and action for declaratory judgment, where they "clearly traced" funds expended by district and established that almost $22 million of $37 million austerity budget constituted state funds. Schulz v Horseheads Cent. Sch. Dist. Bd. of Educ., 222 A.D.2d 819, 634 N.Y.S.2d 792, 1995 N.Y. App. Div. LEXIS 12696 (N.Y. App. Div. 3d Dep't 1995), app. dismissed, 87 N.Y.2d 967, 642 N.Y.S.2d 196, 664 N.E.2d 1259, 1996 N.Y. LEXIS 282 (N.Y. 1996).

Petitioners did not have constitutional voter standing to seek declaration that Clean Water/Clean Air Bond Act (L 1996, ch 412, § 1) violated CLS NY Const Art III § 16 because CLS NY Const Art III § 16 is not linked to any voting rights. Schulz v New York State Exec., 233 A.D.2d 43, 660 N.Y.S.2d 881, 1997 N.Y. App. Div. LEXIS 7479 (N.Y. App. Div. 3d Dep't 1997), aff'd, 92 N.Y.2d 1, 677 N.Y.S.2d 1, 699 N.E.2d 360, 1998 N.Y. LEXIS 1429 (N.Y. 1998).

Petitioners had voter standing to seek declaration that Clean Water/Clean Air Bond Act (L 1996, ch 412, § 1) was unconstitutional, as violative of CLS NY Const Art VII § 11, in that important purpose underlying CLS NY Const Art VII § 11 is to prohibit legislature from lumping several purposes of long-term bonded indebtedness into one bond authorization and thereby obtain voter approval that perhaps could not be obtained if relative merit and strength of each purpose were separately evaluated and appraised. Schulz v New York State Exec., 233 A.D.2d 43, 660 N.Y.S.2d 881, 1997 N.Y. App. Div. LEXIS 7479 (N.Y. App. Div. 3d Dep't 1997), aff'd, 92 N.Y.2d 1, 677 N.Y.S.2d 1, 699 N.E.2d 360, 1998 N.Y. LEXIS 1429 (N.Y. 1998).

To extent that plaintiff voters claimed that financing scheme imposed by New York City Transitional Finance Authority Act (CLS Pub A §§ 2799-aa et seq.) deprived them of state-wide public referendum in violation of CLS NY Const Art VII § 11, even plaintiffs who were not city residents had standing. Schulz v New York State Legislature, 244 A.D.2d 126, 676 N.Y.S.2d 237, 1998 N.Y. App. Div. LEXIS 8682 (N.Y. App. Div. 3d Dep't), app. dismissed, 92 N.Y.2d 917, 680 N.Y.S.2d 456, 703 N.E.2d 267, 1998 N.Y. LEXIS 3134 (N.Y. 1998), app. dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 476, 704 N.E.2d 229, 1998 N.Y. LEXIS 3681 (N.Y. 1998), app. denied, 92 N.Y.2d 818, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4348 (N.Y. 1998).

Voters lacked standing to claim that New York City Transitional Finance Authority Act (CLS Pub A §§ 2799-aa et seq.) violated CLS NY Const Art VII § 8 (gift or loan of state money or credit), CLS NY Const Art VIII § 12 (limits on local indebtedness), or CLS NY Const Art X § 5 (restriction on assumption of obligations of public corporation), because those constitutional provisions are not linked to any voting rights. Schulz v New York State Legislature, 244 A.D.2d 126, 676 N.Y.S.2d 237, 1998 N.Y. App. Div. LEXIS 8682 (N.Y. App. Div. 3d Dep't), app. dismissed, 92

N.Y.2d 917, 680 N.Y.S.2d 456, 703 N.E.2d 267, 1998 N.Y. LEXIS 3134 (N.Y. 1998), app. dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 476, 704 N.E.2d 229, 1998 N.Y. LEXIS 3681 (N.Y. 1998), app. denied, 92 N.Y.2d 818, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4348 (N.Y. 1998).

Voters were not entitled to standing under CLS Gen Mun § 51 to challenge validity of New York City Transitional Finance Authority Act (CLS Pub A §§ 2799-aa et seq.) where they did not appear to have asserted standing under § 51, and they did not allege fraudulent acts or use of public property or funds for entirely illegal purpose. Schulz v New York State Legislature, 244 A.D.2d 126, 676 N.Y.S.2d 237, 1998 N.Y. App. Div. LEXIS 8682 (N.Y. App. Div. 3d Dep't), app. dismissed, 92 N.Y.2d 917, 680 N.Y.S.2d 456, 703 N.E.2d 267, 1998 N.Y. LEXIS 3134 (N.Y. 1998), app. dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 476, 704 N.E.2d 229, 1998 N.Y. LEXIS 3681 (N.Y. 1998), app. denied, 92 N.Y.2d 818, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4348 (N.Y. 1998).

Regardless of how claims were styled, plain language of CLS St Fin § 123-b(1) precluded standing of voters to challenge validity of New York City Transitional Finance Authority Act (CLS Pub A §§ 2799-aa et seq.) where voters essentially were challenging validity of authority’s issuance of bonds to fund capital improvement projects identified in New York City. Schulz v New York State Legislature, 244 A.D.2d 126, 676 N.Y.S.2d 237, 1998 N.Y. App. Div. LEXIS 8682 (N.Y. App. Div. 3d Dep't), app. dismissed, 92 N.Y.2d 917, 680 N.Y.S.2d 456, 703 N.E.2d 267, 1998 N.Y. LEXIS 3134 (N.Y. 1998), app. dismissed, 92 N.Y.2d 946, 681 N.Y.S.2d 476, 704 N.E.2d 229, 1998 N.Y. LEXIS 3681 (N.Y. 1998), app. denied, 92 N.Y.2d 818, 684 N.Y.S.2d 489, 707 N.E.2d 444, 1998 N.Y. LEXIS 4348 (N.Y. 1998).

In an declaratory action filed by two registered voters who were not enrolled with any party, the court denied the state attorney general’s motion to dismiss based on the lack of standing of one voter because the voter denied that he was an enrolled member of a political party, despite what party records indicated; hence, a hearing was required to resolve that factual dispute. Van Allen v Democratic State Comm. of N.Y., 771 N.Y.S.2d 285, 1 Misc. 3d 734, 2003 N.Y. Misc. LEXIS

1209 (N.Y. Sup. Ct.), transferred, 1 N.Y.3d 545, 775 N.Y.S.2d 237, 807 N.E.2d 287, 2003 N.Y. LEXIS 4013 (N.Y. 2003).

**17. — —Taxpayers**

In declaratory judgment action alleging, inter alia, that Executive Order No. 20 (which established position of State Director of Regulatory Reform and office known as Governor's Office of Regulatory Reform (GORR)) violated constitutional doctrine of separation of powers, plaintiff's claims regarding GORR's nonfiscal rule-making review function did not demonstrate sufficient nexus to state's fiscal activities to allow for standing under CLS St Fin § 123-b. Rudder v Pataki, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978, 1999 N.Y. LEXIS 814 (N.Y. 1999).

Taxpayer could not maintain declaratory judgment action challenging constitutionality of sales and use tax assessments and warrants issued thereon where he had signed consent form agreeing to pay taxes and had failed to seek administrative review of assessments, and where there had been no attempt to seize his property pursuant to warrants. Keslow v State Tax Com., 125 A.D.2d 294, 508 N.Y.S.2d 578, 1986 N.Y. App. Div. LEXIS 62557 (N.Y. App. Div. 2d Dep't 1986).

Plaintiff's allegation that it paid real property taxes in excess of $1,000 was sufficient to establish its standing as taxpayer to maintain action pursuant to CLS Gen Mun § 51 to prevent waste of municipal assets, and for declaratory and injunctive relief. Grand Realty Co. v White Plains, 125 A.D.2d 639, 510 N.Y.S.2d 172, 1986 N.Y. App. Div. LEXIS 62927 (N.Y. App. Div. 2d Dep't 1986).

Plaintiffs had standing to maintain declaratory judgment actions to challenge validity of county law giving authority to administrative head of solid waste refuse disposal district to set rates to be charged to private carters where plaintiffs were (1) taxpayers who paid taxes and user fees to finance operations of district and who also hired private carter, and thus might be injured by increased carting fees, and (2) private carters whose business was directly affected by rules and

regulations governing solid refuse disposal. Pelliccio v Axelrod, 129 A.D.2d 76, 516 N.Y.S.2d 940, 1987 N.Y. App. Div. LEXIS 43663 (N.Y. App. Div. 2d Dep't 1987).

Owner of cooperative apartment whose pro rata share of real estate taxes was at least $1,000 had standing, under CLS Gen Mun § 51, to seek injunctive relief and declaratory judgment with respect to city contracts which allegedly violated CLS Gen Oblig §§ 5-322.1 and 5-323; such owner has same right as fee owner to maintain taxpayer action. Fisher v Biderman, 154 A.D.2d 155, 552 N.Y.S.2d 221, 1990 N.Y. App. Div. LEXIS 2385 (N.Y. App. Div. 1st Dep't), app. denied, 76 N.Y.2d 702, 559 N.Y.S.2d 239, 558 N.E.2d 41, 1990 N.Y. LEXIS 1349 (N.Y. 1990).

Petitioners lacked standing as taxpayers under CLS St Fin § 123-b to challenge constitutionality of laws whereby Director of Budget was authorized to enter into service contracts with New York State Thruway Authority which could be pledged or assigned by authority as security for notes or bonds issued by it, and authorizing complex sale and long-term leaseback arrangements among state, authority and Department of Transportation whereby rent revenue would accrue to authority and provide it with necessary income to meet debt service obligations on outstanding bonds, since challenged laws were inextricably bound to bond issuance legislation, and were necessary consequence thereof, and thus fell within exclusionary language of § 123-b which precludes taxpayer standing to challenge “authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof.” Schulz v State, 187 A.D.2d 789, 589 N.Y.S.2d 220, 1992 N.Y. App. Div. LEXIS 12601 (N.Y. App. Div. 3d Dep't 1992), modified, 602 N.Y.S.2d 69, 1993 N.Y. App. Div. LEXIS 8587 (N.Y. App. Div. 3d Dep't 1993).

Under CLS St Fin § 123-b, public utility had standing as taxpayer to maintain action to declare invalid emergency regulation at 18 NYCRR 352.5(d) and administrative directive of Department of Social Services which, in implementing directive of CLS Soc Serv § 131-s, required that persons seeking assistance to prevent shut-off of utility service, who are not otherwise eligible for public assistance, sign agreement to repay utility assistance within one year as condition of receiving assistance, since although promulgation of regulation and administrative directive did not involve expenditure of state funds, their implementation would. Childs v Bane, 194 A.D.2d

221, 605 N.Y.S.2d 488, 1993 N.Y. App. Div. LEXIS 11991 (N.Y. App. Div. 3d Dep't 1993), app. dismissed, 83 N.Y.2d 846, 612 N.Y.S.2d 109, 634 N.E.2d 605, 1994 N.Y. LEXIS 394 (N.Y. 1994), app. denied, 83 N.Y.2d 760, 616 N.Y.S.2d 479, 640 N.E.2d 147, 1994 N.Y. LEXIS 1583 (N.Y. 1994).

Petitioners lacked standing as citizen-taxpayers to maintain combined Article 78 proceeding and declaratory judgment action against school district under CLS St Fin § 123-b to annul support management services contract for custodial and maintenance needs since petitioners failed to clearly trace monies expended or to be expended by district in payment of agreement to identifiable state funds; fact that petitioners also asserted constitutional claim that agreement constituted gift or loan of public funds to private organization in violation of CLS NY Const Art VII § 1 did not create constitutional right of standing. Schulz v Cobleskill-Richmondville Cent. Sch. Dist. Bd. of Educ., 197 A.D.2d 247, 610 N.Y.S.2d 694, 1994 N.Y. App. Div. LEXIS 4143 (N.Y. App. Div. 3d Dep't 1994), aff'd, Schulz v State, 217 A.D.2d 393, 634 N.Y.S.2d 780, 1995 N.Y. App. Div. LEXIS 12301 (N.Y. App. Div. 3d Dep't 1995).

Citizen taxpayers did not have standing to contest bond authorization statutes since there is no requirement of voter approval of such laws that authorized borrowing by submissions within state. Schulz v State, 210 A.D.2d 781, 620 N.Y.S.2d 525, 1994 N.Y. App. Div. LEXIS 13025 (N.Y. App. Div. 3d Dep't 1994), app. dismissed, 85 N.Y.2d 923, 627 N.Y.S.2d 324, 650 N.E.2d 1326, 1995 N.Y. LEXIS 1393 (N.Y. 1995).

In combined Article 78 proceeding and declaratory judgment action, citizen-taxpayers did not have standing under CLS St Fin § 123-b to challenge enrollment of out-of-state students in local school district on basis that such enrollment implicated annual expenditure of taxpayer dollars in violation of CLS NY Const Art VIII § 1, where they failed to trace challenged expenditures to specific disbursements of identifiable state funds; however, residents of affected school district had standing under CLS Gen Mun § 51. Schulz v State, 217 A.D.2d 393, 634 N.Y.S.2d 780, 1995 N.Y. App. Div. LEXIS 12301 (N.Y. App. Div. 3d Dep't 1995), transferred, 87 N.Y.2d 954, 641 N.Y.S.2d 828, 664 N.E.2d 893, 1996 N.Y. LEXIS 244 (N.Y. 1996).

In action for, inter alia, judgment declaring that city council wasted state and local funds by voting illegally to authorize wrongful expenditure of funds to pay for legal services rendered by appointed labor counsel, citizen taxpayers lacked standing to assert claim based on CLS St Fin § 123-b because no state employee or officer was party to action. Schulz v De Santis, 218 A.D.2d 256, 638 N.Y.S.2d 809, 1996 N.Y. App. Div. LEXIS 2051 (N.Y. App. Div. 3d Dep't 1996).

In action for, inter alia, judgment declaring that city council wasted state and local funds by voting illegally to authorize wrongful expenditure of funds, petitioners who allegedly paid real estate taxes on assessments of more than $1,000 in city had standing to assert claims based on CLS Gen Mun § 51. Schulz v De Santis, 218 A.D.2d 256, 638 N.Y.S.2d 809, 1996 N.Y. App. Div. LEXIS 2051 (N.Y. App. Div. 3d Dep't 1996).

Taxpayers who resided in school district containing county’s only nuclear facility had standing to seek declaratory judgment invalidating amendment to county tax act which provided that, upon any assessment reductions of nuclear power electrical generating facilities, school districts in which such facilities were located would be responsible for paying school tax refunds. Prodell v State, 222 A.D.2d 178, 645 N.Y.S.2d 589, 1996 N.Y. App. Div. LEXIS 7865 (N.Y. App. Div. 3d Dep't 1996), app. dismissed, 88 N.Y.2d 1064, 651 N.Y.S.2d 407, 674 N.E.2d 337, 1996 N.Y. LEXIS 3334 (N.Y. 1996), app. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502, 1997 N.Y. LEXIS 229 (N.Y. 1997), cert. denied, 522 U.S. 810, 118 S. Ct. 52, 139 L. Ed. 2d 17, 1997 U.S. LEXIS 4623 (U.S. 1997).

Petitioners did not have citizen-taxpayer standing to seek declaration that Clean Water/Clean Air Bond Act (L 1996, ch 412, § 1) violates CLS NY Const Art VII § 11 and CLS NY Const Art III § 16, because CLS St Fin § 123-b(1) specifically does not confer standing to challenge issuance of state bonds or bond anticipation notes. Schulz v New York State Exec., 233 A.D.2d 43, 660 N.Y.S.2d 881, 1997 N.Y. App. Div. LEXIS 7479 (N.Y. App. Div. 3d Dep't 1997), aff'd, 92 N.Y.2d 1, 677 N.Y.S.2d 1, 699 N.E.2d 360, 1998 N.Y. LEXIS 1429 (N.Y. 1998).

In declaratory judgment action seeking to invalidate Executive Order No. 20 (9 NYCRR § 5.20) which established position of Director of Regulatory Reform with authority to oversee review of

proposed agency regulations, individual plaintiff did not have standing as citizen taxpayer where she failed to designate, with any specificity, either amount of funds to be expended or manner in which expenditure would occur. Rudder v Pataki, 246 A.D.2d 183, 675 N.Y.S.2d 653, 1998 N.Y. App. Div. LEXIS 7989 (N.Y. App. Div. 3d Dep't 1998), aff'd, 93 N.Y.2d 273, 689 N.Y.S.2d 701, 711 N.E.2d 978, 1999 N.Y. LEXIS 814 (N.Y. 1999).

Plaintiff, who alleged that state's payment of legal fees to outside law firm to collect unpaid taxes owed by him and his corporation constituted misappropriation of state funds, had standing to commence action against Commissioner of Taxation and Finance and law firm for limited purpose of seeking equitable or declaratory relief under CLS St Fin § 123-b(1). Gordon v Urbach, 252 A.D.2d 94, 682 N.Y.S.2d 711, 1998 N.Y. App. Div. LEXIS 14117 (N.Y. App. Div. 3d Dep't 1998), app. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 429, 711 N.E.2d 643, 1999 N.Y. LEXIS 708 (N.Y. 1999).

When plaintiff-taxpayer loses his status as such during pendency of action, action abates. Boyle v Town of Woodstock, 257 A.D.2d 702, 682 N.Y.S.2d 729, 1999 N.Y. App. Div. LEXIS 143 (N.Y. App. Div. 3d Dep't 1999).

Individual and institutional taxpayers had standing to commence combined Article 78 proceeding and action for declaratory judgment, challenging town assessor's grant of exemptions under CLS RPTL §§ 420-a and 420-b with regard to property on which respondent was constructing retirement/transitional care/skilled nursing facility and challenging action of town board in entering PILOT (Payments in Lieu of Taxes) agreement with respondent, as decrease in tax base that occurs when property is improperly exempted from taxation constitutes cognizable injury to taxpayers. Fetzer v Town Bd., 270 A.D.2d 804, 705 N.Y.S.2d 147, 2000 N.Y. App. Div. LEXIS 3445 (N.Y. App. Div. 4th Dep't 2000).

Since the Finance Department of the City of New York may have exceeded its statutory powers by improperly imposing a sales tax on the advertisement placement business conducted by the assignor which did not involve the sale of any taxable property or service (Administrative Code of City of New York, tit N, § N46-2), the substitute assignee for the benefit of creditors may

challenge the alleged unlawfully imposed sales tax in a declaratory judgment action notwithstanding the failure of the former assignee to pursue the exclusive statutory remedy under the taxing statute of applying to the city's Finance Administrator for a hearing to redetermine the tax deficiency subject only to judicial review in an article 78 proceeding (Administrative Code, § N46-10.0). Neither the Legislature nor the City of New York ever intended to supersede or limit an assignee for the benefit of creditors from having the court restricted from determining either the validity, the allowance or disallowance of claims filed with the assignee which may be due from the estate of the assignor or to reconsider any claim made against the estate. The court is vested with broad equitable powers to enable it to find and determine the validity or invalidity of any claim which would not have been valid as against the claims of creditors of the assignee even though they be claimed as liens against the assignor's estate. In re Rogers Advertising, Inc., 92 Misc. 2d 720, 401 N.Y.S.2d 716, 1978 N.Y. Misc. LEXIS 1961 (N.Y. Sup. Ct. 1978), app. dismissed, 70 A.D.2d 660, 416 N.Y.S.2d 530, 1979 N.Y. App. Div. LEXIS 12126 (N.Y. App. Div. 2d Dep't 1979).

The substitute assignee for the benefit of creditors may challenge the validity of deliberately exaggerated commercial rent and business taxes assessed against the estate of the assignor in a declaratory judgment action notwithstanding the failure of the former assignee to pursue the exclusive remedy under the taxing statute of applying to the city's Finance Administrator for a hearing to redetermine the tax deficiency subject only to judicial review in an article 78 proceeding (Administrative Code of City of New York, § N46-10.0) since, in an assignment for the benefit of creditors, where the rights of creditors must be carefully protected by the assignee and the court, the assignee is not restricted by the exclusivity provisions of the Administrative Code in taking objection to the validity of tax claims. An unconscionable amount claimed, even by a municipal authority, cannot be allowed to become final and preclusionary as against other creditors who have received no notice of the alleged tax claims. It is the duty of the court, over and above the duty of the assignee, to see to it that creditors are protected against invalid or unconscionable claims regardless of the default of an assignee to have raised the issue prior to a final accounting of the assignor's estate. In re Rogers Advertising, Inc., 92 Misc. 2d 720, 401

N.Y.S.2d 716, 1978 N.Y. Misc. LEXIS 1961 (N.Y. Sup. Ct. 1978), app. dismissed, 70 A.D.2d 660, 416 N.Y.S.2d 530, 1979 N.Y. App. Div. LEXIS 12126 (N.Y. App. Div. 2d Dep't 1979).

Village resident lacked standing as taxpayer to challenge local law prohibiting eating, drinking or having “picnic or lunch basket party” in any public place in village since generalized grievance, shared in substantially equal measure by all of large class of citizens, does not warrant exercise of jurisdiction. Pokoik v Ocean Beach, 148 Misc. 2d 316, 560 N.Y.S.2d 171, 1990 N.Y. Misc. LEXIS 458 (N.Y. Sup. Ct. 1990), aff'd, 184 A.D.2d 499, 584 N.Y.S.2d 166, 1992 N.Y. App. Div. LEXIS 7683 (N.Y. App. Div. 2d Dep't 1992).

Citizen taxpayers had standing to challenge, as violation of CLS NY Const Art VII § 11 constitutional referendum requirement for incurring state debt, statutory financing mechanisms whereby Metropolitan Transportation Authority and Thruway Authority were authorized to issue special “appropriation-risk” bonds for financing of mass transportation, bridge and highway projects from dedicated funds backed by revenue from monies collected from state-wide taxes and fees, and subject to annual appropriation by legislature. Schulz v State, 156 Misc. 2d 169, 601 N.Y.S.2d 239, 1993 N.Y. Misc. LEXIS 284 (N.Y. Sup. Ct.), aff'd, 193 A.D.2d 171, 606 N.Y.S.2d 916, 1993 N.Y. App. Div. LEXIS 9836 (N.Y. App. Div. 3d Dep't 1993).

**18. Justiciability**

In two actions for declaratory judgments challenging the constitutionality of the mandatory retirement provisions of Bank Law § 246(1)(c)(ii), but not challenging a savings bank’s bylaw that was enacted pursuant to the statute and effected the mandatory retirement of a bank’s trustees as they reached age 75, the statute would not be declared unconstitutional, since no justiciable controversy existed on which the court could properly rule. Connor v Siebert, 56 N.Y.2d 674, 451 N.Y.S.2d 714, 436 N.E.2d 1316, 1982 N.Y. LEXIS 3342 (N.Y. 1982).

CLS Soc Serv §§ 344(2), 350(1)(a) and 350-j(3) manifest legislative determination that family units should be kept together in home-type setting and impose duty on State Commissioner of Social Services to establish shelter allowances adequate for that purpose, including allowances

that bear reasonable relation to cost of housing in New York City; thus, recipients of public assistance presented justiciable controversy in their action to declare that commissioner had violated statutes. Jiggetts v Grinker, 75 N.Y.2d 411, 554 N.Y.S.2d 92, 553 N.E.2d 570, 1990 N.Y. LEXIS 713 (N.Y. 1990).

Questions of sportsmanship and fairness with respect to sporting contests depend largely on rules of particular sport and expertise of those knowledgeable in that sport; they are not questions suitable for judicial resolution. Mercury Bay Boating Club, Inc. v San Diego Yacht Club, 76 N.Y.2d 256, 557 N.Y.S.2d 851, 557 N.E.2d 87, 1990 N.Y. LEXIS 960 (N.Y. 1990).

Request for writ of mandate or declaratory relief brought by several contractors and contractors' associations to challenge Commissioner of Labor's administration of CPL Labor § 220 was properly dismissed; plaintiffs lacked standing to bring suit since they did not demonstrate any injury or harmful effect on themselves stemming from alleged misadministration, and they pleaded no justicable controversy since they presented no specific set of facts for court to consider. Associated General Contractors, New York State Chapter, Inc. v Roberts, 122 A.D.2d 406, 505 N.Y.S.2d 220, 1986 N.Y. App. Div. LEXIS 59719 (N.Y. App. Div. 3d Dep't 1986).

Court improperly dismissed, as time barred, husband's action seeking declaration that wife was habitually living with another man and holding herself out as his wife and concomitant declaration that enforcement of alimony provisions of divorce judgment was barred by CLS Dom Rel § 248, since action was premised on wife's alleged current habitual cohabitation; however, since separation agreement survived divorce and provided that wife's right to receive alimony would terminate only upon either party's death or wife's remarriage, wife's current living arrangements were contractually irrelevant, declaration as to whether those arrangements barred enforcement of spousal support provisions of divorce judgment would have no effect on contractual right, and thus court should have dismissed action on ground that declaratory relief was neither necessary nor useful. Frasca v Frasca, 129 A.D.2d 766, 514 N.Y.S.2d 757, 1987 N.Y. App. Div. LEXIS 45462 (N.Y. App. Div. 2d Dep't 1987).

There was justiciable controversy in declaratory judgment action regarding executive order which imposed affirmative action requirements on state agencies where (1) plaintiff remained on at least one eligible list for appointment to civil service, and thus his alleged status as one who was not eligible for favored treatment under executive order demonstrated that he had sufficient interest to constitute standing, and (2) plaintiff's allegations of discrimination in hiring indicated that controversy involved present prejudice to him. Hase v New York State Civil Service Dep't, 148 A.D.2d 68, 544 N.Y.S.2d 387, 1989 N.Y. App. Div. LEXIS 9398 (N.Y. App. Div. 3d Dep't), app. dismissed, 74 N.Y.2d 944, 550 N.Y.S.2d 277, 549 N.E.2d 479, 1989 N.Y. LEXIS 3329 (N.Y. 1989).

Action for declaratory judgment establishing that judicial enforcement of criminal defendant's exercise of peremptory challenges which discriminated on basis of sex, religion and national origin constituted equal protection violation was properly dismissed for failure to state cause of action in absence of any factual allegations establishing justiciable controversy on issue. Holtzman v Supreme Court of State, 152 A.D.2d 724, 545 N.Y.S.2d 40, 1989 N.Y. App. Div. LEXIS 10655 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 616, 550 N.Y.S.2d 276, 549 N.E.2d 478, 1989 N.Y. LEXIS 3355 (N.Y. 1989).

Justiciable controversy appropriate for declaratory relief existed in action by Superintendent of State Police for declaration as to whether hiring practices of Division of State Police were governed by CLS Exec § 215(3), which provided that applicants must be between 21 and 29 years of age, or by CLS Exec § 296(3-a)(a), which prohibited age discrimination, since (1) superintendent asserted that former statute applied and State Commissioner of Human Rights asserted that he could order superintendent to comply with latter statute, (2) commissioner had, on at least 4 occasions, sought injunctive relief directed at examinations scheduled by superintendent, and (3) controversy presented question of law with no disputed facts, and adjudication would likely render later litigation unnecessary. Constantine v White, 166 A.D.2d 59, 569 N.Y.S.2d 765, 1991 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div. 3d Dep't 1991).

Action by owner of restaurant and dancing establishment for judgment declaring that village ordinance which prohibited public consumption of food and beverages was unconstitutionally vague, and violated his right to eat and consume beverages in public without restriction, was properly dismissed for failure to set forth justiciable controversy, since there is no protected right to eat and drink in public without restriction. Pokoik v Ocean Beach, 184 A.D.2d 499, 584 N.Y.S.2d 166, 1992 N.Y. App. Div. LEXIS 7683 (N.Y. App. Div. 2d Dep't 1992).

In action for judgment declaring invalidity of county resolution which reduced amount of unused sick time payable at death or retirement to certain county employees earning over $40,000 per year, court did not err in refusing to dismiss complaint on ground that it did not present justiciable issue, since plaintiff did not attack county’s right to allocate resources or to establish compensation, and court would be required to decide only whether resolution violated due process and whether categories of compensation created by resolution impermissibly discriminated against particular class in violation of equal protection. Gruen v County of Suffolk, 187 A.D.2d 560, 590 N.Y.S.2d 217, 1992 N.Y. App. Div. LEXIS 13027 (N.Y. App. Div. 2d Dep't 1992).

Justiciable controversy was presented in declaratory judgment action to determine whether river bottom was owned by village, town or state where property owner desired to dredge bed of river so as to create channel through bog between his property and river, and there was requirement that he obtain consent of owner of river bottom in order to obtain permit. DiCanio v Nissequogue, 189 A.D.2d 223, 596 N.Y.S.2d 74, 1993 N.Y. App. Div. LEXIS 3441 (N.Y. App. Div. 2d Dep't 1993).

Declaratory judgment action by plaintiff whose teaching certificate was revoked by Commissioner of Education, alleging that CLS Educ § 305(7) was unconstitutional delegation of legislative power, was properly stayed pending decision in Article 78 proceeding because plaintiff could obtain relief sought (return of his certification) via Article 78 proceeding and, in view of principle of judicial restraint, there was no compelling reason why his constitutional claim

should proceed. Welcher v Sobol, 222 A.D.2d 1001, 636 N.Y.S.2d 421, 1995 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 3d Dep't 1995).

Court should not have declared that restrictive covenant barred construction of “condominiums” in general, even though court properly found that covenant became effective against plaintiffs prior to their purchase of parcel they sought to develop, and that their development plan was in clear violation of covenant’s terms, where sole justiciable controversy presented by plaintiffs was applicability of covenant to their development plan; additional declaration regarding condominiums in general constituted advisory opinion which could have effect only in event another development plan involving condominium ownership were proposed. Carlisle v Spatola, 232 A.D.2d 444, 648 N.Y.S.2d 466, 1996 N.Y. App. Div. LEXIS 10139 (N.Y. App. Div. 2d Dep't 1996).

There was no justiciable issue to sustain combined Article 78 proceeding and declaratory judgment action challenging fairness of administrative appeal and reconsideration processes of Adirondack Park Agency (APA) since distinction existed between those processes as to issues pertaining to permits (9 NYCRR part 572 et seq.) and matters involving resolution of either statutory or regulatory violations which are received by enforcement committee (9 NYCRR part 581 et seq.), and since instant cause of action was reinstated, as timely, based on APA’s notification letter that petitioner’s request for reconsideration was denied on matter addressing permit, enforcement committee was not involved in petitioner’s appeal or reconsideration (9 NYCRR § 572.22). Hunt Bros. Contrs. v Glennon, 235 A.D.2d 897, 652 N.Y.S.2d 429, 1997 N.Y. App. Div. LEXIS 563 (N.Y. App. Div. 3d Dep't 1997).

President of New York City Deputy Sheriffs’ Association sufficiently set forth justiciable controversy to warrant declaratory relief as to proper interpretation of CLS Men Hyg § 9.43 and rights and duties of parties thereunder where he alleged that police department customarily carried out functions under § 9.43 that allegedly belonged, by statutory mandate, solely to sheriff. Rivera v Russi, 243 A.D.2d 161, 674 N.Y.S.2d 42, 1998 N.Y. App. Div. LEXIS 6670 (N.Y. App. Div. 1st Dep't 1998).

Claims by President of New York City Deputy Sheriffs' Association, alleging that sheriff was sole agency authorized to serve, process, and execute certain warrants, orders, and writs under various statutory provisions that named only sheriff would be dismissed, even assuming that such functions belonged exclusively to sheriff, where president did not allege that police had carried out such functions or were about to do so, and thus he failed to set forth justiciable controversy warranting declaratory relief. Rivera v Russi, 243 A.D.2d 161, 674 N.Y.S.2d 42, 1998 N.Y. App. Div. LEXIS 6670 (N.Y. App. Div. 1st Dep't 1998).

Court erred in granting insurer's summary judgment motion declaring that it had no duty to defend or indemnify its insureds, motel bar and its owner, on basis of "alcoholic beverage" exclusion since underlying complaint alleged that insureds negligently failed "to properly supervise, manage and operate" establishment, and failed to afford underlying plaintiff "protection from the unlawful acts of another patron,"; such allegations were at least facially distinct from those relating to service of alcoholic beverages, and thus could not be said as matter of law to fall within exclusion. Dryden Mut. Ins. Co. v Harr, 247 A.D.2d 684, 668 N.Y.S.2d 730, 1998 N.Y. App. Div. LEXIS 941 (N.Y. App. Div. 3d Dep't 1998).

Proceeding seeking declaratory, injunctive, and mandamus relief based on alleged violation of prisoners' right as foreign nationals, under Article 36 of Vienna Convention on Consular Relations, to be advised on arrest of their right to contact representative of their country would be dismissed for lack of justiciable controversy where operative allegation of petition was that police "continue to arrest and detain other foreign nationals," petitioners did not appear to seek any form of postconviction relief for themselves, and even if they did, treaty does not require that such proceedings be entertained outside context of Criminal Procedure Law. Walker v Pataki, 266 A.D.2d 40, 698 N.Y.S.2d 624, 1999 N.Y. App. Div. LEXIS 11391 (N.Y. App. Div. 1st Dep't 1999).

Counterclaim in Article 78 proceeding seeking declaration that New York City Department of Environmental Protection had right to shut down aqueduct that supplied water to city and certain villages whenever it deemed such action necessary did not present justiciable controversy

where parties' stipulation that aqueduct would continue to operate had resolved immediate dispute, and case presented only hypothetical issues concerning future events. United Water New Rochelle, Inc. v City of New York, 275 A.D.2d 464, 712 N.Y.S.2d 637, 2000 N.Y. App. Div. LEXIS 8918 (N.Y. App. Div. 2d Dep't 2000).

Causes of action were subject to dismissal because there was an undisputed absence of any justiciable controversy as to the enforceability of the call rights provisions contained in the option agreements. Fewer v GFI Group Inc., 124 A.D.3d 457, 2 N.Y.S.3d 428, 2015 N.Y. App. Div. LEXIS 416 (N.Y. App. Div. 1st Dep't 2015).

Plaintiff was not entitled to declaratory judgment as to whether it was a charitable corporation and thus exempt from the provisions of the New York State Labor Relations Act under Labor Law § 715, subdivision 3 where such matter had been decided, contrary to plaintiff's position, by the Labor Relations Board and plaintiff had the ultimate right of appeal from the Board's decision. Inter-County Blood Banks, Inc. v New York State Labor Relations Bd., 56 Misc. 2d 1069, 291 N.Y.S.2d 665, 1968 N.Y. Misc. LEXIS 1395 (N.Y. Sup. Ct. 1968).

Conservation Law § 429-j, subdivision 5, does not dispense with the provision of CPLR 3001 which requires the existence of a justiciable controversy before a declaratory judgment may be obtained. Nyack v Spring Valley Water Co., 68 Misc. 2d 23, 324 N.Y.S.2d 721, 1971 N.Y. Misc. LEXIS 1422 (N.Y. Sup. Ct. 1971), aff'd, 38 A.D.2d 453, 330 N.Y.S.2d 817, 1972 N.Y. App. Div. LEXIS 4817 (N.Y. App. Div. 3d Dep't 1972).

Despite defendants' claim, in suit brought by loan companies seeking a judgment declaring that the New York wage assignment statutes violate neither the New York nor Federal Constitution, that no judicable controversy existed since the Second Circuit Court of Appeals, in litigation also raising the constitutionality issue, decided that there was no due process violation, a reading of the federal court opinion indicated that the case was not decided on the merits; furthermore, there still existed a judicable controversy based on the parties' stipulation to stay the execution of wage assignment pending completion of the litigation. Beneficial Finance Co. v Bond, 83 Misc. 2d 9, 372 N.Y.S.2d 374, 1975 N.Y. Misc. LEXIS 2791 (N.Y. Sup. Ct. 1975).

In declaratory judgment action seeking to invalidate Public Service Commission (PSC) opinion which allegedly directed electric utilities to engage in retail wheeling, generation deregulation or asset divestiture in violation of antitrust laws and antidiscriminatory provisions of Public Service Law, justiciable controversy was not presented where PSC opinion encouraged but did not order utilities to engage in such actions, nor did opinion modify PSC's regulation of generation of electricity. Energy Ass'n v PSC, 169 Misc. 2d 924, 653 N.Y.S.2d 502, 1996 N.Y. Misc. LEXIS 507 (N.Y. Sup. Ct. 1996), aff'd, 273 A.D.2d 708, 710 N.Y.S.2d 662, 2000 N.Y. App. Div. LEXIS 7453 (N.Y. App. Div. 3d Dep't 2000).

Trial court should have allowed a would-be buyer of real property to amend its complaint to add causes of action clarifying that it sought declarations both that the buyer had a right of first refusal and that it was entitled to the return of money advanced to the seller. M&A Oasis, Inc. v MTM Assocs., L.P., 307 A.D.2d 872, 764 N.Y.S.2d 9, 2003 N.Y. App. Div. LEXIS 9005 (N.Y. App. Div. 1st Dep't 2003).

It was error for a trial court to stay a declaratory judgment action that certain insurers had filed in order to obtain a determination of whether they had to provide coverage for asbestos claims against their insured; while the stay purported merely to stay, not decide, the justiciability of the issues, the effect of the stay was a ruling that the issues were not presently justiciable, in view of the pendency of a bankruptcy petition that the insured's affiliate had filed, and the pendency of the insured's adversary proceeding in the bankruptcy court. The case in the bankruptcy court would not have decided all of the issues of coverage under the 145 relevant insurance policies, and a determination as to the insurers' responsibility to provide coverage could properly be made before it was determined whether or not the insured was liable for the thousands of asbestos claims that had been filed against it. Mt. McKinley Ins. Co. v Corning Inc., 33 A.D.3d 51, 818 N.Y.S.2d 73, 2006 N.Y. App. Div. LEXIS 8525 (N.Y. App. Div. 1st Dep't 2006).

School district's hybrid proceeding pursuant to N.Y. C.P.L.R. art. 78 and declaratory judgment action challenging a city's purported action in declining to review the school district's permit application was dismissed because there was no evidence that the city ever refused to review

the application or asserted a formal set of conditions, and thus the underlying dispute was not ripe for judicial review and there was no justiciable controversy under N.Y. C.P.L.R. 3001; moreover, there was no denial of the application, and the permit was not issued subject to any set of conditions. Rather, the evidence showed that the commissioner did not receive the properly stamped plans, which were necessary to review the permit application, until the same day that the action was commenced. Matter of Enlarged City School Dist. of Middletown v City of Middletown, 96 A.D.3d 840, 946 N.Y.S.2d 208, 2012 N.Y. App. Div. LEXIS 4684 (N.Y. App. Div. 2d Dep't 2012).

**19. —Actual controversy**

A tenant was entitled to bring a declaratory judgment action to decide the issue of whether an option to terminate his lease had been properly exercised, even though summary proceedings in civil court were generally favored to resolve landlord-tenant disputes, where the civil court would not be available for such a proceeding for six months, in that the lease provided for a 180-day notice period preceeding the actual termination, and no actual dispute would occur until after expiration of that period and the tenant refused to move out, and where there did exist an actual juticiable controversy regarding the construction of the lease as of the date of the service of the termination notice. Wincig v Chock 574 5th Operating, Inc., 100 A.D.2d 775, 474 N.Y.S.2d 51, 1984 N.Y. App. Div. LEXIS 17872 (N.Y. App. Div. 1st Dep't 1984).

In a declaratory judgment action brought by a county employee against a county seeking a determination that he was entitled to coverage under Gen Mun Law § 207-c arising from circumstances in which it appeared that the employee had been seriously injured in a helicopter crash while acting in the course of his duties as an ambulance medical technician in the county police department, following which, after paying plaintiff statutory benefits for some time, the county made an administrative decision to exclude ambulance medical technicians from coverage under Gen Mun Law § 207-c and stopped paying the employee’s salary, and, before the instant action was tried, the employee went on accidental disability retirement, a judgment

declaring that the employee was covered by Gen Mun Law § 207-c was erroneous, since there was no justiciable controversy on which such a judgment could be made, in that it was uncontested that the employee was entitled to coverage under the statute but that coverage was necessarily terminated upon his retirement. Mastrangelo v County of Nassau, 102 A.D.2d 814, 476 N.Y.S.2d 589, 1984 N.Y. App. Div. LEXIS 18984 (N.Y. App. Div. 2d Dep't), app. dismissed, 63 N.Y.2d 944, 1984 N.Y. LEXIS 6208 (N.Y. 1984).

Plaintiffs (prostitute and patron of prostitutes) failed to present justiciable controversy, and accordingly did not state cause of action for judgment declaring CLS Penal §§ 230.00 and 230.03 unconstitutional as applied to themselves insofar as those statues criminalize private commercial sex between consenting adults, in absence of showing that (1) they had been arrested, prosecuted, or threatened with prosecution in connection with their prostitution activities, (2) they had reasonable fears of being threatened with arrest or prosecution in future, or (3) criminalization of prostitution inhibited them from engaging in acts of prostitution; furthermore, challenge to criminal prosecution statues did not present situation which would typically evade review so as to fall within exception to principle that court's power to declare law is limited to determining actual controversies in pending cases since any defendant charged with prostitution or patronizing prostitutes may raise unconstitutionality of statutes as defense. Cherry v Koch, 126 A.D.2d 346, 514 N.Y.S.2d 30, 1987 N.Y. App. Div. LEXIS 41241 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 603, 518 N.Y.S.2d 1026, 512 N.E.2d 552, 1987 N.Y. LEXIS 17435 (N.Y. 1987).

Where petitioners had no standing in underlying Article 78 proceeding, they could not invoke court's jurisdiction to enter declaratory judgment since they had not demonstrated existence of any actual controversy. Guild of Admin. Officers v County of Suffolk, 126 A.D.2d 725, 510 N.Y.S.2d 914, 1987 N.Y. App. Div. LEXIS 41872 (N.Y. App. Div. 2d Dep't), app. denied, 69 N.Y.2d 609, 516 N.Y.S.2d 1025, 509 N.E.2d 360, 1987 N.Y. LEXIS 16417 (N.Y. 1987).

There was no need for judicial declaration that New York City firefighters whose families resided out of state could nevertheless establish in-state residence necessary to retain employment

under CLS Pub O §§ 3 and 30 where fire department officials had not taken contrary position and had not established irrebuttable presumption that firefighter's residence was same as that of his family, and thus there was no genuine dispute between parties. Winkler v Spinnato, 134 A.D.2d 66, 523 N.Y.S.2d 530, 1987 N.Y. App. Div. LEXIS 50868 (N.Y. App. Div. 2d Dep't 1987), aff'd, 72 N.Y.2d 402, 534 N.Y.S.2d 128, 530 N.E.2d 835, 1988 N.Y. LEXIS 2702 (N.Y. 1988).

Court should have granted defendant's motion for summary judgment in declaratory judgment action, which arose after defendants regraded parcel of land adjacent to plaintiff's property and over which plaintiff was granted drainage license, where it was established that neither regrading of soil within licensed area nor construction undertaken by defendants exclusively upon their adjoining property had adversely affected plaintiff's drainage license. Ide v E. J. Del Monte Corp., 209 A.D.2d 974, 619 N.Y.S.2d 463, 1994 N.Y. App. Div. LEXIS 11980 (N.Y. App. Div. 4th Dep't 1994).

In action under CLS RPAPL § 1501 for judgment declaring that plaintiffs had right to exclude public from 28-acre pond surrounded by their land, state defendants were not entitled to summary judgment on ground that no justiciable controversy existed because state did not claim any right or interest in pond, where complaint alleged that state law enforcement personnel refused to enforce plaintiffs' rights in pond based on advice from other state agents that pond was (or might be) open to public as navigable waters. Hanigan v State, 213 A.D.2d 80, 629 N.Y.S.2d 509, 1995 N.Y. App. Div. LEXIS 7766 (N.Y. App. Div. 3d Dep't 1995).

Court properly dismissed action for judgment declaring that respondent would be subject to town's local laws respecting disposal of waste and operation of landfills within town boundaries in event it was granted permit to build regional solid waste management facility, as existence of controversy was contingent on happening of future events that might never occur, where respondent had option to purchase portion of proposed site but did not yet have option to purchase parcel that would actually serve as landfill, it did not have permit to build landfill, and permit process would not be complete until draft environmental impact state was accepted and numerous requirements were met. Town of Coeymans v City of Albany, 237 A.D.2d 856, 655

N.Y.S.2d 172, 1997 N.Y. App. Div. LEXIS 2725 (N.Y. App. Div. 3d Dep't), app. denied, 90 N.Y.2d 803, 661 N.Y.S.2d 179, 683 N.E.2d 1053, 1997 N.Y. LEXIS 2272 (N.Y. 1997).

Action for judgment declaring that village law establishing “zoning district of the Cultural and Performing Arts District” was unconstitutional, illegal and void as of date of its enactment, and to enjoin village from entertaining any application to designate any parcels of land subject to that law, should have been dismissed for lack of justiciable controversy, as any decision as to legality of law was premature where it was undisputed that law had never been utilized and had not yet affected any property. Rosenblum v Village of Bellport, 270 A.D.2d 326, 704 N.Y.S.2d 878, 2000 N.Y. App. Div. LEXIS 2690 (N.Y. App. Div. 2d Dep't), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1715 (N.Y. 2000).

In consolidated actions arising from efforts to place mobile concrete plant on industrially zoned property, court’s ruling that preliminary injunction issued in first lawsuit, enjoining construction of proposed plant, was unaffected by town’s subsequent issuance of certificate of occupancy (CO) for redesigned plant and remained in effect until court ruled on merits of first lawsuit, did not render issue raised in second lawsuit (whether CLS Town § 267-a(6) authorized building inspector to issue stop work order pending adjacent landowners’ appeal to zoning board of appeals regarding issuance of CO) nonjusticiable although merits of first lawsuit were still pending, since preliminary injunction could be vacated at any time. Bonded Concrete Inc. v Town of Saugerties, 282 A.D.2d 900, 723 N.Y.S.2d 553, 2001 N.Y. App. Div. LEXIS 3945 (N.Y. App. Div. 3d Dep't), app. denied, 97 N.Y.2d 653, 737 N.Y.S.2d 53, 762 N.E.2d 931, 2001 N.Y. LEXIS 3457 (N.Y. 2001).

Trial court properly declined to declare that a city’s responses to a newpaper’s Freedom of Information Law (FOIL) requests and rulings on administrative appeals were untimely and to order the city to cease this practice because, under N.Y. Pub. Off. Law § 89(4)(a), the remedy for an untimely response or ruling was to deem the response a denial and file an N.Y. C.P.L.R. art. 78 proceeding; review of a FOIL determination did not provide for mandamus relief. The newspaper’s reliance on N.Y. C.P.L.R. 3001 was unavailing because, as nothing about the

declaratory and mandamus relief sought touched on the sole relief that the petition sought in respect to the four individual FOIL requests, then there was no “justiciable controversy.” Matter of New York Times Co. v City of N.Y. Police Dept., 103 A.D.3d 405, 959 N.Y.S.2d 171, 2013 N.Y. App. Div. LEXIS 689 (N.Y. App. Div. 1st Dep't), app. denied, 22 N.Y.3d 854, 977 N.Y.S.2d 183, 999 N.E.2d 548, 2013 N.Y. LEXIS 2941 (N.Y. 2013).

Where the issue of whether an employee was entitled to a five percent or three percent bonus based on sale of all or part of his employer’s assets depended upon whether he was discharged without cause or resigned, a trial court erred in holding that it could not issue a declaratory judgment under CPLR 3001 because no sale had occurred, as the future event was in the control of the company and likely to occur. Realtime Data, LLC v Melone, 104 A.D.3d 748, 961 N.Y.S.2d 275, 2013 N.Y. App. Div. LEXIS 1492 (N.Y. App. Div. 2d Dep't 2013).

Pursuant to N.Y. C.P.L.R. 3001, as a lawn care company and its president sought declaratory relief on issues for which there was no actual active controversy, or for hypothetical issues related to future events which might or might not occur, no justiciable controversy was presented; dismissal of the declaratory relief request was warranted. Matter of Green Thumb Lawn Care, Inc. v Iwanowicz, 107 A.D.3d 1402, 967 N.Y.S.2d 542, 2013 N.Y. App. Div. LEXIS 4127 (N.Y. App. Div. 4th Dep't 2013), app. denied, 109 A.D.3d 1219, 972 N.Y.S.2d 139, 2013 N.Y. App. Div. LEXIS 6135 (N.Y. App. Div. 4th Dep't 2013), app. denied, 22 N.Y.3d 866, 986 N.Y.S.2d 20, 9 N.E.3d 370, 2014 N.Y. LEXIS 721 (N.Y. 2014).

Dismissal of declaratory judgment action affirmed because the resident failed to present a justiciable controversy that would or had impacted his rights as a voting taxpayer to state a cause of action for declaratory relief since the enabling statute for the library district did not require the town to specifically itemize in its annual budget the amount that it would levy to satisfy its share and he failed to show how the town’s budget process affected his legal rights as a voter-taxpayer. Salvador v Town of Queensbury, 162 A.D.3d 1359, 79 N.Y.S.3d 725, 2018 N.Y. App. Div. LEXIS 4560 (N.Y. App. Div. 3d Dep't 2018).

Neighbors failed to allege the existence of a justiciable controversy to support their request for a judgment declaring that the applicants could not create a trespass onto the neighbors' property, but relied on hearsay as to what the applicants might do in the future. Matter of Hargraves v City of Rye Zoning Bd. of Appeals, 162 A.D.3d 1022, 81 N.Y.S.3d 72, 2018 N.Y. App. Div. LEXIS 4653 (N.Y. App. Div. 2d Dep't 2018).

The presence of a real controversy is a necessary prerequisite to granting a declaratory judgment under CPLR § 3001, and a plaintiff's conclusory allegation that the complaint sets forth a justiciable controversy is valueless in the absence of supporting factual averments demonstrating the presence of such a controversy. Rosenzweig v New York State Surrogate's Court, 44 Misc. 2d 1013, 255 N.Y.S.2d 618, 1965 N.Y. Misc. LEXIS 2382 (N.Y. Sup. Ct. 1965).

A party may challenge validity of a governmental act only in a genuine controversy arising between litigants affecting his private rights. Hodgkins v Central School Dist., 78 Misc. 2d 91, 355 N.Y.S.2d 932, 1974 N.Y. Misc. LEXIS 1337 (N.Y. Sup. Ct. 1974), aff'd, 48 A.D.2d 302, 368 N.Y.S.2d 891, 1975 N.Y. App. Div. LEXIS 9885 (N.Y. App. Div. 3d Dep't 1975).

Where transsexual whose birth certificate designated sex as "male" had undergone sex reassignment surgery and become a female and there was no dispute as to obligations, transsexual's application for declaratory judgment establishing female sexual identity presented nonjusticiable controversy. Anonymous v Mellon, 91 Misc. 2d 375, 398 N.Y.S.2d 99, 1977 N.Y. Misc. LEXIS 2309 (N.Y. Sup. Ct. 1977).

Justiciable controversy existed in proceeding brought by parents under CLS Educ § 3635 to compel school officials to issue bus passes to certain students, although such relief was barred by statute of limitations with respect to current academic year, since new application for transportation in coming academic year would be timely, and matter had been actively disputed by parties for more than 2 years. Arlyn Oaks Civic Ass'n v Brucia, 171 Misc. 2d 634, 654 N.Y.S.2d 1016, 1997 N.Y. Misc. LEXIS 33 (N.Y. Sup. Ct. 1997).

Insolvent hospital’s attempt to maintain a mandatory reverse limited fund class action, with its unsecured creditors as class defendants, failed; as the hospital asserted no claims against any parties, there was no justiciable controversy. Genesee Hosp. v Allied Office Prods., 193 Misc. 2d 225, 749 N.Y.S.2d 355, 2001 N.Y. Misc. LEXIS 1305 (N.Y. Sup. Ct. 2001).

Where a health club member did not claim any kind of monetary loss other than payment of membership fees, the member’s declaratory judgment claims under N.Y. Gen. Bus. Law §§ 349, 623(3) were properly dismissed since there was no justiciable controversy under N.Y. C.P.L.R. 3001. Sokoloff v Town Sports Int'l, Inc., 6 A.D.3d 185, 778 N.Y.S.2d 9, 2004 N.Y. App. Div. LEXIS 3727 (N.Y. App. Div. 1st Dep't 2004).

Bank's application for a declaratory judgment that it negotiated in good faith was denied because the bank's foreclosure complaint did not plead a claim for or demand a remedy of a declaratory judgment that it negotiated in good faith during settlement conferencing. Flagstar Bank, FSB v Walker, 51 Misc. 3d 806, 29 N.Y.S.3d 752, 2016 N.Y. Misc. LEXIS 635 (N.Y. Sup. Ct. 2016).

**20. — —Advisory opinions**

Fact that court may be required to determine rights of parties upon happening of future event does not mean that declaratory judgment will be merely advisory; in typical case where future event is act contemplated by one party, it is assumed that parties will act according to law and thus court’s determination will have immediate and practical effect of influencing their conduct. New York Public Interest Research Group, Inc. v Carey, 42 N.Y.2d 527, 399 N.Y.S.2d 621, 369 N.E.2d 1155, 1977 N.Y. LEXIS 2403 (N.Y. 1977).

Principle that it is function of courts to determine controversies between litigants and not to give advisory opinions is not merely question of judicial prudence or restraint but is, rather, constitutional command defining proper role of courts under common-law system. New York Public Interest Research Group, Inc. v Carey, 42 N.Y.2d 527, 399 N.Y.S.2d 621, 369 N.E.2d 1155, 1977 N.Y. LEXIS 2403 (N.Y. 1977).

The Court of Appeals would strike the declaration of constitutionality of an uncodified statute and would dismiss the complaint, despite the fact that defendants Commissioner of Taxation and Finance and Superintendent of Insurance were nonappealing parties, since the relief granted was incidental to the restraint upon the court against rendering an advisory determination so that, once the controversy was determined to be nonjusticiable it could not be allowed to stand. American Ins. Asso. v Chu, 64 N.Y.2d 379, 487 N.Y.S.2d 311, 476 N.E.2d 637, 1985 N.Y. LEXIS 15875 (N.Y.), cert. denied, 474 U.S. 803, 106 S. Ct. 36, 88 L. Ed. 2d 29, 1985 U.S. LEXIS 3099 (U.S. 1985).

State courts lacked subject matter jurisdiction over state's request that court consider whether electric utility's implementation of its own emergency plan following nuclear accident at its generating station would usurp state's police power, even though federal licensing agency that required plan, as well as utility, agreed to submit controversy to court, since plan had not yet been approved by agency, agency was not party to action, and it would not be bound by any determination; thus, state was seeking nothing more than advisory opinion for possible use by agency in future, which is form of relief beyond judicial function. Cuomo v Long Island Lighting Co., 71 N.Y.2d 349, 525 N.Y.S.2d 828, 520 N.E.2d 546, 1988 N.Y. LEXIS 91 (N.Y. 1988).

Special law that, inter alia, prescribes procedure for determining Staten Islanders' interest in secession from New York City (L 1989, ch 773, as amended by L 1990, ch 17) is more than "advisory only," and thus is ripe for appellate review, since law does more than merely solicit interest in secession in that it authorizes commitment of public funds and other public resources to conduct studies, hold hearings and submit legislation that would effectuate secession if legislature passed such legislation and governor signed it. New York v State, 76 N.Y.2d 479, 561 N.Y.S.2d 154, 562 N.E.2d 118, 1990 N.Y. LEXIS 3150 (N.Y. 1990).

The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory; where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical

effect of influencing their conduct. Bethlehem Steel Corp. v Board of Education, 61 A.D.2d 147, 402 N.Y.S.2d 655, 1978 N.Y. App. Div. LEXIS 9715 (N.Y. App. Div. 4th Dep't), aff'd, 44 N.Y.2d 831, 406 N.Y.S.2d 752, 378 N.E.2d 115, 1978 N.Y. LEXIS 2027 (N.Y. 1978).

Power to render declaratory judgment does not extend to giving of advisory opinion with regard to future event which is beyond control of parties and which may never occur, such that court could not render declaratory judgment as to applicability of Federal Condominium and Co-Operative Conversion Protection and Abuse Relief Act of 1980 ( 15 USCS § 3601 et seq.) to management agreement and master lease described as “sweetheart” deals or windfalls for sponsor of co-operative conversion plan, as well as in light of fact that statute in question is relatively new which has not been extensively interpreted. Phoenix Tenants Ass'n v 6465 Realty Co., 119 A.D.2d 427, 500 N.Y.S.2d 657, 1986 N.Y. App. Div. LEXIS 55399 (N.Y. App. Div. 1st Dep't 1986).

Property owners’ attempt to require town zoning enforcement official to enforce zoning regulation lacked necessary justiciability for declaratory judgment action to lie where owners did not and could not allege that official enforcement of ordinance against adjoining landowner was mandatory, rather than discretionary act; any judicial declaration with respect to whether activities or structures on adjoining landowner’s property violated ordinance would thus be purely advisory and would not create any binding obligation on official to act. Manuli v Hildenbrandt, 144 A.D.2d 789, 534 N.Y.S.2d 763, 1988 N.Y. App. Div. LEXIS 10988 (N.Y. App. Div. 3d Dep't 1988).

Although courts do not render advisory opinions and, therefore, action may not be maintained if issue presented for adjudication involves future event which might not occur, action may proceed where practical likelihood is that future contingency will occur. Prodell v State, 211 A.D.2d 966, 621 N.Y.S.2d 712, 1995 N.Y. App. Div. LEXIS 389 (N.Y. App. Div. 3d Dep't), transferred, 86 N.Y.2d 831, 634 N.Y.S.2d 436, 658 N.E.2d 214, 1995 N.Y. LEXIS 3640 (N.Y. 1995).

Court should have dismissed action for declaratory judgment that any action by defendants to recover on their claim under insurance policy would be time-barred, as fact that action is time-barred is affirmative defense which may be waived if not asserted in responsive pleading, and thus before action is even commenced, any declaration as to applicability of period of limitations is purely advisory and not justiciable. Employers' Fire Ins. Co. v Klemons, 229 A.D.2d 513, 645 N.Y.S.2d 849, 1996 N.Y. App. Div. LEXIS 7904 (N.Y. App. Div. 2d Dep't 1996).

CLS Gen Mun § 207-a does not give firefighter right to seek “status” determination from municipality in absence of current need for benefits. Lewis v City of Gloversville, 246 A.D.2d 804, 667 N.Y.S.2d 796, 1998 N.Y. App. Div. LEXIS 298 (N.Y. App. Div. 3d Dep't 1998).

That portion of a complaint seeking declaratory relief against defendant Office of Court Administration (OCA), in regard to a memorandum prepared by OCA’s counsel interpreting CPL § 460.70 and relied upon, in part, by defendant County Court Judge in requiring plaintiff to pay the full costs of preparing transcripts required for the perfection of his appeal would be dismissed, since a declaratory judgment concerning such memorandum would be merely an advisory opinion evaluating the accuracy of a statutory interpretation and would not determine any justiciable controversy between the parties. Harrington v State Office of Court Admin., 114 Misc. 2d 351, 451 N.Y.S.2d 595, 1982 N.Y. Misc. LEXIS 3482 (N.Y. Sup. Ct. 1982), aff'd, 94 A.D.2d 863, 463 N.Y.S.2d 586, 1983 N.Y. App. Div. LEXIS 18330 (N.Y. App. Div. 3d Dep't 1983).

Law firm retained by president of public employee labor union organized as not-for-profit corporation would be ordered to represent union in action brought against it for declaratory judgment where law firm retained by union’s board of directors was in substantial agreement with position taken by plaintiffs in declaratory judgment action and its representation of union would create friendly law suit requesting advisory opinion, and would thus require court to dismiss declaratory judgment action as not presenting justiciable controversy. Simoni v Civil Service Employees Ass'n, Local 1000, etc., 133 Misc. 2d 1, 507 N.Y.S.2d 371, 1986 N.Y. Misc. LEXIS 2958 (N.Y. Sup. Ct. 1986).

Court would dismiss proceeding brought pursuant to CLS Gen City § 20(2), in which city sought order providing that compensation to be paid for property should be ascertained and determined solely by income capitalization method, since proceeding called for advisory opinion given that city had not yet taken any property and property owner had not yet suffered any damage. In re Jamaica Water Supply Co., 158 Misc. 2d 378, 600 N.Y.S.2d 914, 1993 N.Y. Misc. LEXIS 255 (N.Y. Sup. Ct. 1993).

Court would address request for declaratory judgment as to whether dating service would be subject to CLS Gen Bus § 394-c, even though action could be seen as attempt to obtain advisory opinion, since it was reasonable for plaintiff to seek declaration before incurring major expenses to expand its business into New York, and matter involved real dispute involving substantial legal interests and not hypothetical state of facts; plaintiff would not be required to expend substantial funds, enter into contracts, acquire facilities, hire employees and advertise before knowing whether it was required to conform to statute. Great Expectations Creative Management v Attorney-General of New York, 162 Misc. 2d 352, 616 N.Y.S.2d 917, 1994 N.Y. Misc. LEXIS 404 (N.Y. Sup. Ct. 1994).

Declaratory judgment action brought by the State of New York, the New York State Department of Correctional Services, and the New York State Division of Parole against various felons was dismissed as the action raised hypothetical questions resulting from N.Y. Correction Law § 601-d and the resentencing of various felons to impose post-release supervision. State of New York v Myers, 870 N.Y.S.2d 757, 22 Misc. 3d 809, 2008 N.Y. Misc. LEXIS 7268 (N.Y. Sup. Ct. 2008).

**21. —Ripeness for review**

Request for declaratory judgment is premature if future event is beyond control of parties and may never occur; such as challenge to statute which has not yet become effective. New York Public Interest Research Group, Inc. v Carey, 42 N.Y.2d 527, 399 N.Y.S.2d 621, 369 N.E.2d 1155, 1977 N.Y. LEXIS 2403 (N.Y. 1977).

For challenge to administrative action to be ripe, action sought to be reviewed must be final, and anticipated harm caused by action must be direct and immediate. Weingarten v Lewisboro, 77 N.Y.2d 926, 569 N.Y.S.2d 599, 572 N.E.2d 40, 1991 N.Y. LEXIS 531 (N.Y. 1991).

Individual who became resident of city in 1974, who had previously qualified as a candidate for city office under eligibility requirements in effect in 1974, who announced his intention to be candidate in 1975 and whose opportunity to procure nomination from his political party was adversely affected by enactment in 1975 of local law establishing two-year residency requirement for eligibility to hold certain city offices was adversely affected in real and immediate manner by promulgation of local law so that controversy surrounding constitutionality of local law was ripe for judicial determination. Phelan v Buffalo, 54 A.D.2d 262, 388 N.Y.S.2d 469, 1976 N.Y. App. Div. LEXIS 13765 (N.Y. App. Div. 4th Dep't 1976).

In absence of order giving substance to defendants' speculative fears of improper relief, with respect to plaintiff's request that town zoning classifications be declared invalid insofar as they prohibited use of plaintiff's property for retail purposes, defendants' challenge to requested relief was premature. Hartsdale Venture Co. v Greenburgh, 59 A.D.2d 903, 399 N.Y.S.2d 137, 1977 N.Y. App. Div. LEXIS 14104 (N.Y. App. Div. 2d Dep't 1977).

Petitioners' action seeking declaration that Transit Authority's preemployment drug tests were unconstitutional was ripe for review, although proceeding was commenced prior to agency's issuance of final termination notices and agency could have ultimately decided to vacate petitioners' suspensions, since petitioners suffered actual injury by virtue of their suspensions without pay before proceeding was commenced, it was unlikely that they would be reinstated, and harm sought to be enjoined was not contingent on future developments or resolution of facts at administrative level, but involved purely legal issues; even if case were not fully ripe when proceeding was commenced, it ripened when petitioners were terminated prior to Special Term's consideration of case. Dozier v New York City, 130 A.D.2d 128, 519 N.Y.S.2d 135, 1987 N.Y. App. Div. LEXIS 45074 (N.Y. App. Div. 2d Dep't 1987).

Action for judgment declaring that plaintiff, who became paraplegic as result of one-car accident, was covered by underinsured motorist endorsement contained in policy covering car in which she was injured, was ripe for adjudication in view of likelihood that plaintiff's recovery would exceed policy limit of $350,000. Rung v United States Fidelity & Guaranty Co., 139 A.D.2d 914, 527 N.Y.S.2d 903, 1988 N.Y. App. Div. LEXIS 4086 (N.Y. App. Div. 4th Dep't 1988).

In action by hospitals against insurance brokers for failure to obtain medical malpractice insurance for hospitals and attending physicians, which required hospitals to obtain inferior coverage elsewhere at higher rates, and seeking declaration that they were entitled to indemnification for any uncovered claims that might arise, dismissal for prematurity was unwarranted since judgments likely to be recovered or potential liability of hospitals could well reach into coverage for which hospitals contracted. Cabrini Medical Center v KM Ins. Brokers, 142 A.D.2d 529, 531 N.Y.S.2d 1, 1988 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 1st Dep't), app. dismissed, 73 N.Y.2d 785, 536 N.Y.S.2d 744, 533 N.E.2d 674, 1988 N.Y. LEXIS 6402 (N.Y. 1988).

Declaratory judgment action brought by hospital to require county to defend and indemnify it in malpractice action would not be dismissed as premature since (1) contract between hospital and county provided that county's obligation to defend and indemnify hospital required only that claim of malpractice be made against hospital by patient referred to it for same condition within 2-year period, and (2) allegations in complaint and bill or particulars in underlying malpractice action clearly fell within terms of contract. Brookhaven Memorial Hosp. Medical Center, Inc. v County of Suffolk, 155 A.D.2d 404, 547 N.Y.S.2d 336, 1989 N.Y. App. Div. LEXIS 13941 (N.Y. App. Div. 2d Dep't 1989).

Action seeking declaration as to constitutionality of statute which set forth process by which Borough of Staten Island may be separated from New York City (L 1989, ch 773) was ripe for determination since statute, which authorizes series of referenda on which only residents of Staten Island may vote, is not purely advisory in nature, and question of equal protection was raised by fact that statute, in effect, gives Staten Islanders veto power over secession which is

denied residents of other boroughs. New York v State, 158 A.D.2d 169, 557 N.Y.S.2d 914, 1990 N.Y. App. Div. LEXIS 7899 (N.Y. App. Div. 1st Dep't), aff'd, 76 N.Y.2d 479, 561 N.Y.S.2d 154, 562 N.E.2d 118, 1990 N.Y. LEXIS 3150 (N.Y. 1990).

Fact that statement of proposed audit adjustment was not actual tax assessment did not render controversy unripe for review since declaratory judgment was available to adjudicate rights before wrong actually occurred. Two Twenty East Ltd. Partnership v New York State Dep't of Taxation & Finance, 185 A.D.2d 202, 586 N.Y.S.2d 596, 1992 N.Y. App. Div. LEXIS 9098 (N.Y. App. Div. 1st Dep't 1992).

Action to declare CLS Tax § 1105(c)(8), which imposes sales tax on protective and detective services, inapplicable to services rendered by plaintiffs as licensed independent insurance adjusters, following issuance of nonbinding advisory opinion by defendant Commissioner of Taxation and Finance finding that plaintiffs' services were investigative and therefore subject to sales tax, was ripe for judicial review, since commissioner's opinion letter took definitive position on issue inflicting actual, concrete injury, in that plaintiffs had been placed at disadvantage relative to their competitors, who were not collecting tax, as well as being exposed to potential personal liability for taxes. Compass Adjusters & Investigators v Commissioner of Taxation & Fin., 197 A.D.2d 38, 610 N.Y.S.2d 625, 1994 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 3d Dep't 1994).

Action challenging constitutionality of statute, which required school district to pay school tax refund in event of reduction in assessment of nuclear power plant, was not rendered premature by fact that town had filed affidavit of intention to move for permission to appeal to Court of Appeals in action pertaining to reduction of plant's assessment. Prodell v State, 211 A.D.2d 966, 621 N.Y.S.2d 712, 1995 N.Y. App. Div. LEXIS 389 (N.Y. App. Div. 3d Dep't), transferred, 86 N.Y.2d 831, 634 N.Y.S.2d 436, 658 N.E.2d 214, 1995 N.Y. LEXIS 3640 (N.Y. 1995).

It was not premature to bring declaratory judgment action challenging validity of 11 NYCRR part 152, which established physicians professional liability insurance merit rating plan, despite claim by superintendent of insurance that plan was not fully operational, since (1) regulation had been

in effect for over one year, during which time insurers were required to adopt, then submit for approval, merit rating plan, (2) insureds presumably had been charged with premium surcharges based on approved plans, or faced prospect of that happening soon, and (3) action attacked regulation on its face, not as applied to individual physicians; that regulation allowed periodic adjustment of those factors specified for assigning points to generate surcharges did not affect challenge to methodology in its present formulation. New York State Soc. of Obstetricians & Gynecologists, Inc. v Corcoran, 138 Misc. 2d 591, 525 N.Y.S.2d 457, 1987 N.Y. Misc. LEXIS 2807 (N.Y. Sup. Ct. 1987).

Intervenor's application for declaration that CLS Men Hyg Art 78 was unconstitutional because of its failure to provide for appointment of counsel for indigent subjects of committeeship proceedings presented justiciable controversy ripe for review, although challenged provision was to be repealed and replaced by new statute which provided for appointment of counsel, since it was likely that numerous committeeship proceedings would be conducted prior to effective date of new statute. In re Rodriguez, 159 Misc. 2d 929, 607 N.Y.S.2d 567, 1992 N.Y. Misc. LEXIS 675 (N.Y. Sup. Ct. 1992).

Controversy was ripe for review, notwithstanding that it stemmed from issuance of nonbinding advisory opinion by defendant Commissioner of Taxation and Finance, where plaintiffs challenged applicability of CLS Tax § 1105(c)(8) and were already collecting and remitting sales tax pursuant to statute. Compass Adjusters & Investigators v Commissioner of Taxation & Fin., 159 Misc. 2d 138, 604 N.Y.S.2d 468, 1993 N.Y. Misc. LEXIS 422 (N.Y. Sup. Ct. 1993), aff'd, 197 A.D.2d 38, 610 N.Y.S.2d 625, 1994 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 3d Dep't 1994).

Action for judgment declaring that plaintiffs were entitled to take possession of property on death of 86-year-old life tenant was not premature during life tenant's lifetime, as gift to plaintiffs should life tenant die without issue created contingent remainder which was vested subject to being divested in event of life tenant's death leaving issue, and declaration sought by plaintiffs did not preclude nor interfere with that determination on death of life tenant. Demund v LaPoint, 169 Misc. 2d 1020, 647 N.Y.S.2d 662, 1996 N.Y. Misc. LEXIS 344 (N.Y. Sup. Ct. 1996).

In declaratory judgment action challenging authority of New York City Health and Hospitals Corporation (HHC) to surrender use and occupancy of health care facility, issue as to necessity of city council approval prior to city's exercise of complete dominion and control over HHC property was ripe for judicial review despite HHC's assertion that it did not officially surrender facility to city but only determined to cease operating it as nursing home, and that it ultimately might propose entirely different plan, where HHC had transferred residents and staff and stopped using facility, Department of Buildings had determined that premises were unfit for occupancy, HHC supported demolition order, and it was undisputed that mayor favored turning premises into parkland and that HHC desired to exit from public health care business. Council of City of New York v Giuliani, 183 Misc. 2d 799, 705 N.Y.S.2d 801, 1999 N.Y. Misc. LEXIS 639 (N.Y. Sup. Ct. 1999).

**22. — —Particular actions held not ripe**

Complaint in action for declaratory judgment that town zoning ordinance was unconstitutional was premature where complainant had not applied for a permit to construct new building pursuant to the ordinance and complainant would be restricted to his administrative remedy in the first instance. Old Farm Road, Inc. v New Castle, 26 N.Y.2d 462, 311 N.Y.S.2d 500, 259 N.E.2d 920, 1970 N.Y. LEXIS 1284 (N.Y. 1970).

Developers' declaratory judgment action did not present controversy which was ripe for review, and action would be dismissed, where developers challenged constitutionality of statute and regulation allowing town planning board to require $5,000-per-lot recreation fee as condition of subdivision approval, but no such fee had been imposed on plaintiff developers. Weingarten v Lewisboro, 77 N.Y.2d 926, 569 N.Y.S.2d 599, 572 N.E.2d 40, 1991 N.Y. LEXIS 531 (N.Y. 1991).

In an Article 78 proceeding brought by a doctor against the Workers' Compensation Board to prevent the Board from seeking, or threatening to seek, to remove the doctor's authorization to render treatment in workers' compensation cases, based on the fact that the former chairman of the Board had sent a letter to the doctor advising her that her treatment authorization would be

withdrawn in the event she failed to desist from charging fees for medical services in excess of the Board's medical fee schedule, the trial court properly dismissed the doctor's petition on the ground that no justiciable controversy existed where the record showed that the Board chairman who had sent the letter had died, that more than two and one-half years had elapsed thereafter with no action having been taken by either of the successor chairmen, and that there was no indication that the present chairman would act on the original threat, so that the dispute between the parties was dependent upon the possible happening of a future event that might never occur, and where, in the event administrative proceedings were later to be instituted challenging the doctor's authority to render services in compensation cases, she would then have a full opportunity to litigate the issue in the administrative proceeding, by judicial review following any determination, or, if necessary, through an action for declaratory judgment relief. Furlong v New York State Workers' Compensation Bd., 97 A.D.2d 357, 467 N.Y.S.2d 366, 1983 N.Y. App. Div. LEXIS 19903 (N.Y. App. Div. 1st Dep't 1983).

Ground lessee of land and building could not bring declaratory judgment action seeking classification of rental income to be received by ground lessee from cooperative units after conversion of building, under lease agreement that requires lessee to pay lessor certain percentage of gross income derived from property, as lessee's problem with regard to co-operative rental income has not yet matured, and is uncertain, at this time, in light of fact that successful co-operative conversion may never occur. Bolt Associates v Diamonds-In-The-Roth, Inc., 119 A.D.2d 524, 501 N.Y.S.2d 41, 1986 N.Y. App. Div. LEXIS 55459 (N.Y. App. Div. 1st Dep't 1986).

Court properly dismissed, as premature, insured's action seeking declaration that insurance brokers breached their contractual obligation by failing to obtain proper insurance coverage, since insured had not as yet made any claim against policy and there was no showing that coverage in question was not provided; declaratory relief was improper since any rejection of insured's claim was beyond parties' control and might never occur. Staten Island Hospital v Alliance Brokerage Corp., 137 A.D.2d 674, 524 N.Y.S.2d 766, 1988 N.Y. App. Div. LEXIS 1769

(N.Y. App. Div. 2d Dep't 1988), dismissed, 166 A.D.2d 574, 560 N.Y.S.2d 859, 1990 N.Y. App. Div. LEXIS 12715 (N.Y. App. Div. 2d Dep't 1990).

Supreme Court erred in declaring that CLS ECL § 27-0704(2) was unconstitutional to extent that it permitted Commissioner of Department of Environmental Conservation to alter boundaries of deep flow recharge area where there was no indication that commissioner considered exercising power which court enjoined him from exercising, and thus harm which plaintiffs anticipated (enlargement of area in which construction of solid-waste landfills is strictly proscribed) might never occur. Islip v Cuomo, 147 A.D.2d 56, 541 N.Y.S.2d 829, 1989 N.Y. App. Div. LEXIS 7117 (N.Y. App. Div. 2d Dep't 1989).

Court would dismiss part of summary proceeding that sought declaration that tenant did not use apartment as primary residence since claim was not ripe for review where other pending actions brought into question whether tenant was under lease or was entitled to lease. Ansonia Assoc. v Consiglio, 163 A.D.2d 98, 557 N.Y.S.2d 346, 1990 N.Y. App. Div. LEXIS 8342 (N.Y. App. Div. 1st Dep't 1990).

In action by insurer of contractor sued by homeowners for extensive fire damage to their home during renovation work, seeking declaration of its obligations with respect to defense and indemnification of contractor, cross-motion by homeowners seeking declaration that insurer was obligated to defend contractor and indemnify it for any judgment ultimately awarded against contractor was premature since homeowners failed to satisfy condition precedent to maintenance of direct action against contractor’s insurer pursuant to CLS Ins § 3420(a)(2) in that no judgment had yet been obtained against contractor which had gone unsatisfied for 30 days, and homeowners were mere strangers to insurance contract until such time. Mount Vernon Fire Ins. Co. v NIBA Constr., 195 A.D.2d 425, 600 N.Y.S.2d 936, 1993 N.Y. App. Div. LEXIS 7625 (N.Y. App. Div. 1st Dep't 1993).

Complaint seeking declaration that insurance agent and insurance carrier were obligated to indemnify plaintiff for any liability he might incur in personal injury action against him arising from automobile collision, on theory that they had negligently failed to recommend that he procure

additional insurance coverage when he purchased automobile and homeowner's insurance, was properly dismissed as premature since plaintiff had not yet sustained any damages as result of defendants' alleged negligence inasmuch as there was no judgment or settlement against him in underlying personal injury action and, in fact, might never be. Hesse v Speece, 204 A.D.2d 514, 611 N.Y.S.2d 308, 1994 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 2d Dep't 1994).

Action for judgment declaring that coverage for injury to plaintiff's son was provided by homeowner's policy issued to tortfeasor's mother was properly dismissed as premature, where no personal injury action had been commenced to recover damages against tortfeasor and his mother. Terry v Farmer's Ins. Co., 236 A.D.2d 829, 653 N.Y.S.2d 767, 1997 N.Y. App. Div. LEXIS 1760 (N.Y. App. Div. 4th Dep't 1997).

Plaintiffs' abstract contention that inclusion of word "repair" rendered city ordinance unconstitutionally vague alleged only hypothetical future controversy that was not ripe for adjudication where city building inspector had not yet exercised his discretion under ordinance, and therefore it was not yet known whether and how ordinance would be enforced. Schultz v City of Port Jervis, 242 A.D.2d 699, 662 N.Y.S.2d 591, 1997 N.Y. App. Div. LEXIS 9205 (N.Y. App. Div. 2d Dep't 1997).

In firefighter's action against city and its mayor seeking declaration that he was entitled to wages and benefits under CLS Gen Mun § 207-a, declaratory relief was premature, and complaint would be dismissed, where firefighter sought determination from defendants "to insure [that] continuing medical treatments and future corrective surgery for his right knee are covered," and there was high degree of uncertainty as to whether those possible future events, which were not within parties' control, would ever come to pass. Lewis v City of Gloversville, 246 A.D.2d 804, 667 N.Y.S.2d 796, 1998 N.Y. App. Div. LEXIS 298 (N.Y. App. Div. 3d Dep't 1998).

Declaration as to whether parties' amendatory agreement abrogated defendant's right under initial agreement to terminate certain specified services that plaintiff was to perform for defendant could not be made at preanswer stage of action where (1) defendant did not appeal from court's finding that triable issue of fact existed as to whether defendant gave proper notice

of its election to terminate subject services, (2) controversy would not be ended even if Appellate Division were to declare in defendant's favor that its right to make such election carried over into amendatory agreement, and (3) declaration should not be made if it results in trying controversy piecemeal. Electronic Data Sys. Corp. v Xerox Corp., 273 A.D.2d 28, 709 N.Y.S.2d 46, 2000 N.Y. App. Div. LEXIS 6347 (N.Y. App. Div. 1st Dep't 2000).

In action for judgment declaring that governor lacked authority to bind state to tribal gaming compact, so much of claims as sought to enjoin expansion of gambling activity onto other sites was not ripe for review where governor had neither taken action nor given any indication that he intended to take action on development sought to be enjoined. Saratoga County Chamber of Commerce Inc. v Pataki, 275 A.D.2d 145, 712 N.Y.S.2d 687, 2000 N.Y. App. Div. LEXIS 8884 (N.Y. App. Div. 3d Dep't 2000).

Issues were not ripe for review, and thus court properly dismissed declaratory judgment complaint challenging implementation of New York City's Mandatory Medicaid Managed Care Program, where action was predicated on administrative determinations not yet made, including final federal approval of plan and issuance of final request for proposals. Federation of Mental Health Ctrs. v DeBuono, 275 A.D.2d 557, 712 N.Y.S.2d 667, 2000 N.Y. App. Div. LEXIS 8649 (N.Y. App. Div. 3d Dep't 2000).

Court would dismiss proceeding brought pursuant to CLS Gen City § 20(2) in which city sought order providing that compensation to paid for property should be ascertained and determined solely by income capitalization method since question presented was not justiciable in that it was contingent on happening of future event, as city had not yet taken any property. In re Jamaica Water Supply Co., 158 Misc. 2d 378, 600 N.Y.S.2d 914, 1993 N.Y. Misc. LEXIS 255 (N.Y. Sup. Ct. 1993).

Insurer failed to satisfy its burden to prove that insured breached policy's cooperation clause, and its declaratory judgment action was dismissed as premature, where only factual assertion evincing failure to cooperate was insured's nonappearance at his examination before trial and, after letter of warning was sent to insured, insurer and plaintiff in underlying action had

stipulated that insured's deposition could proceed as late as 30 days prior to trial. Allstate Ins. Co. v Loester, 177 Misc. 2d 372, 675 N.Y.S.2d 832, 1998 N.Y. Misc. LEXIS 280 (N.Y. Sup. Ct. 1998).

In declaratory judgment action challenging Long Island Power Authority's proposed property tax settlement to resolve tax refunds ordered in previous judgment and proposed bifurcated rate structure plan in connection with acquisition of Long Island Lighting Company, plaintiffs' objections were not ripe for judicial review where no agreement had been reached with taxing jurisdiction, and projected resultant bifurcated rate plan, which was contingent on proposed tax settlement agreement, was not to occur until year 2003. Initiative for Competitive Energy v Long Island Power Auth., 178 Misc. 2d 979, 683 N.Y.S.2d 391, 1998 N.Y. Misc. LEXIS 553 (N.Y. Sup. Ct. 1998).

Combined declaratory judgment action and Article 78 proceeding, brought by village and city against school district and Commissioner of Education to prevent construction of school bus garage and fueling facility, was dismissed as premature where project had yet to undergo engineering and architectural review, and commissioner had not yet issued final approval. Village of Skaneateles v Board of Educ., 180 Misc. 2d 591, 689 N.Y.S.2d 865, 1999 N.Y. Misc. LEXIS 171 (N.Y. Sup. Ct. 1999).

Where plaintiff sought a declaration that a variance was invalid, declaratory relief under N.Y. C.P.L.R. 3001 was unavailable because there was no present prejudice to plaintiff; plaintiff had not applied for a building permit for the residential units involving the variance at issue, and, as a result, the dispute was not ripe for judicial review. Waterways Dev. Corp. v Lavalle, 28 A.D.3d 539, 813 N.Y.S.2d 485, 2006 N.Y. App. Div. LEXIS 4357 (N.Y. App. Div. 2d Dep't 2006).

Property owner's claim that time limitation in the opt-out provision in the Cannabis Law violated the New York State Constitution was not ripe for adjudication where the city did not desire to opt-out or prohibit a cannabis dispensary, but desired to have the dispensary operate within its jurisdiction. As such, even if the restriction placed on the city's ability to opt-out was invalidated, it would not change anything for the property owner. Moreover, to the extent that the property

owner contended that the city may later change its position, that alleged nothing more than a hypothetical adjudication where the existence of a controversy was dependent upon the happening of future events. Matter of Buenos Hill Inc. v Saratoga Springs Planning Bd., 83 Misc. 3d 494, 206 N.Y.S.3d 902, 2024 N.Y. Misc. LEXIS 807 (N.Y. Sup. Ct. 2024).

**23. —Mootness**

An action by a community concert association seeking a declaration as to the legality of the school board's refusal to permit a scheduled artist to perform in the school building because of his controversial views of the Vietnam War presented a constitutional question that was not rendered moot by the fact that petitioner's appeal did not come before the Court of Appeals until after the date of the scheduled concert; and the appeal presented a "justiciable controversy" for which a declaratory judgment was an appropriate remedy. East Meadow Community Concerts Asso. v Board of Education, 18 N.Y.2d 129, 272 N.Y.S.2d 341, 219 N.E.2d 172, 1966 N.Y. LEXIS 1176 (N.Y. 1966).

Constitutional issue of conformity of Nassau County Administrative Code's tax sale notice provisions with procedural due process was not mooted by evidence that property owner was sent actual notice where owner denied that she had received notice and county failed to establish that actual notice had been given. McCann v Scaduto, 71 N.Y.2d 164, 524 N.Y.S.2d 398, 519 N.E.2d 309, 1987 N.Y. LEXIS 19993 (N.Y. 1987).

In declaratory judgment action seeking apportionment of settlement which had been reached among defendants in personal injury case stemming from automobile accident, court could not reach and resolve underlying questions of tort liability—including employment status of persons involved in accident—since such questions had been rendered moot by settlement of underlying action. 81 N.Y.2d 938, 597 N.Y.S.2d 933, 613 N.E.2d 965.

Unsuccessful bidder's Article 78 proceeding, which challenged city's selection of other contractors and sought preliminary injunction to prevent certification of let contracts, was converted into declaratory judgment action although injunctive proceeding was moot because

work under contracts at issue was completely or substantially done, where issues raised in petition challenged validity of relatively new and pervasive public bidding regulations being used by city. Diamond Asphalt Corp. v Sander, 92 N.Y.2d 244, 678 N.Y.S.2d 567, 700 N.E.2d 1203, 1998 N.Y. LEXIS 1828 (N.Y. 1998).

In a taxpayer's action challenging the validity of the state's payment of its employees in the form of non-negotiable "statements of net earnings," the action was properly dismissed as moot where the form of payment resulted from the failure of the state to enact a timely budget, where it could not be presumed that lengthy budget impasses would occur in future years, and where the state comptroller publicly declared that he would not use this form of payment in future years. New York Public Interest Research Group, Inc. v Regan, 91 A.D.2d 774, 457 N.Y.S.2d 1022, 1982 N.Y. App. Div. LEXIS 19668 (N.Y. App. Div. 3d Dep't 1982), app. denied, 58 N.Y.2d 610, 462 N.Y.S.2d 1027, 449 N.E.2d 426, 1983 N.Y. LEXIS 3831 (N.Y. 1983).

Creditors' action (action no. 2) to set aside transfer of property from debtor to her mother on ground that it was fraudulent attempt to hinder creditors' ability to recover any judgment which they might obtain against debtor in their original action for debt (action no. 1) was rendered moot by reconveyance of property from mother to debtor during course of litigation; thus, there was no underlying action which affected real property so that notice of pendency filed by creditors in action no. 2 had no effect on debtor's subsequent transfer of property to mortgagees in satisfaction of loans, and accordingly, creditors' present action seeking declaration that judgment they obtained in action no. 1 constituted lien on property was properly dismissed. Colombo v Caiati, 131 A.D.2d 532, 516 N.Y.S.2d 476, 1987 N.Y. App. Div. LEXIS 47990 (N.Y. App. Div. 2d Dep't 1987).

Any claim by mobile home park owner for subsequent damages arising out of inverse condemnation allegedly resulting from diminished value of his land was rendered moot by judicial declaration that local laws regulating eviction of mobile home owners, which favored home owners over park owners, were invalid under CLS Real P § 233; to extent that such claim existed, park owner failed to raise any triable issues of fact that enactment of local laws

constituted taking of property where laws made no effort to restrict rent increases, and thus tenants were not given any economic interest in their site which could be marketed to others. Ba Mar, Inc. v County of Rockland, 164 A.D.2d 605, 566 N.Y.S.2d 298, 1991 N.Y. App. Div. LEXIS 1023 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 78 N.Y.2d 877, 573 N.Y.S.2d 67, 577 N.E.2d 58, 1991 N.Y. LEXIS 839 (N.Y. 1991), app. denied, 78 N.Y.2d 982, 574 N.Y.S.2d 935, 580 N.E.2d 407, 1991 N.Y. LEXIS 4028 (N.Y. 1991).

Action seeking declaration that village zoning ordinance did not apply to developer's property because approved subdivision plan which developer's predecessor had previously submitted to town planning board was statutorily exempt from subsequent zoning changes, or alternatively that developer had acquired vested right to build in accordance with town's zoning laws, was not rendered moot by fact that developer submitted new site plan applications that satisfied new zoning requirements and that had been approved, conditioned on phased construction schedule, since action sought right to develop lots in accordance with town's, rather than village's, zoning ordinance. Ramapo 287 Ltd. Partnership v Montebello, 165 A.D.2d 544, 568 N.Y.S.2d 492, 1991 N.Y. App. Div. LEXIS 4594 (N.Y. App. Div. 3d Dep't 1991).

In action seeking declaratory and injunctive relief based on claimed unconstitutionality of CLS Tax §§ 601(d) and 651(b)(2), ruling of Appellate Division that § 651(b)(2) was unconstitutional as applied rendered academic plaintiffs' constitutional challenges to validity of § 601(d) based on interaction of that section with § 651(b)(2), since § 601(d) was inapplicable once plaintiffs were no longer obligated to file joint state income tax return under § 651(b)(2). Brady v State, 172 A.D.2d 17, 576 N.Y.S.2d 896, 1991 N.Y. App. Div. LEXIS 15096 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 915, 581 N.Y.S.2d 667, 590 N.E.2d 252, 1992 N.Y. LEXIS 5035 (N.Y. 1992), aff'd, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060, 1992 N.Y. LEXIS 4241 (N.Y. 1992).

Town was properly granted summary judgment dismissing, as moot, declaratory judgment action in which property owner sought ruling invalidating town resolution imposing moratorium on development in area where his property was located, since resolution had been superseded

by local law exempting plaintiff's property from moratorium. Flanders Assocs. v Town of Southampton, 198 A.D.2d 328, 603 N.Y.S.2d 176, 1993 N.Y. App. Div. LEXIS 10697 (N.Y. App. Div. 2d Dep't 1993).

Court should have dismissed, as academic, action to declare that CLS Soc Serv § 133 requires state and city agencies provide applicants for public assistance with temporary assistance to meet their immediate medical needs where all plaintiffs had been found eligible to receive Medicaid retroactive to date of their applications. Pastore v Sabol, 230 A.D.2d 835, 646 N.Y.S.2d 709, 1996 N.Y. App. Div. LEXIS 8546 (N.Y. App. Div. 2d Dep't 1996).

Cause of action seeking declaration that town resolution imposing moratorium on development was unconstitutional because moratorium was excessively long would be dismissed as academic where moratorium had expired. W.J.F. Realty Corp. v Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81, 1997 N.Y. App. Div. LEXIS 6865 (N.Y. App. Div. 2d Dep't 1997).

In divorce action, husband's motion for judgment declaring that CLS Dom Rel § 236(B)(5)(h) and (6)(d) are unconstitutional was moot, and judicial decision sought would be rendering of advisory opinion, where wife waived her rights to have husband's failure to deliver Get (Jewish religious divorce) considered on issues of equitable distribution and maintenance, and thus there was no dispute between parties that had to be resolved. Becher v Becher, 245 A.D.2d 408, 667 N.Y.S.2d 50, 1997 N.Y. App. Div. LEXIS 13078 (N.Y. App. Div. 2d Dep't 1997), app. dismissed, 91 N.Y.2d 956, 671 N.Y.S.2d 716, 694 N.E.2d 885, 1998 N.Y. LEXIS 873 (N.Y. 1998).

Plaintiffs' appeal from judgment denying their challenge to validity of city zoning ordinance, which approved change in zone for certain property leased by defendant, was not moot, even though defendant's concrete plant was fully constructed and operational, where plaintiffs promptly moved for preliminary injunction and temporary restraining order at start of their suit before any construction had begun, temporary restraining order was denied, court never ruled on preliminary injunction, and when defendant later obtained permission from health department to begin construction, plaintiffs immediately moved for preliminary injunction; thus, plaintiffs did

all they could do to timely safeguard their interests, and defendant was put on notice that if it proceeded with construction, it would do so at its own risk. Vitiello v City of Yonkers, 255 A.D.2d 506, 680 N.Y.S.2d 607, 1998 N.Y. App. Div. LEXIS 12669 (N.Y. App. Div. 2d Dep't 1998).

Court properly dismissed as moot third party complaint brought by former owners of property, seeking declaratory judgment against property owners association and its environmental control committee, which had denied application for particular use of property by prospective buyer, where property had since been sold to another buyer. Sisters of the Resurrection, New York Inc. v Country Horizons, 257 A.D.2d 729, 682 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 25 (N.Y. App. Div. 3d Dep't 1999).

Appeal would be dismissed as moot where (1) appeal was from judgment that dismissed hybrid action for declaratory and injunctive relief and Article 78 proceeding to review town resolution authorizing widening and overlay of airport runway, and (2) modifications to runway had been completed. Gorman v Town Bd. of E. Hampton, 273 A.D.2d 235, 709 N.Y.S.2d 433, 2000 N.Y. App. Div. LEXIS 6229 (N.Y. App. Div. 2d Dep't 2000).

Action to declare that defendants were in violation of CLS County § 218-a(b), NYC Charter § 677(c), and 9 NYCRR § 180.5(a)(3)(iv) was not rendered moot by fact that plaintiff was subsequently moved to non-secure detention facility pendente lite; however, class action certification was inappropriate under governmental operations rule since individual Family Court proceedings were more than adequate for adjudication of issue, and there was no indication that defendants had already ignored or willfully violated prior court orders. Jamie B. v Hernandez, 274 A.D.2d 335, 712 N.Y.S.2d 91, 2000 N.Y. App. Div. LEXIS 8048 (N.Y. App. Div. 1st Dep't 2000).

Amount of construction that occurred on subject land after Supreme Court dismissed combined Article 78 proceeding and declaratory judgment action challenging rezoning of land from residential to commercial as violative of CLS ECL Art 8 rendered petitioners' claims moot and precluded further review by Appellate Division where (1) during nearly 9-month pendency of appeal, owner expended over $1 million by clearing 9 of 12 acres, installing infrastructure, and

substantially completing larger of 2 proposed office buildings for site, (2) petitioners did not move before Supreme Court for injunctive relief precluding such construction, (3) appeal was moot even as to yet undeveloped part of land, because that area was confined to relatively small "footprint" of proposed second building, and (4) exception to mootness doctrine for issues that would typically evade review did not apply, because subject land was part of large preserve area that had long history of litigation in which courts had recognized importance of maintaining its unique ecology. Save the Pine Bush Inc. v City of Albany, 281 A.D.2d 832, 722 N.Y.S.2d 310, 2001 N.Y. App. Div. LEXIS 3012 (N.Y. App. Div. 3d Dep't 2001).

Dismissal of a cause of action for a declaratory judgment as to whether an owner was allowed to lease its condominium unit to a nonparty proposed tenant was proper because the proposed tenant was no longer interested in such a lease; accordingly, the dispute was moot, and there was no longer a "justiciable controversy." Furthermore, there was no basis to find that the exception for cases where the issue presented was likely to recur, typically evaded review, and raised a substantial and novel question was applicable. Big Four LLC v Bond St. Lofts Condominium, 94 A.D.3d 401, 941 N.Y.S.2d 567, 2012 N.Y. App. Div. LEXIS 2373 (N.Y. App. Div. 1st Dep't), app. denied, 19 N.Y.3d 808, 950 N.Y.S.2d 106, 973 N.E.2d 204, 2012 N.Y. LEXIS 1849 (N.Y. 2012).

**24. — —Exceptions**

An Article 78 proceeding by former nursing home residents who sought an order directing the Commissioner of Health to appoint a receiver pursuant to Pub Health Law § 2810(2)(a) to oversee the operation of the facility pending completion of the discharge of patients following revocation of the nursing home's operating certificate would be treated as one seeking declaratory relief so that the issue of statutory construction could be reached, since, though the proceeding was moot due to the fact that all the residents of the home had been discharged and transferred, the issue of whether the appointment of a receiver under Pub Health Law § 2810(2)(a) is mandatory or directory potentially affected the health and safety of numerous

nursing home patients, and the need for prompt remedial action would likely deprive the Court of Appeals of an opportunity for meaningful review in the likely event that a similar situation later arose, so that recognized exceptions to the mootness doctrine were manifestly applicable. McCormick v Axelrod, 59 N.Y.2d 568, 466 N.Y.S.2d 277, 453 N.E.2d 506, 1983 N.Y. LEXIS 3231 (N.Y. 1983).

In an Article 78 proceeding by former residents of a nursing home seeking an order directing the Commissioner of Health to appoint a receiver for the home pursuant to Pub Health Law § 2810(2)(a) to oversee operation of the home pending completion of the discharge of the patients following revocation of the home's operating certificate, the issue of whether the statute's receivership requirements are mandatory or directory would be reviewable, and the proceeding treated as one for declaratory relief, despite the fact that the proceeding was moot due to the discharge and transfer of all former patients, since the proceeding fell within the scope of recognized exceptions to the mootness doctrine in that the interpretation of the statute potentially affected the health and safety of numerous nursing home patients, and the need for prompt remedial action in future similar situations would likely deprive the Court of Appeals of an opportunity for meaningful review. McCormick v Axelrod, 59 N.Y.2d 568, 466 N.Y.S.2d 277, 453 N.E.2d 506, 1983 N.Y. LEXIS 3231 (N.Y. 1983).

University's declaratory judgment action which sought declaration of unconstitutionality of city zoning ordinance was rendered moot by repeal of ordinance, but university's appeal from adverse decision would not be dismissed where controversy remained with regard to university's attempt to enjoin city entirely from interfering with its proposed expansion into residential area. Cornell University v Bagnardi, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509, 1986 N.Y. LEXIS 21172 (N.Y. 1986).

In a declaratory judgment action challenging the constitutionality of a zoning ordinance which, with a limited exception for two persons 62 years of age or over, restricted occupancy of one-family homes to persons related by blood, marriage or adoption, the issues were not mooted, nor were plaintiffs deprived of standing either by plaintiff owners' contract to sell the one-family

house in question, or by their tenants' move to another one-family house within the municipality, where a criminal prosecution based on the ordinance was still pending, where plaintiffs owned at least one other house within the municipality subject to the ordinance, the value of which plaintiffs claimed was adversely affected by the ordinance, and where the tenants remained in violation of the ordinance in their new home. McMinn v Oyster Bay, 105 A.D.2d 46, 482 N.Y.S.2d 773, 1984 N.Y. App. Div. LEXIS 20677 (N.Y. App. Div. 2d Dep't 1984), aff'd, 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240, 1985 N.Y. LEXIS 17940 (N.Y. 1985).

Appellate Division would not dismiss, as moot, appeal by Commissioner of Office of Mental Health from judgment declaring that CLS Men Hyg § 29.11 and regulations thereunder violated due process insofar as they permitted transfer of involuntarily admitted mentally ill patients from municipal facilities to state psychiatric facilities without consent or prior judicial hearing, although all named patient plaintiffs had been discharged prior to their proposed transfers, in light of significance of issue, likelihood of repetition, and need to clarify law for participants. Savastano v Nurnberg, 152 A.D.2d 290, 548 N.Y.S.2d 555, 1989 N.Y. App. Div. LEXIS 15798 (N.Y. App. Div. 2d Dep't 1989), app. denied, 75 N.Y.2d 945, 555 N.Y.S.2d 692, 554 N.E.2d 1280, 1990 N.Y. LEXIS 596 (N.Y. 1990), aff'd, 77 N.Y.2d 300, 567 N.Y.S.2d 618, 569 N.E.2d 421, 1990 N.Y. LEXIS 4466 (N.Y. 1990).

Declaratory judgment action challenging Governor's failure to timely submit to legislature all of his budget bills simultaneously with Executive Budget was not rendered moot when budget bills were passed since requested relief, in form of judicial declaration of when all Governor's budget bills were to be submitted, had not been obtained; moreover, there was likelihood of repetition, based on Governor's understanding of his constitutional duty as to when his budget bills might be submitted and his pattern of presenting them after his Executive Budget had been submitted, matter involved novel issue, and there was clear ongoing public interest. Winner v Cuomo, 176 A.D.2d 60, 580 N.Y.S.2d 103, 1992 N.Y. App. Div. LEXIS 1496 (N.Y. App. Div. 3d Dep't 1992).

In Lemon Law proceeding involving consumer motor vehicle lease wherein manufacturer and lessee of vehicle sought declaratory judgment that lease was deemed void as of date arbitrator

determined that vehicle was defective and that lessee and lessor qualified for refunds prescribed by CLS Gen Bus § 198-a, court would render decision although matter was moot because lessor had agreed, in interim, to release lessee from his lease obligation and to deliver clear title to manufacturer, since issues presented were of state-wide significance in that they affected every automobile manufacturer doing business in New York, as well as every motor vehicle lessee who availed himself of arbitration procedure under Lemon Law. Conlan v General Motors Corp., 137 Misc. 2d 244, 520 N.Y.S.2d 139, 1987 N.Y. Misc. LEXIS 2680 (N.Y. Sup. Ct. 1987).

Court would not dismiss, as moot, declaratory judgment action challenging constitutionality of CLS Men Hyg § 29.11 and 14 NYCRR § 517.4, which allow transfer of involuntarily committed mentally ill patients from acute-care to long-term facilities without prior judicial hearing, even though patient plaintiffs had been released without transfer, since (1) significant issues were raised, (2) challenged statute and regulations could potentially affect other members of public, (3) issues raised had not previously been addressed, and (4) remaining plaintiff, director of mental hygiene legal service, would vigorously litigate issues. Savastano v Nurnberg, 139 Misc. 2d 593, 529 N.Y.S.2d 403, 1987 N.Y. Misc. LEXIS 2831 (N.Y. Sup. Ct. 1987), rev'd, 152 A.D.2d 290, 548 N.Y.S.2d 555, 1989 N.Y. App. Div. LEXIS 15798 (N.Y. App. Div. 2d Dep't 1989).

Public assistance recipient's declaratory judgment action seeking relief from the New York City Human Resources Administration's (HRA's) failure to schedule mandatory work activity appointments for him at times that did not conflict with his known unsubsidized work schedule was not rendered moot by HRA's reversal of the sanctions imposed for his noncompliance because it was likely that he continually would be subjected to schedule conflicts and, consequently, be sanctioned again for non-compliance. Matter of Cruz v Doar, 994 N.Y.S.2d 233, 46 Misc. 3d 499, 2013 N.Y. Misc. LEXIS 6637 (N.Y. Sup. Ct. 2013).

**25. —Exhaustion of administrative remedies**

New York City, N.Y., Admin. Code § 11-681(2) required a bank holding company to appeal a decision by the New York City (New York) Department of Finance denying its claim for a tax

refund to the New York City Tax Appeals Tribunal before it filed suit against the Department, and the state supreme court held that New York courts did not have jurisdiction to hear the company's lawsuit against the Department, seeking a judgment declaring that it was entitled to the refund, because the company failed to file that appeal. Bankers Trust Corp. v N.Y. City Dep't of Fin., 1 N.Y.3d 315, 773 N.Y.S.2d 1, 805 N.E.2d 92, 2003 N.Y. LEXIS 3983 (N.Y. 2003).

Where property owner claims that use restrictions are unconstitutional as applied to his particular parcel rather than on their face, he must generally exhaust administrative remedies before he may attack restrictions in a declaratory judgment action. Dur-Bar Realty Co. v Utica, 57 A.D.2d 51, 394 N.Y.S.2d 913, 1977 N.Y. App. Div. LEXIS 10477 (N.Y. App. Div. 4th Dep't 1977), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3719 (N.Y. 1977), aff'd, 44 N.Y.2d 1002, 408 N.Y.S.2d 502, 380 N.E.2d 328, 1978 N.Y. LEXIS 2174 (N.Y. 1978).

Where owner had to obtain a special permit from zoning board of appeals for use of his parcel located in a land conservation district under city zoning ordinance and also a permit from State Department of Environmental Conservation in order to fill the subject parcel, owner which had never made a formal application for permit to fill but merely received a negative response to its informal inquiry had not exhausted administrative remedies so that his complaint for declaratory judgment attacking ordinance as applied to its parcel was premature. Dur-Bar Realty Co. v Utica, 57 A.D.2d 51, 394 N.Y.S.2d 913, 1977 N.Y. App. Div. LEXIS 10477 (N.Y. App. Div. 4th Dep't 1977), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3719 (N.Y. 1977), aff'd, 44 N.Y.2d 1002, 408 N.Y.S.2d 502, 380 N.E.2d 328, 1978 N.Y. LEXIS 2174 (N.Y. 1978).

An action seeking a declaration as to the interpretation of a section of Workers' Compensation Law was properly dismissed as not presenting a justiciable controversy, where the plaintiff had failed to exhaust her administrative remedies, and she was speculating how the Workers' Compensation Board would interpret the statute. Bishop v Workers' Compensation Bd., 90 A.D.2d 604, 456 N.Y.S.2d 183, 1982 N.Y. App. Div. LEXIS 18669 (N.Y. App. Div. 3d Dep't 1982).

In absence of factual issues, declaratory judgment action is appropriate remedy to challenge validity or application of particular statute without first exhausting administrative remedies. Compass Adjusters & Investigators v Commissioner of Taxation & Fin., 197 A.D.2d 38, 610 N.Y.S.2d 625, 1994 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 3d Dep't 1994).

Workers' compensation claimant's combined Article 78-declaratory judgment proceeding was properly dismissed where his workers' compensation case was still pending, and thus he had failed to exhaust his administrative remedies. Ford v Snashall, 275 A.D.2d 493, 712 N.Y.S.2d 658, 2000 N.Y. App. Div. LEXIS 8409 (N.Y. App. Div. 3d Dep't 2000).

Challenged amendments to CLS Tax art 13-A were not shown to be facially unconstitutional, and thus action for judgment declaring that CLS Tax § 301 violated federal Commerce Clause (because it imposed tax on fuel imported into New York by vessels for consumption by importer within New York while engaged in interstate commerce) was dismissed for failure to exhaust administrative remedies. Moran Towing Corp. v Urbach, 182 Misc. 2d 756, 699 N.Y.S.2d 252, 1999 N.Y. Misc. LEXIS 509 (N.Y. Sup. Ct. 1999), rev'd, 283 A.D.2d 78, 726 N.Y.S.2d 748, 2001 N.Y. App. Div. LEXIS 6005 (N.Y. App. Div. 3d Dep't 2001), aff'd, 1 A.D.3d 722, 768 N.Y.S.2d 33, 2003 N.Y. App. Div. LEXIS 11736 (N.Y. App. Div. 3d Dep't 2003).

**26. —Political questions**

Action seeking declaration that audit fee provision of 1990-1991 budget bill violated state constitution was justiciable controversy, despite state's contention that action amounted to judicial invasion of budgetary process, which is exclusive domain of executive and legislative branches, where sole ground of action was that, in adopting provision as amendment to budget bill, legislature acted beyond its delegated authority by altering bill in way that is expressly prohibited by state constitution. New York State Bankers Ass'n v Wetzler, 81 N.Y.2d 98, 595 N.Y.S.2d 936, 612 N.E.2d 294, 1993 N.Y. LEXIS 644 (N.Y. 1993).

Determination on merits of question regarding constitutionality of government action may not be forestalled by dismissing it as nonjusticiable for reasons of alleged triviality or purposeless

judicial meddling in executive and legislative process. New York State Bankers Ass'n v Wetzler, 81 N.Y.2d 98, 595 N.Y.S.2d 936, 612 N.E.2d 294, 1993 N.Y. LEXIS 644 (N.Y. 1993).

Judicial branch had power to review constitutionality of bicameral “recall” practice—by which legislature, after passing bill and formally sending it to governor, requests that governor return bill to legislature—since practice purportedly was created by internal rules of assembly and senate, and involved clear and unambiguous constitutional regimen; discrete rules of 2 houses do not constitute organic law and may not substitute for or substantially alter plain and precise terms of constitutional law-making power. King v Cuomo, 81 N.Y.2d 247, 597 N.Y.S.2d 918, 613 N.E.2d 950, 1993 N.Y. LEXIS 1166 (N.Y. 1993).

Action seeking declaration of invalidity of chapters 53 of Laws of 1981, 1982, 1983, and 1984, insofar as they required use of 1970 census figures and 1969 assessment rolls in apportioning state aid to localities for respective fiscal years, was not subject to dismissal as nonjusticiable since dispute centered on whether legislature exceeded its authority as limited by equal protection clauses of state and federal constitutions. Brookhaven v State, 142 A.D.2d 338, 535 N.Y.S.2d 773, 1988 N.Y. App. Div. LEXIS 13235 (N.Y. App. Div. 3d Dep't 1988), app. dismissed, 74 N.Y.2d 714, 543 N.Y.S.2d 399, 541 N.E.2d 428, 1989 N.Y. LEXIS 841 (N.Y. 1989).

Members of New York State Assembly presented justiciable issue by commencing declaratory judgment action against Governor challenging his failure to timely submit to legislature all of his budget bills simultaneously with Executive Budget; dispute was not over Governor’s power to draft budget, but effort to secure court clarification of scope of authority granted him by New York Constitution. Winner v Cuomo, 176 A.D.2d 60, 580 N.Y.S.2d 103, 1992 N.Y. App. Div. LEXIS 1496 (N.Y. App. Div. 3d Dep't 1992).

Declaratory judgment action by State Comptroller to challenge constitutionality of CLS Pub A § 381 was justiciable, even though State Comptroller had stated that he would not act to enforce statute and that budget matters were best left to legislature, since he had also stated that he would obey decision of court and it appeared that, if action were to be dismissed, defendants

would commence suit to compel State Comptroller to give effect to statute. Regan v Cuomo, 182 A.D.2d 1060, 583 N.Y.S.2d 41, 1992 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 3d Dep't 1992).

Court properly refused to entertain action for judgment to declare that, under 6 NYCRR former § 360-1.2(a)(5), beneficial use determinations (BUD's) were permits, and that plaintiff's BUD petitions be deemed approved, where (1) no previous administrative declaration on topic had been rendered, (2) case involved interpretation of Department of Environmental Conservation's own regulatory procedures and specialized nature of its BUD's, and (3) procedures under 6 NYCRR Part 619 were comprehensive and expeditious, and would define and resolve plaintiff's issue. Lehigh Portland Cement Co. v New York State Dep't of Envtl. Conservation, 210 A.D.2d 670, 619 N.Y.S.2d 850, 1994 N.Y. App. Div. LEXIS 12475 (N.Y. App. Div. 3d Dep't 1994), modified, aff'd, 87 N.Y.2d 136, 638 N.Y.S.2d 388, 661 N.E.2d 961, 1995 N.Y. LEXIS 4444 (N.Y. 1995).

Petition for mandamus, prohibition, injunctive relief and declaratory judgment with respect to implementation of Executive Order No. 27 (9 NYCRR § 5.27), which required Attorney-General to appear and supersede Bronx District Attorney in potential death penalty case because of district attorney's previously expressed intention not to utilize death penalty provisions of CLS Penal § 125.27, was properly dismissed for lack of justiciability, as petitioners failed to show that governor acted without constitutional or statutory authority; governor's apparent objective was to assure that state laws were applied in uniform fashion throughout state's 62 counties, and emergent nature of his intervention was justified by possibility that Bronx District Attorney might take action foreclosing appropriate consideration of death penalty pursuant to CLS CPL § 250.40. Johnson v Pataki, 229 A.D.2d 242, 655 N.Y.S.2d 463, 1997 N.Y. App. Div. LEXIS 5952 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 900, 662 N.Y.S.2d 430, 685 N.E.2d 211, 1997 N.Y. LEXIS 2686 (N.Y. 1997), aff'd, 91 N.Y.2d 214, 668 N.Y.S.2d 978, 691 N.E.2d 1002, 1997 N.Y. LEXIS 3703 (N.Y. 1997).

Court would dismiss action for judgment declaring that New York City Transit Authority (NYCTA) failed to meet its obligation to provide reasonable level of service, breached its duty as public

common carrier, and breached its contract with plaintiff bus riders, since relief sought by plaintiffs would embroil judiciary in management and operation of NYCTA. Nemser v New York City Transit Authority, 140 Misc. 2d 369, 530 N.Y.S.2d 493, 1988 N.Y. Misc. LEXIS 387 (N.Y. Sup. Ct. 1988), aff'd, 150 A.D.2d 993, 542 N.Y.S.2d 1003, 1989 N.Y. App. Div. LEXIS 6258 (N.Y. App. Div. 1st Dep't 1989).

**27. —Religious issues**

In action by regional synod of national church organization seeking declaration that it was entitled to all right, title and interest in property and assets of local church under both provisions of church constitutional documents and CLS Relig Corp § 17-c authorizing synod to take control of congregation's property where necessary to protect it from waste, synod was entitled to summary judgment dismissing local church's counterclaim alleging that synod breached fiduciary duty in failing to provide church with efficient pastors, since civil courts should not intervene in ecclesiastical matters such as church governance even if rights to church property may be affected incidentally. Upstate New York Synod of Evangelical Lutheran Church v Christ Evangelical Lutheran Church, 185 A.D.2d 693, 585 N.Y.S.2d 919, 1992 N.Y. App. Div. LEXIS 9249 (N.Y. App. Div. 4th Dep't 1992).

Action by diocese officials, seeking declaratory and injunctive relief as to ownership of church property in possession of defendant church after it voted to disaffiliate itself from diocese, was justiciable although dispute arose when diocese refused to ordain church's deacon-in-charge as priest, where controversy could be resolved by neutral principles of law without resort to judicial intrusion into matters of religious doctrine. Trustees of the Diocese of Albany v Trinity Episcopal Church, 250 A.D.2d 282, 684 N.Y.S.2d 76, 1999 N.Y. App. Div. LEXIS 471 (N.Y. App. Div. 3d Dep't 1999).

Board of education and church provided justiciable controversy in action for declaratory judgment where board of education ended practice of leasing its buses to church for provision of transportation between released-time religious education site and school on basis of board's

interpretation of CLS Educ § 1501-b(1)(h). St. James Church v Board of Educ., 163 Misc. 2d 471, 621 N.Y.S.2d 486, 1994 N.Y. Misc. LEXIS 587 (N.Y. Sup. Ct. 1994).

**28. Pleadings**

Petition alleging that a 64 percent increase in rates imposed by a county water authority was "excessive, arbitrary and capricious" and also discriminatory, was sufficient to support a cause of action for a declaratory judgment as to the reasonableness of such rates. Lakeland Water Dist. v Onondaga County Water Authority, 24 N.Y.2d 400, 301 N.Y.S.2d 1, 248 N.E.2d 855, 1969 N.Y. LEXIS 1376 (N.Y. 1969).

Petition, treated as initiating an action for declaratory judgment and related relief, whereby school bus driver, who had been discharged from his employment by contractor because school district stated in letter that he would no longer be allowed to drive a school bus in the district, claimed entitlement to procedural due process protection did not fail to state a cause of action merely because of the absence of a direct employer-employee relationship between the driver and the school district. Lawson v Greenburgh Cent. School Dist., 50 A.D.2d 893, 377 N.Y.S.2d 176, 1975 N.Y. App. Div. LEXIS 11792 (N.Y. App. Div. 2d Dep't 1975).

In an action brought by a tenant association against the sponsors of a condominium conversion, the trial court properly denied defendants' motion for a declaratory judgment pursuant to CPLR § 3001 as to whether or not Gen Bus Law § 352-eeee had implicitly overruled certain provisions of the applicable rent stabilization code, since such a motion does not lie prior to joinder of issue, and defendants had yet to serve their answer. 58 West 58th Street Tenant Asso. v 58 West 58th Street Associates, 98 A.D.2d 609, 469 N.Y.S.2d 344, 1983 N.Y. App. Div. LEXIS 20891 (N.Y. App. Div. 1st Dep't 1983).

In action for judgment declaring zoning ordinance invalid, court should have denied plaintiff's request to replead cause of action alleging that village board failed to issue declaration of environmental significance or nonsignificance under State Environmental Quality Review Act prior to amending ordinance where he failed to allege any matters of environmental concern,

and thus failed to allege “good ground” to support cause of action under CLS CPLR § 3211. Vanderwoude v Post/Rockland Associates, 130 A.D.2d 739, 515 N.Y.S.2d 838, 1987 N.Y. App. Div. LEXIS 46753 (N.Y. App. Div. 2d Dep't), app. dismissed, 70 N.Y.2d 796, 522 N.Y.S.2d 112, 516 N.E.2d 1225, 1987 N.Y. LEXIS 19365 (N.Y. 1987).

Plaintiff was not obligated to assert timeliness of his second action following dismissal of first action for failure to serve timely complaint, since statute of limitations is not element of plaintiff’s claim, but rather affirmative defense to be pleaded and proved, or waived, by defendant. Joseph T. Ryerson & Son, Inc. v Piffath, 132 A.D.2d 527, 517 N.Y.S.2d 538, 1987 N.Y. App. Div. LEXIS 49054 (N.Y. App. Div. 2d Dep't 1987).

Motion to dismiss declaratory judgment action prior to service of answer presents for consideration only whether cause of action for declaratory relief is set forth and not question of whether plaintiff is entitled to favorable declaration. Staver Co. v Skrobisch, 144 A.D.2d 449, 533 N.Y.S.2d 967, 1988 N.Y. App. Div. LEXIS 11792 (N.Y. App. Div. 2d Dep't 1988), app. dismissed, 74 N.Y.2d 791, 545 N.Y.S.2d 106, 543 N.E.2d 749, 1989 N.Y. LEXIS 940 (N.Y. 1989).

Wife properly pleaded action under CLS Dom Rel § 236(B) for declaration as to validity of foreign state divorce decree, even though complaint was inartfully drawn, where wife stated in opposition to motion to dismiss (1) that she had never set foot in foreign state, never appeared in person or by attorney in foreign state, and never accepted jurisdiction of foreign state, and (2) that she had brought action for declaration of validity of foreign divorce decree. Elson v Elson, 149 A.D.2d 141, 545 N.Y.S.2d 311, 1989 N.Y. App. Div. LEXIS 11177 (N.Y. App. Div. 2d Dep't 1989).

Complaint stated causes of action for declaratory relief and accounting where it alleged that parties had each agreed to invest $50,000 in close corporation and to share profits, but that plaintiff never received his stock and that defendant converted plaintiff’s contribution to his own use. Chalem v Bonime, 155 A.D.2d 360, 547 N.Y.S.2d 329, 1989 N.Y. App. Div. LEXIS 14313 (N.Y. App. Div. 1st Dep't 1989).

Professional organization of licensed taxicab brokers and several individual brokers stated cause of action against New York City Taxi and Limousine Commission for judgment declaring new penalty schedule void as unreasonable and arbitrary where complaint alleged (1) that there existed no valid reason to radically increase penalties, (2) that experience under old rules revealed no widespread noncompliance or recidivism requiring increased penalties for purpose of deterrence, and (3) that mandatory suspension provisions of 30-day duration were unreasonable because they would result not merely in 30-day interruption but rather in loss of entire value of broker's license. U.B.A., Inc. v New York City Taxi & Limousine Com., 161 A.D.2d 202, 554 N.Y.S.2d 588, 1990 N.Y. App. Div. LEXIS 4944 (N.Y. App. Div. 1st Dep't 1990).

In action for judgment declaring interests of parties in corporation formed by plaintiff to purchase real property, affirmative defense of lack of justiciable controversy should have been dismissed where putative shareholders asserted that they owned share of corporation and plaintiff asserted that they did not. Fischer v Deitsch, 168 A.D.2d 599, 563 N.Y.S.2d 839, 1990 N.Y. App. Div. LEXIS 16018 (N.Y. App. Div. 2d Dep't 1990).

Defendant/respondent waived any challenge to unverified complaint/petition of lake association in combined action for declaratory judgment and Article 78 proceeding regarding improvement of property on lake with boat launching area where challenge was not raised within 24 hours. Ireland v Queensbury Zoning Bd. of Appeals, 169 A.D.2d 73, 571 N.Y.S.2d 834, 1991 N.Y. App. Div. LEXIS 9313 (N.Y. App. Div. 3d Dep't), app. dismissed, 79 N.Y.2d 822, 580 N.Y.S.2d 201, 588 N.E.2d 99, 1991 N.Y. LEXIS 5138 (N.Y. 1991).

Town officials were not entitled to dismissal, for failure to state cause of action, of complaint alleging that they did not notify owners of pending resolution to rezone their property; action stated valid challenge to constitutionality of town officials' failure to give owners actual notice, and to provision of town code giving town officials authority to waive such notice. Detmer v Acampora, 207 A.D.2d 475, 616 N.Y.S.2d 506, 1994 N.Y. App. Div. LEXIS 8379 (N.Y. App. Div. 2d Dep't 1994).

Complaint alleging that zoning charge was unreasonable, arbitrary, confiscatory, and that it served no legitimate governmental purpose, stated valid cause of action; if such action were proven, zoning change would be deprivation of property without due process. Detmer v Acampora, 207 A.D.2d 477, 616 N.Y.S.2d 505, 1994 N.Y. App. Div. LEXIS 8380 (N.Y. App. Div. 2d Dep't 1994).

In combined proceeding under CLS CPLR Article 78 and action for declaratory judgment challenging method by which water district had assessed taxes for construction of new water treatment facility, petitioners' claim that they had been deprived of their property without due process should not have been dismissed as matter of law since claim alleged that tax at issue proposed, or clearly resulted in, such flagrant and palpable inequalities between burden imposed and benefit received as to amount to arbitrary taking of property without compensation. Schulz v New York State Legislature, 230 A.D.2d 578, 660 N.Y.S.2d 155, 1997 N.Y. App. Div. LEXIS 7244 (N.Y. App. Div. 3d Dep't 1997), app. denied, 95 N.Y.2d 769, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3819 (N.Y. 2000).

In action seeking declaration that plaintiff was not obligated to defend or indemnify its insured in underlying action, court erred in granting defendant's motion to amend its answer to include affirmative defense of improper notice of disclaimer under CLS Ins § 3420(d) where motion was brought on eve of trial, 4 years after service of answer, all facts on which defense was based were known to defendant from outset, and belated challenge to notice of disclaimer seriously prejudiced plaintiff by depriving it of opportunity to conduct discovery on issue. Excelsior Ins. Co. v Antretter Contr. Corp., 262 A.D.2d 124, 693 N.Y.S.2d 100, 1999 N.Y. App. Div. LEXIS 6795 (N.Y. App. Div. 1st Dep't 1999).

In action seeking declaration that plaintiff was not obligated to defend or indemnify defendants in underlying action, court improperly denied plaintiff's motion for leave to serve amended complaint, even though plaintiff did not fully explain delay in seeking to amend complaint to add, inter alia, allegations that liability policies it had issued to its insured contained absolute pollution exclusions, where documentary evidence indicated that proposed amendments had merit, and

there was no showing of prejudice as result of amendments. Eagle Ins. Co. v Queens Tunnel Serv. Station, Inc., 287 A.D.2d 434, 730 N.Y.S.2d 867, 2001 N.Y. App. Div. LEXIS 9210 (N.Y. App. Div. 2d Dep't 2001).

When the nature of the relief sought by state agency, the interpretation of a legislative act, was available by way of a declaratory judgment action, the appellate court converted the matter to an action for declaratory relief and deemed the order to show cause and supporting papers to be a summons and complaint, respectively. Matter of State of New York (Essex Prop. Mgt., LLC), 152 A.D.3d 1169, 59 N.Y.S.3d 624, 2017 N.Y. App. Div. LEXIS 5370 (N.Y. App. Div. 4th Dep't 2017).

Construing the allegations of the complaint in the light most favorable to the plaintiff, plaintiff-tenant stated a valid cause of action where it sought a judgment declaring that its consent to paying increased rent in exchange for the defendant-landlord’s consent to a sublease, under their written agreement, was void for duress and want of consideration, and defendant’s consent to subletting was valid notwithstanding the invalidity of the plaintiff’s consent to pay higher rent. Equity Funding Corp. v Carol Management Corp., 66 Misc. 2d 1020, 322 N.Y.S.2d 965, 1971 N.Y. Misc. LEXIS 1687 (N.Y. Sup. Ct.), aff'd, 37 A.D.2d 1047, 326 N.Y.S.2d 384, 1971 N.Y. App. Div. LEXIS 7274 (N.Y. App. Div. 1st Dep't 1971).

The note of issue in petitioners’ taxpayer action for a declaratory judgment (State Finance Law, art 7-A) and petitioners’ proceeding for a judgment under CPLR article 78 challenging the validity of the State Energy Conservation Construction Code (9 NYCRR 7810.1 et seq.), brought on by an order to show cause served upon respondents 11 days before the proceeding was to be heard, is proper and should not be stricken since, under the circumstances, an answer should have been served on or before the return date for final determination (CPLR 7804, subd [c]; State Finance Law, § 123-c); since the statement of readiness is required for Trial Term practice and since the instant action and proceeding were brought on at Special Term, the statement of readiness is improper and should be stricken. New York State Builders Ass'n v State, 98 Misc. 2d 1045, 414 N.Y.S.2d 956, 1979 N.Y. Misc. LEXIS 2188 (N.Y. Sup. Ct. 1979).

In declaratory judgment action, New York State Society of Obstetricians and Gynecologists, Inc. stated cause of action on claim that regulation which established physicians professional liability insurance merit rate plan (11 NYCRR part 152) permitted confiscatory taking of property by establishing period of review of chargeable losses which exceeded limits of reasonable retroactivity and that it arbitrarily and capriciously discriminated among doctors in terms of dollar amounts charged per premium surcharge because it failed to distinguish between risks faced by physicians practicing different medical specialties, especially in light of apparent unequal treatment of doctors with similar experience records and current lack of articulated reason for disparity. New York State Soc. of Obstetricians & Gynecologists, Inc. v Corcoran, 138 Misc. 2d 591, 525 N.Y.S.2d 457, 1987 N.Y. Misc. LEXIS 2807 (N.Y. Sup. Ct. 1987).

Prospective adoptive parents (plaintiffs) stated cause of action for judgment declaring that administration by Department of Social Services (DSS) of religious matching provisions of adoption laws violated Establishment Clause where it was alleged (1) that they were first incorrectly told that natural mother of child they sought to adopt had expressed no religious preference, (2) that they were at first encouraged to pursue adoption of child, and (3) that child care agency then terminated its relationship with plaintiffs solely because of their religion. Orzechowski v Perales, 153 Misc. 2d 464, 582 N.Y.S.2d 341, 1992 N.Y. Misc. LEXIS 72 (N.Y. Sup. Ct. 1992).

**29. —Particular complaints held insufficient**

In an action by an insured seeking a declaration that its insurers were liable for a 36 million dollar settlement paid by the insured, the Appellate Division correctly dismissed the complaint insofar as it sought declaratory relief, on the ground that it was without jurisdiction as a matter of law, where the insurance policy in issue only covered liability in excess of 50 million dollars. Combustion Engineering, Inc. v Travelers Indem. Co., 53 N.Y.2d 875, 440 N.Y.S.2d 617, 423 N.E.2d 40, 1981 N.Y. LEXIS 2455 (N.Y. 1981).

Where plaintiff contended that the defendant had conditionally approved applications for the licensing of package stores, but failed to show that the application had been conditionally approved without a determination of public convenience and advantage, that complaint was insufficient in an action for a declaratory judgment and to permanently enjoin the State Liquor Authority from issuing any package store licenses pursuant to its Bulletin No. 390 and its Rule 17 on the ground that the said Bulletin and Rule were arbitrary and capricious. Walsh v New York State Liquor Authority, 23 A.D.2d 876, 259 N.Y.S.2d 491, 1965 N.Y. App. Div. LEXIS 4248 (N.Y. App. Div. 2d Dep't), aff'd, 16 N.Y.2d 781, 262 N.Y.S.2d 502, 209 N.E.2d 821, 1965 N.Y. LEXIS 1230 (N.Y. 1965).

Petition alleging that transportation authority was threatening to cut bus services was insufficient to support declaratory relief for failure to comply with Public Authorities Law § 1305 which contemplates approval by county legislature of any alterations in existing bus services but does not require such approval for mere scheduling changes. County of Rensselaer v Capital Dist. Transp. Authority, 42 A.D.2d 445, 349 N.Y.S.2d 20, 1973 N.Y. App. Div. LEXIS 4568 (N.Y. App. Div. 3d Dep't 1973).

Complaint establishing nothing more than a series of unrelated allegations concluding in a request for a judgment declaring Insurance Law to be invalid and illegal failed to meet justiciability test requiring that controversy be definite and concrete, real or substantial, or admit of specific relief through a decree of conclusive character. N.Y. State Ass'n of Ins. Agents, Inc. v Schenck, 44 A.D.2d 757, 354 N.Y.S.2d 232, 1974 N.Y. App. Div. LEXIS 5286 (N.Y. App. Div. 4th Dep't 1974).

Supreme Court should have declined to reach merits in declaratory judgment action challenging constitutionality of statutes which criminalize prostitution, in view of its determination that plaintiffs failed to state cause of action. Cherry v Koch, 126 A.D.2d 346, 514 N.Y.S.2d 30, 1987 N.Y. App. Div. LEXIS 41241 (N.Y. App. Div. 2d Dep't), app. denied, 70 N.Y.2d 603, 518 N.Y.S.2d 1026, 512 N.E.2d 552, 1987 N.Y. LEXIS 17435 (N.Y. 1987).

In action for judgment declaring rights and obligations of parties under sublease of commercial premises, complaint against original lessor should have been dismissed for failure to present justiciable controversy since he had conveyed entire premises and all his rights therein to his codefendant prior to commencement of action; in addressing motion to dismiss complaint in declaratory judgment action, determinative question is not whether plaintiff is entitled to declaration in his favor but whether court's jurisdiction has been properly invoked. Nasa Auto Supplies, Inc. v 319 Main Street Corp., 133 A.D.2d 265, 519 N.Y.S.2d 54, 1987 N.Y. App. Div. LEXIS 49754 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff's motion for summary judgment in action to declare rights and obligations of parties to insurance contract should have been denied where plaintiff submitted no sworn statement to support its factual contentions and submitted neither entire policy nor indorsement pursuant to which rights and obligations of parties were to be declared. Allstate Ins. Co. v Grabarcik, 133 A.D.2d 728, 520 N.Y.S.2d 16, 1987 N.Y. App. Div. LEXIS 51772 (N.Y. App. Div. 2d Dep't 1987).

In action brought by insured seeking declaration that insurers had duty to defend insured in underlying tort actions that arose from fatal fire at insured's premises, court properly dismissed complaint as against public administrator, as legal representative of certain victims of fire, since victims were strangers to insurance contracts at issue, were not in privity with insurers, were not third-party beneficiaries of those contracts, and thus could not seek enforcement of insurers' obligations under policies on those grounds; further, public administrator and those he represented would have no rights against insurers under CLS Ins § 3420(b)(1) unless and until judgment were entered against insured in underlying tort action. Clarendon Place Corp. v Landmark Ins. Co., 182 A.D.2d 6, 587 N.Y.S.2d 311, 1992 N.Y. App. Div. LEXIS 9086 (N.Y. App. Div. 1st Dep't), app. dismissed, app. denied, 80 N.Y.2d 918, 589 N.Y.S.2d 303, 602 N.E.2d 1119, 1992 N.Y. LEXIS 3373 (N.Y. 1992).

Complaint did not state cause of action for declaratory relief in "matrimonial action" as that term is used in CLS Dom Rel § 236(B)(2), and wife was accordingly not entitled to relief under CLS Dom Rel §§ 236 and 237, where (1) pro forma divorce obtained by parties in Soviet Union was

valid under Soviet law, having been voluntarily sought by wife to expedite her emigration, and was thus not product of any fraud or coercion such as would justify its nonrecognition on public policy grounds, and (2) while parties asserted their intention to remarry once in United States, they did not do so, and given invalidity of common-law marriages in New York, no marital relationship between parties arose by reason of their having cohabitated and had child together subsequent to Soviet divorce. Gotlib v Ratsutsky, 195 A.D.2d 432, 601 N.Y.S.2d 1, 1993 N.Y. App. Div. LEXIS 7626 (N.Y. App. Div. 1st Dep't 1993), reh'g denied, 197 A.D.2d 942, 604 N.Y.S.2d 712, 1993 N.Y. App. Div. LEXIS 10193 (N.Y. App. Div. 1st Dep't 1993), aff'd, 83 N.Y.2d 696, 613 N.Y.S.2d 120, 635 N.E.2d 289, 1994 N.Y. LEXIS 1287 (N.Y. 1994).

Court should have dismissed action to declare that insurer owed duty to defend and indemnify its insured where plaintiff failed to join insured as necessary party. White v Nationwide Mut. Ins. Co., 228 A.D.2d 940, 644 N.Y.S.2d 590, 1996 N.Y. App. Div. LEXIS 7228 (N.Y. App. Div. 3d Dep't 1996).

Action seeking declaration of rights to easement which trusteeship held for benefit of all inhabitants of town should have been dismissed for failure to join trusteeship as necessary party. Katz v Village of Southampton, 244 A.D.2d 461, 664 N.Y.S.2d 457, 1997 N.Y. App. Div. LEXIS 11644 (N.Y. App. Div. 2d Dep't 1997), app. denied, 95 N.Y.2d 753, 711 N.Y.S.2d 155, 733 N.E.2d 227, 2000 N.Y. LEXIS 979 (N.Y. 2000).

Plaintiff's "fear and anxiety that another flood would occur while no one was on hand to summon help," and his unsupported claim that his upstairs neighbor's sinks and bathtub had inadequate overflow drains, were insufficient to show his claim for injunctive or declaratory relief for alleged breach of statutory warranty of habitability or to defeat defendant residential cooperative's summary judgment motion where plaintiff admitted in his deposition testimony that complained-of leaks had not rendered his apartment uninhabitable, and further admitted that he had not experienced any subsequent leaks. Silverman v 145 Tenants Corp., 248 A.D.2d 261, 670 N.Y.S.2d 434, 1998 N.Y. App. Div. LEXIS 2660 (N.Y. App. Div. 1st Dep't 1998).

Action seeking judgment declaring that property owners associations' protective covenants were unenforceable could not be maintained where all property owners within community had not been joined. Sisters of the Resurrection, New York Inc. v Country Horizons, 257 A.D.2d 729, 682 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 25 (N.Y. App. Div. 3d Dep't 1999).

In action seeking declaration of parties' rights and obligations under natural gas transportation agreement (contract), court properly denied defendant's summary judgment motion on its breach of contract counterclaim seeking recovery under annual reservation fee provision of contract since provision in question was ambiguous in reference to plaintiff's obligation to pay annual reservation fee when no diversion gas was supplied by defendant. St. Lawrence Gas Co. v Power City Partners L.P., 271 A.D.2d 741, 705 N.Y.S.2d 439, 2000 N.Y. App. Div. LEXIS 3905 (N.Y. App. Div. 3d Dep't 2000).

Insurer was equitably estopped from bringing action, on eve of trial, seeking declaration that it be relieved of any duty to defend or indemnify insured in underlying personal injury action since insurer had appeared and defended insured for prior 3 years, even though it could have withdrawn its defense on ground of noncoverage 3 months after receiving notice of personal injury action. Travelers Prop. Cas. v Weiner, 174 Misc. 2d 831, 666 N.Y.S.2d 392, 1997 N.Y. Misc. LEXIS 558 (N.Y. Sup. Ct. 1997).

Town's complaint that the homeowners' demands for declaratory relief, where they requested a stay or a temporary restraining order as to a criminal prosecution, were improperly advanced in a special proceeding rather than in a plenary action at law was without merit as any defect as to the form of the proceeding was presumably curable under N.Y. C.P.L.R. 103(c). Matter of Fortuna v Prusinowski, 870 N.Y.S.2d 742, 22 Misc. 3d 974, 2008 N.Y. Misc. LEXIS 7112 (N.Y. Sup. Ct. 2008).

**30. Availability of alternative remedy**

Where it could not be determined from petition whether petitioner was alleging there was no statute regulating use of sanitary landfill or whether petitioner was alleging there was such a

statute but it had no validity and where respondent town's affidavit indicated there was some legislative activity in area by town board. CPLR Article 78 action to annul determination denying petitioner use of respondent town's sanitary landfill was inappropriate and would not be converted into appropriate motion for declaratory judgment. Clark Disposal Service, Inc. v Bethlehem, 51 A.D.2d 1080, 380 N.Y.S.2d 821, 1976 N.Y. App. Div. LEXIS 11925 (N.Y. App. Div. 2d Dep't 1976).

There is no requirement that plaintiffs be without other remedies before resorting to declaratory judgment, and availability of other remedies is but one factor to be considered in determining whether declaratory judgment action may be maintained. Rochester v Vanderlinde Electric Corp., 56 A.D.2d 185, 392 N.Y.S.2d 167, 392 N.Y.S.2d 854, 1977 N.Y. App. Div. LEXIS 10043 (N.Y. App. Div. 4th Dep't 1977).

Where contract between city, lessee of city sewer system, and contractor provided that all work thereunder was to be performed to city's satisfaction, but without prejudice to rights of parties as to resolution of contractual disputes for compensation or damages and where contract was designed to avoid delay, fact that city and lessee of sewer system might have brought breach of contract action after contractor refused to replace defective electrical power cable did not preclude declaratory judgment action brought by city and lessee of city sewer system against contractor and contractor's surety which had furnished performance bond. Rochester v Vanderlinde Electric Corp., 56 A.D.2d 185, 392 N.Y.S.2d 167, 392 N.Y.S.2d 854, 1977 N.Y. App. Div. LEXIS 10043 (N.Y. App. Div. 4th Dep't 1977).

A taxpayer's exclusive remedy to redress the wrongful denial of a partial exemption is to commence a tax certiorari proceeding pursuant to the provisions of Article 7 of the Real Property Tax Law, but if the assessor erroneously fails or refuses to wholly exempt the taxpayer's property, the resulting tax is a nullity which may be challenged in an action in equity, in an Article 78 proceeding, or in a declaratory judgment action. Stabile v Half Hollow Hills Cent. School Dist., 83 A.D.2d 945, 442 N.Y.S.2d 778, 1981 N.Y. App. Div. LEXIS 15391 (N.Y. App. Div. 2d Dep't 1981).

An action for a judgment declaring a certain lease of real property void, with an accompanying prayer for eviction of the defendant tenant and for a money judgment, would be converted, pursuant to CPLR § 103(c), into an action to recover real property under Real P Actions & Pr Law §§ 601 et seq., where, although an appellate court will not generally refashion the form of a parties' action, the conversion would not generate factual questions or create a potential for different claims or defenses, and would be in furtherance of judicial economy and the expeditious resolution of the parties' dispute. Diocese of Buffalo v McCarthy, 91 A.D.2d 213, 458 N.Y.S.2d 764, 1983 N.Y. App. Div. LEXIS 16116 (N.Y. App. Div. 4th Dep't), app. denied, 59 N.Y.2d 605, 1983 N.Y. LEXIS 4738 (N.Y. 1983).

Causes of action alleging that proposed microwave transmission facility would violate local zoning and land use ordinances and that New York Power Authority (NYPA) exceeded its statutory mandate (CLS Pub A § 1005) by proposing to construct and operate facility were properly characterized as declaratory and not governed by 4-month limitations period applicable to challenging violations of State Environmental Quality Review Act since conduct which would give rise to right to remedial or coercive relief (construction and operation of facility) had not yet occurred when present action was commenced, and even if underlying cause of action first arose when NYPA sanctioned facility, action was still timely, calling as it did for construction of statute rather than review of particular agency determination or procedure. Dreves v New York Power Authority, 131 A.D.2d 182, 520 N.Y.S.2d 956, 1987 N.Y. App. Div. LEXIS 49517 (N.Y. App. Div. 3d Dep't 1987), app. dismissed, 71 N.Y.2d 889, 527 N.Y.S.2d 770, 522 N.E.2d 1068, 1988 N.Y. LEXIS 209 (N.Y. 1988).

Since class action certification is inappropriate in Article 78 proceeding, declaratory judgment action is proper procedural device where plaintiffs sue on behalf of class and challenge administrative determination impacting on entire class. Conrad v Regan, 155 A.D.2d 931, 548 N.Y.S.2d 957, 1989 N.Y. App. Div. LEXIS 14786 (N.Y. App. Div. 4th Dep't 1989).

Corporation's action for judgment declaring unconstitutionality of New York City general corporation tax was not subject to dismissal, under doctrine of election of remedies, by virtue of

fact that corporation was also contesting tax levied against it by proceeding before New York City Department of Finance; taxpayer may attack constitutionality of statute in plenary action even when it has received administrative determination. Banfi Prods. Corp. v O'Cleireacain, 182 A.D.2d 465, 582 N.Y.S.2d 695, 1992 N.Y. App. Div. LEXIS 6017 (N.Y. App. Div. 1st Dep't 1992).

Declaratory relief was appropriate in action by mother of one party to divorce action, who had obtained lien on marital home pursuant to confession of judgment based on loan she allegedly made to enable parties to purchase home, seeking declaration of her rights under divorce action stipulation, to which she was party, that home be sold and proceeds placed in escrow account, even though mother's attorney had raised issue in stipulation conference that stipulation require that escrow fund not be depleted below amount allegedly owed to plaintiff, since such issue was not made express term of stipulation, and judge presiding over divorce action indicated that several other claims for funds in escrow account might take precedence over mother's claim, leaving possibility that escrow fund would be depleted before mother's claim was adjudicated, and there were issues relating to nature of mother's claim to escrow money which might become academic if adjudication were delayed. Lazich v Vittoria & Parker, 196 A.D.2d 526, 601 N.Y.S.2d 492, 1993 N.Y. App. Div. LEXIS 8042 (N.Y. App. Div. 2d Dep't), app. denied, 82 N.Y.2d 656, 602 N.Y.S.2d 805, 622 N.E.2d 306, 1993 N.Y. LEXIS 3222 (N.Y. 1993).

Purchaser of real property was entitled to seek judgment declaring as invalid lien of confessed judgment which had been entered against property as security for bail bond issued by insurer at behest of seller of property; declaratory judgment action is available to determine validity of lien, notwithstanding existence of other remedies. Irons v Roberts, 206 A.D.2d 683, 614 N.Y.S.2d 792, 1994 N.Y. App. Div. LEXIS 7504 (N.Y. App. Div. 3d Dep't 1994).

Supreme Court did not err in "converting" action from one for reformation of insurance policy to one for declaratory judgment where action was not truly conversion as contemplated by CLS CPLR § 103 but, rather, instance where court simply awarded relief to which insured was entitled, on basis of evidence adduced, under slightly different theory than that delineated in complaint; essentially, court amended complaint, sua sponte, to conform to proof presented and

arguments advanced on motions. Olochnowitz v Hopmeier-Evans-Gage Agency, 225 A.D.2d 853, 639 N.Y.S.2d 496, 1996 N.Y. App. Div. LEXIS 2067 (N.Y. App. Div. 3d Dep't 1996).

Court erred in granting plaintiff's motion for summary judgment in declaratory judgment action where language of underlying agreement was ambiguous, and plaintiff had adequate, alternative remedy in another form of action, such as breach of contract. Levey v A. Leventhal & Sons, 231 A.D.2d 877, 647 N.Y.S.2d 597, 1996 N.Y. App. Div. LEXIS 14293 (N.Y. App. Div. 4th Dep't 1996).

Although decedent's widow initiated proceeding for determination of parties' rights under pension plan in form of declaratory judgment action in Supreme Court, Supreme Court properly transferred matter to Surrogate's Court, wherein separate proceeding was pending with issues relevant to settlement of decedent's affairs, as Surrogate's Court could grant all relief requested without issuing declaratory judgment. In re Greenwold, 236 A.D.2d 400, 653 N.Y.S.2d 625, 1997 N.Y. App. Div. LEXIS 1037 (N.Y. App. Div. 2d Dep't 1997).

Complaint, seeking declaratory relief but no damages for alleged defamation, failed because plaintiff had adequate remedy at law in post-publication damages. Ramos v Madison Square Garden Corp., 257 A.D.2d 492, 684 N.Y.S.2d 212, 1999 N.Y. App. Div. LEXIS 398 (N.Y. App. Div. 1st Dep't 1999).

Declaratory judgment action was properly dismissed where plaintiff recording artist's dispute with defendant record company over formula for calculating royalties would be resolved on plaintiff's cause of action for breach of contract, and defendant's calculation of future royalties would be governed by doctrine of stare decisis. Watson v Sony Music Entm't, Inc., 282 A.D.2d 222, 722 N.Y.S.2d 385, 2001 N.Y. App. Div. LEXIS 3406 (N.Y. App. Div. 1st Dep't 2001).

The existence of other available remedies does not alone preclude an action for declaratory judgment, and it lies within the court's discretion to entertain it. Berkule v Feldman, 39 Misc. 2d 250, 240 N.Y.S.2d 462, 1963 N.Y. Misc. LEXIS 2035 (N.Y. Sup. Ct. 1963), aff'd, 20 A.D.2d 761, 247 N.Y.S.2d 550, 1964 N.Y. App. Div. LEXIS 4239 (N.Y. App. Div. 1st Dep't 1964).

The court is empowered to dismiss a declaratory judgment action where the defendant has not moved to dismiss since the decision to exercise jurisdiction in a declaratory judgment action is discretionary and the court may properly exercise its discretion in refusing to proceed to declaratory judgment when other remedies ensuring review are adequate. It is an abuse of discretion to entertain jurisdiction in a declaratory judgment action where another action between the same parties in which all the issues could be determined is actually pending. Anonymous Town Justice v New York Com. on Judicial Conduct, 96 Misc. 2d 541, 409 N.Y.S.2d 198, 1978 N.Y. Misc. LEXIS 2638 (N.Y. Sup. Ct. 1978).

Action seeking declaration that property tax assessment was jurisdictionally defective was not time barred on ground that claim could have been brought as Article 78 proceeding, to which 4-month limitation period applies, since principal relief sought was refund of taxes paid under protest; thus, action would be converted to one for moneys had and received to which 6-year limitation period would apply, thereby making plaintiffs' claim timely. K. Capolino Design & Renovation, Ltd. v Assessors of Yonkers, 138 Misc. 2d 811, 525 N.Y.S.2d 461, 1987 N.Y. Misc. LEXIS 2814 (N.Y. Sup. Ct. 1987).

Action brought by Borough President of Richmond County against Triborough Bridge and Tunnel Authority to invalidate decision to raise tolls on Verrazano Narrows Bridge, and to enjoin collection of increased tolls, which was properly maintained in Richmond County by virtue of CLS CPLR § 505(a), would not be converted into Article 78 proceeding, making New York County only proper venue under CLS CPLR § 506(b) as county "where material events" took place, since plaintiff was well within rights in seeking injunctive relief through declaratory judgment action. Molinari v Triborough Bridge & Tunnel Authority, 146 Misc. 2d 580, 551 N.Y.S.2d 767, 1990 N.Y. Misc. LEXIS 52 (N.Y. Sup. Ct. 1990).

Action, seeking declaration that claims asserted by defendant in Ohio breach of contract action were barred by New York law, was not subject to dismissal on ground that full and adequate remedy could be obtained in Ohio action since plaintiffs were not required to wait to be sued in

Ohio in order to obtain relief. Babcock & Wilcox Co. v Control Components, 161 Misc. 2d 636, 614 N.Y.S.2d 678, 1993 N.Y. Misc. LEXIS 610 (N.Y. Sup. Ct. 1993).

Supreme Court action by comptroller of City of New York, to enforce memorandum of understanding (MOU) between city and state that settled actions in Court of Claims involving repayment of federal funds allocated for never-completed Westway highway project, was not subject to dismissal on ground that declaratory and injunctive relief sought was unavailable because only remedy for breach of MOU would be to vacate discontinuance of Court of Claims actions; although it was too soon to determine what relief (if any) would be appropriate, it appeared that declaration of parties rights was possible, and it was sufficient on state's motion to dismiss to hold that at least some relief was possible. Hevesi v Pataki, 169 Misc. 2d 467, 643 N.Y.S.2d 895, 1996 N.Y. Misc. LEXIS 174 (N.Y. Sup. Ct. 1996).

Declaratory judgment action challenging constitutionality of Statewide Offset Program, which allows Department of Taxation and Finance to offset taxpayers' state income tax refunds against debts owed by taxpayers to state agencies, was not suitable for conversion to Article 78 proceeding; therefore, defendants' motion to convert action and dismiss plaintiffs' claims as barred by 4 month statute of limitations was denied. Butler v Wing, 177 Misc. 2d 779, 677 N.Y.S.2d 216, 1998 N.Y. Misc. LEXIS 349 (N.Y. Sup. Ct. 1998), rev'd, 275 A.D.2d 273, 713 N.Y.S.2d 33, 2000 N.Y. App. Div. LEXIS 8974 (N.Y. App. Div. 1st Dep't 2000).

**31. —As bar to declaratory judgment**

Parties to agreement may not seek declaration of their contract rights when agreement specifies different, reasonable means for resolving disputes; declaratory judgment in such circumstances may be unnecessary and could also enable parties to circumvent their contractual undertakings. Kalisch-Jarcho, Inc. v New York, 72 N.Y.2d 727, 536 N.Y.S.2d 419, 533 N.E.2d 258, 1988 N.Y. LEXIS 3536 (N.Y. 1988).

In an action, inter alia, to declare that a corporation was not liable for any injuries sustained by defendants as a result of a certain fire, the trial court properly dismissed the action as the matter

in dispute could be determined in the basic negligence action which was then pending in federal court. Furthermore, joinder pursuant to CPLR § 1001 would be inapplicable where the defendants in the declaratory judgment action were plaintiffs in the federal forum who commenced an action to recover damages for their own specific injuries and who would be unaffected by damages sustained by other plaintiffs, although all damages arose out of the same occurrence. E. I. Du Pont de Nemours & Co. v Russo, 84 A.D.2d 532, 443 N.Y.S.2d 90, 1981 N.Y. App. Div. LEXIS 15576 (N.Y. App. Div. 2d Dep't 1981).

A complaint which asked for a declaration that a license agreement had not terminated and was a valid, subsisting, and binding contract was not a proper case for a declaratory judgment, where the contract had expired, in that there was no necessity for resorting to a declaratory judgment. Automated Ticket Systems, Ltd. v Quinn, 90 A.D.2d 738, 455 N.Y.S.2d 799, 1982 N.Y. App. Div. LEXIS 18924 (N.Y. App. Div. 1st Dep't 1982), aff'd, 58 N.Y.2d 949, 460 N.Y.S.2d 533, 447 N.E.2d 82, 1983 N.Y. LEXIS 2897 (N.Y. 1983).

A declaratory judgment action brought by the insurer for the employer of a driver who had been named as defendant in a personal injury action, to establish that the covered vehicle had been operated by the employee without the employer’s consent, so that the insurer would not be liable under the terms of the policy for the injuries that had been sustained by the personal injury plaintiff, would be dismissed, since the question of whether the employee had been operating the subject vehicle with the employer’s consent was subject to determination in the underlying negligence action. Allstate Ins. Co. v Santiago, 98 A.D.2d 608, 469 N.Y.S.2d 343, 1983 N.Y. App. Div. LEXIS 20890 (N.Y. App. Div. 1st Dep't 1983).

Action seeking declaration that town election was illegal due to voting machine malfunction required dismissal since only proceeding in nature of quo warranto under CLS Exec § 63-b or mandamus under Article 78 is appropriate remedy for trying title to public office; however, with regard to whether voting machine actually malfunctioned, mandamus would not be appropriate remedy since issue could not be resolved as matter of law. Ellis v Eaton, 136 A.D.2d 890, 524 N.Y.S.2d 937, 1988 N.Y. App. Div. LEXIS 1328 (N.Y. App. Div. 4th Dep't 1988).

It was proper exercise of discretion to dismiss causes of action for declaratory judgments as to plaintiffs' rights under certain contracts where plaintiffs had adequate, alternative remedy in form of breach of contract action; declaratory judgment was not necessary to preserve plaintiff's future rights should court dismiss breach of contract action on laches or limitations grounds since laches, being equitable defense, was applicable only to plaintiffs' equitable cause of action for breach of fiduciary duty, and even assuming viability of defendants' statute of limitations defense, determinations on breach of contract claims would merely be confined to those time periods not barred by applicable limitations statute and would sufficiently guide parties on their future performance of contracts, thereby obviating need for declaratory judgments. Apple Records, Inc. v Capitol Records, Inc., 137 A.D.2d 50, 529 N.Y.S.2d 279, 1988 N.Y. App. Div. LEXIS 5139 (N.Y. App. Div. 1st Dep't 1988).

Tenant who defaulted in summary eviction proceeding could not maintain action for judgment declaring that her constitutional rights and her rights under CLS Real P § 235-b and CLS RPAPL § 745 had been violated by City Court's policy of requiring rental arrears to be deposited with court before allowing trial on warranty of habitability defense in nonpayment proceeding, since tenant could have adequately addressed those issues by moving to vacate her default in summary eviction proceeding, and by appealing if court refused to vacate default; declaratory judgment action may not be used to circumvent normal appellate process. Rodriguez v City Court of Yonkers, 138 A.D.2d 475, 526 N.Y.S.2d 24, 1988 N.Y. App. Div. LEXIS 2849 (N.Y. App. Div. 2d Dep't 1988).

Court did not err in dismissing commercial lessee's action for judgment declaring that lessor was not entitled to enforce lease because of its own breach of lease, despite lessee's claim that its loss of good will had left it without damages remedy, since lessee's own principal had asserted dollar figure on such loss in his affidavit in support of motion for preliminary injunction. Jolly King Restaurant v Hershey Chan Realty, 214 A.D.2d 422, 625 N.Y.S.2d 35, 1995 N.Y. App. Div. LEXIS 4383 (N.Y. App. Div. 1st Dep't 1995).

Declaratory judgment actions were properly dismissed where relief sought in each was declaration as to validity of mortgage note, which could be determined in separate pending action to recover on note. Murray Hill Invs. v Adas Yereim, Inc., 226 A.D.2d 602, 641 N.Y.S.2d 562, 1996 N.Y. App. Div. LEXIS 4368 (N.Y. App. Div. 2d Dep't 1996).

Court should have dismissed plaintiff's action seeking, inter alia, declaration that he was not in default under terms of his proprietary lease, and that his rights thereunder had not been validly terminated, since summary holdover proceeding seeking to evict him on ground that his lease had been terminated was pending in county district court, and he would be able to obtain full redress of his legal rights under lease in that proceeding. DiGeronimo v Amrod, 248 A.D.2d 652, 673 N.Y.S.2d 914, 1998 N.Y. App. Div. LEXIS 3509 (N.Y. App. Div. 2d Dep't 1998).

While the use of a declaratory judgment can be justified in many situations though an alternative remedy exists, the rule is qualified by the general principle that where there is no necessity for such a declaratory judgment and it would serve no useful purpose or where there is a full and adequate remedy available through an established form of action, the remedy should not be used. Hunterfly Realty Corp. v State, 62 Misc. 2d 567, 309 N.Y.S.2d 260, 1970 N.Y. Misc. LEXIS 1762 (N.Y. Sup. Ct. 1970).

**32. —Statutory remedies**

Action pursuant to CLS Gen Mun § 51 may take form of action for declaratory judgment if it satisfies statute's requirements that showing be made of illegal official act that imperils public interest. Korn v Gulotta, 72 N.Y.2d 363, 534 N.Y.S.2d 108, 530 N.E.2d 816, 1988 N.Y. LEXIS 2686 (N.Y. 1988).

The court will not by an advisory opinion pass upon an abstract question. Swift & Co. v James Stewart & Co., 261 A.D. 930, 25 N.Y.S.2d 487, 1941 N.Y. App. Div. LEXIS 8133 (N.Y. App. Div. 1941).

A not-for-profit corporation organized to establish and maintain churches, schools and missions which has challenged the jurisdiction of the taxing authority to levy a tax on its real property is not barred from maintaining an action for a judgment seeking to have its land declared exempt from taxation by its failure to proceed according to the provisions of article 7 of the Real Property Tax Law. Order Minor Conventuals v Lee, 64 A.D.2d 227, 409 N.Y.S.2d 667, 1978 N.Y. App. Div. LEXIS 12248 (N.Y. App. Div. 3d Dep't 1978).

Although section 63-b of the Executive Law permits the Attorney-General to bring an action in the nature of quo warranto to determine title to the chairmanship of the Niagara Frontier Transportation Authority, a party claiming to be chairman may bring a declaratory judgment action to determine such title since there was no indication that the Attorney-General intended to take an active role in the resolution of the dispute, and it is in the public interest to address the issues rather than await a quo warranto proceeding brought by the Attorney-General. Dekdebrun v Hardt, 68 A.D.2d 241, 417 N.Y.S.2d 331, 1979 N.Y. App. Div. LEXIS 10544 (N.Y. App. Div. 4th Dep't), app. dismissed, 48 N.Y.2d 608 (N.Y. 1979), app. dismissed, 48 N.Y.2d 882, 1979 N.Y. LEXIS 7233 (N.Y. 1979).

A physician under investigation by the State Board for Professional Medical Conduct who sought to quash a subpoena duces tecum issued by the Board would not be allowed, by seeking relief in the form of an action for a declaratory judgment and an injunction, to circumvent the statutory requirement under CPLR § 2304. Anonymous v Axelrod, 92 A.D.2d 789, 459 N.Y.S.2d 778, 1983 N.Y. App. Div. LEXIS 17157 (N.Y. App. Div. 1st Dep't 1983).

Property owners' causes of action, including actions for declaratory judgment and injunctive relief, challenging town's expansion of its sewage treatment facility were time-barred where (1) town board authorized and approved expansion by resolutions in 1988, 1989, and 1990, (2) owners did not challenge those decisions until 1993 or later, well beyond 30-day statute of limitations, and (3) owners did not commence Article 78 proceeding, which CLS Town § 195(2) provides as exclusive method for such challenge. Herzog v Town of Thompson, 251 A.D.2d 917, 674 N.Y.S.2d 830, 1998 N.Y. App. Div. LEXIS 7729 (N.Y. App. Div. 3d Dep't), app.

dismissed, 92 N.Y.2d 943, 681 N.Y.S.2d 471, 704 N.E.2d 224, 1998 N.Y. LEXIS 4002 (N.Y. 1998).

A paternity proceeding in Family Court under Family Ct Act §§ 511 et seq. is a more appropriate remedy for a controversy regarding the determination of fatherhood than a declaratory judgment action in the Supreme Court, since the legislature has vested exclusive jurisdiction over paternity proceedings in the Family Court and the function of a declaratory judgment is to determine a justiciable controversy which is either not ripe for adjudication or not amenable to the usual remedies. Sondra S. v Jay O., 126 Misc. 2d 322, 482 N.Y.S.2d 660, 1984 N.Y. Misc. LEXIS 3611 (N.Y. Fam. Ct. 1984).

Art gallery was entitled to summary judgment in action for judgment declaring that it was not entitled to hold plaintiff's artistic work as security for loan, where all relief sought by plaintiff (return of his artistic works) was available to him in his first cause of action under CLS CPLR Art 71 seeking recovery of chattel. Zucker v Hirschl & Adler Galleries, 170 Misc. 2d 426, 648 N.Y.S.2d 521, 1996 N.Y. Misc. LEXIS 380 (N.Y. Sup. Ct. 1996).

**33. — —Article 78 proceedings**

The only way by which an insurance company may contest the application of franchise tax to premiums received for insurance under its own employee benefit plan is under Article 78 of the CPLR and an action for declaratory judgment does not lie. Mutual Life Ins. Co. v State Tax Com., 24 A.D.2d 853, 264 N.Y.S.2d 862, 1965 N.Y. App. Div. LEXIS 2905 (N.Y. App. Div. 1st Dep't 1965), aff'd, 17 N.Y.2d 736, 270 N.Y.S.2d 205, 217 N.E.2d 31, 1966 N.Y. LEXIS 1417 (N.Y. 1966).

Action to compel superintendent of insurance to issue an order to all insurance companies, brokers, and agents to cease and desist from engaging in practice of "wrap-up" insurance could not be brought as declaratory judgment action but must be brought under Article 78. Industrial Group Service, Inc. v Cantor, 24 A.D.2d 1032, 264 N.Y.S.2d 880, 1965 N.Y. App. Div. LEXIS 2885 (N.Y. App. Div. 3d Dep't 1965).

Appropriate remedy to review determination of village zoning board of appeals granting application to permit property owner to use his property, zoned as residential, as a commercial parking lot was Article 78 proceeding rather than action seeking declaratory judgment. Island Park Taxpayers & Property Owners Asso. v Sacino, 42 A.D.2d 729, 345 N.Y.S.2d 664, 1973 N.Y. App. Div. LEXIS 3829 (N.Y. App. Div. 2d Dep't 1973).

Article 78 proceeding instituted to review determination of zoning board of appeals permitting use of lot zoned residential as a commercial parking lot resulting in final judgment in favor of board would bar subsequent declaratory judgment action seeking similar relief. Island Park Taxpayers & Property Owners Asso. v Sacino, 42 A.D.2d 729, 345 N.Y.S.2d 664, 1973 N.Y. App. Div. LEXIS 3829 (N.Y. App. Div. 2d Dep't 1973).

In an action in which a county board of supervisors sought a declaratory judgment to the effect that a state code provision did not apply to the county, the trial court erred in denying the motion by defendant, the state department of health, to convert the action into an Article 78 proceeding where, in doing so, the court precluded review of defendant’s attempts to secure a fact-finding hearing upon the alleged violations of the state code provision in the resolution of a factual issue critical to the outcome of the dispute. Delaware County Bd. of Supervisors v New York State Dep't of Health, 81 A.D.2d 968, 439 N.Y.S.2d 741, 1981 N.Y. App. Div. LEXIS 11709 (N.Y. App. Div. 3d Dep't 1981).

In a nursing home’s declaratory judgment action against the commissioner of the state health department, the complaint would be dismissed where the action had been one to review a determination of an administrative body, where the complaint had raised no constitutional issues, and where the vehicle for review would have been an Article 78 proceeding, which was time-barred. Geneva General Hospital Nursing Home Co. v Axelrod, 92 A.D.2d 739, 461 N.Y.S.2d 91, 1983 N.Y. App. Div. LEXIS 17060 (N.Y. App. Div. 4th Dep't 1983).

An order denying a CPLR § 3211 motion to dismiss a landlord’s declaratory relief action (seeking declarations that certain procedures of New York’s conciliation and appeals board, established in respect to its consideration of updated comparable rentals, were arbitrary,

capricious and unduly burdensome) was error and would be reversed, and the complaint dismissed on appeal, where plaintiffs had a remedy, in the form of an Article 78 proceeding challenging the determination (if and when one was made), which, pursuant to local law, was the exclusive remedy. Greystone Management Corp. v Conciliation & Appeals Bd., 94 A.D.2d 614, 462 N.Y.S.2d 13, 1983 N.Y. App. Div. LEXIS 18026 (N.Y. App. Div. 1st Dep't 1983), aff'd, 62 N.Y.2d 763, 477 N.Y.S.2d 315, 465 N.E.2d 1251, 1984 N.Y. LEXIS 9011 (N.Y. 1984).

So long as declaratory judgment action is limited to resolving question of law whether office in question is vacant, it is appropriate alternative to Article 78 proceeding and does not thwart policies underlying restriction of remedy of quo warranto to actions brought by attorney-general. La Polla v De Salvatore, 112 A.D.2d 6, 490 N.Y.S.2d 396, 1985 N.Y. App. Div. LEXIS 50634 (N.Y. App. Div. 4th Dep't 1985).

Special Term properly converted resource management firm’s action for declaratory judgment to Article 78 proceeding where basis of action was allegation that Department of Labor was acting in excess of its jurisdiction by completing administrative procedures on status of certain workers (as employees or independent contractors) after workers had withdrawn their claims for benefits. Institute for Resource Management, Inc. v Roberts, 122 A.D.2d 465, 504 N.Y.S.2d 853, 1986 N.Y. App. Div. LEXIS 59755 (N.Y. App. Div. 3d Dep't 1986).

Public power authority and public power utility were entitled to conversion of declaratory judgment action to Article 78 proceeding where suit was brought to review decision of Public Service Commission that rate change proposed by power utility properly computed allocation back to its customers savings stemming from use of low-cost power generated by power authority, and where public service commission’s decision was more “quasi-judicial” than “pure legislative act” because, pursuant to CLS Pub A § 1005, administrative law judges presided over 27 days of extensive public hearings with 14 intervenors, 5,671 pages of transcript and 322 exhibits. Eve v Power Authority of New York, 123 A.D.2d 532, 506 N.Y.S.2d 700, 1986 N.Y. App. Div. LEXIS 60660 (N.Y. App. Div. 1st Dep't 1986).

In action for judgment declaring zoning ordinance invalid, plaintiff had no cause of action based on alleged violation of notice provisions of CLS Vill § 7-706 where defendants offered uncontested evidence that law as enacted was substantially same as that described in public notice and discussed at public hearing, and that substantial change occurred not at time of enactment but when law was applied; plaintiff's remedy was to bring Article 78 challenge to village board's interpretation of law as applied. Vanderwoude v Post/Rockland Associates, 130 A.D.2d 739, 515 N.Y.S.2d 838, 1987 N.Y. App. Div. LEXIS 46753 (N.Y. App. Div. 2d Dep't), app. dismissed, 70 N.Y.2d 796, 522 N.Y.S.2d 112, 516 N.E.2d 1225, 1987 N.Y. LEXIS 19365 (N.Y. 1987).

Court should have dismissed, as time barred, action seeking judgment declaring that certain seasonal cottages were legal nonconforming structures and that structures could be lawfully converted to year-round use without violating town code since plaintiff could have commenced Article 78 proceeding under CLS Town § 267 within 30 days after town zoning board of appeals denied proposed conversion as unlawful expansion of nonconforming use, but plaintiff instead waited for nearly one year to bring declaratory judgment action. Association for Improv. v Cortlandt, 137 A.D.2d 742, 525 N.Y.S.2d 251, 1988 N.Y. App. Div. LEXIS 1897 (N.Y. App. Div. 2d Dep't), app. dismissed, 72 N.Y.2d 914, 532 N.Y.S.2d 848, 529 N.E.2d 178, 1988 N.Y. LEXIS 2968 (N.Y. 1988).

It was error to dismiss plaintiff's cause of action for declaratory judgment on ground that Article 78 proceeding seeking same relief was pending where defendants failed to submit Article 78 petition or other proof that claims were identical. Itzkowitz v Town Bd. of Niagara, 139 A.D.2d 932, 527 N.Y.S.2d 915, 1988 N.Y. App. Div. LEXIS 4198 (N.Y. App. Div. 4th Dep't 1988).

Proper procedural vehicle to challenge whether 22 NYCRR § 520.6 had been applied to plaintiff in unconstitutional manner was Article 78 proceeding seeking review of denial of plaintiff's petition for waiver of § 520.6; thus, 4-month limitation period of CLS CPLR § 217 was applicable in action to declare § 520.6 invalid as applied to plaintiff. Koeppel v Wachtler, 141 A.D.2d 613, 529 N.Y.S.2d 359, 1988 N.Y. App. Div. LEXIS 6911 (N.Y. App. Div. 2d Dep't 1988), app.

dismissed, 74 N.Y.2d 650, 542 N.Y.S.2d 519, 540 N.E.2d 714, 1989 N.Y. LEXIS 541 (N.Y. 1989).

Declaratory judgment action by state employee who sought to clarify her retirement status was properly converted to Article 78 proceeding, notwithstanding plaintiff's claim that her placement in Tier III classification diminished her rights to retirement benefits under Tier II in violation of CLS NY Const Art V § 7, since challenge was directed at Comptroller's assessment of her appropriate membership date rather than constitutionality of statutes. Goodman v Regan, 151 A.D.2d 958, 542 N.Y.S.2d 998, 1989 N.Y. App. Div. LEXIS 8865 (N.Y. App. Div. 3d Dep't 1989).

Although Article 78 proceeding is appropriate means to review determination of public official interpreting statute he is empowered to administer, it is not exclusive means, and use of declaratory judgment action has been approved in appropriate circumstances. Conrad v Regan, 155 A.D.2d 931, 548 N.Y.S.2d 957, 1989 N.Y. App. Div. LEXIS 14786 (N.Y. App. Div. 4th Dep't 1989).

Either Article 78 proceeding or declaratory judgment action may be utilized to pursue claim for full real property tax exemption under CLS RPTL § 420-a. Emunim v Fallsburg, 161 A.D.2d 943, 557 N.Y.S.2d 514, 1990 N.Y. App. Div. LEXIS 5594 (N.Y. App. Div. 3d Dep't 1990), app. dismissed, 76 N.Y.2d 888, 561 N.Y.S.2d 549, 562 N.E.2d 874, 1990 N.Y. LEXIS 3102 (N.Y. 1990), modified, 78 N.Y.2d 194, 573 N.Y.S.2d 43, 577 N.E.2d 34, 1991 N.Y. LEXIS 1014 (N.Y. 1991).

In combined action for declaratory judgment and Article 78 proceeding challenging constitutionality of lot restriction in zoning ordinance, Supreme Court erred, after denying petitioner's request for Article 78 relief on merits, in refusing to consider request for declaratory relief on ground that petitioner had not used "the appropriate vehicle." Fischlin v Board of Appeals, 176 A.D.2d 50, 579 N.Y.S.2d 494, 1992 N.Y. App. Div. LEXIS 1502 (N.Y. App. Div. 3d Dep't 1992).

City agency was entitled to summary judgment dismissing action for judgment declaring that plaintiffs were entitled to release of interest of city agency in certain real property which was taken by in rem tax foreclosure, since city code granted city discretion to grant or deny applications for release of city's interest in property taken by in rem tax foreclosure, and plaintiffs' only avenue of judicial review of determination denying their motion for release was through Article 78 proceeding. Seagate Sisterhood v Department of Housing Preservation & Dev., 184 A.D.2d 503, 584 N.Y.S.2d 602, 1992 N.Y. App. Div. LEXIS 7672 (N.Y. App. Div. 2d Dep't 1992).

Plaintiff properly commenced declaratory judgment action against town, and was not required to bring Article 78 proceeding, where he challenged local law as exceeding authority delegated to town boards by CLS Town § 274-a; plaintiff challenged enactment of local law and not adverse determination with regard to use of his property. Janiak v Town of Greenville, 203 A.D.2d 329, 610 N.Y.S.2d 286, 1994 N.Y. App. Div. LEXIS 3711 (N.Y. App. Div. 2d Dep't 1994).

In declaratory judgment action by plaintiff whose teaching certificate was revoked by Commissioner of Education, constitutional challenge to CLS Educ § 305(7) was not waived by plaintiff's failure to raise issue at his administrative proceeding where plaintiff challenged statute itself, not merely its application to him; Article 78 proceeding is not proper method for testing constitutional validity of legislative enactment. Welcher v Sobol, 222 A.D.2d 1001, 636 N.Y.S.2d 421, 1995 N.Y. App. Div. LEXIS 13754 (N.Y. App. Div. 3d Dep't 1995).

Declaratory judgment action, seeking to declare that certain premises was subject to taxation, was properly converted to Article 78 proceeding where defendant corporation was agency of state. Town of Fishkill v Royal Dutchess Props., 231 A.D.2d 511, 648 N.Y.S.2d 107, 1996 N.Y. App. Div. LEXIS 8845 (N.Y. App. Div. 2d Dep't 1996).

In action alleging that enactment of town subdivision law was ultra vires and not in noncompliance with local land use and development code, CLS Mun H R §§ 20(5) and 22, and CLS ECL Art 8, petitioners' claims were properly maintainable in Article 78 proceeding even if matter was brought as declaratory judgment action, because each claim concerned matters of

procedure only; court should have applied 4-month statute of limitations (CLS CPLR § 217) rather than 6-year catch-all statute of limitations for declaratory judgment actions. Llana v Town of Pittstown, 234 A.D.2d 881, 651 N.Y.S.2d 675, 1996 N.Y. App. Div. LEXIS 12864 (N.Y. App. Div. 3d Dep't 1996).

Action against State Insurance Fund for judgment declaring that drivers of plaintiff's cabs were independent contractors was time-barred where issues raised should have been brought in Article 78 proceeding, and action was begun more than 4 months after determination at issue. Colon v State Ins. Fund, 245 A.D.2d 413, 666 N.Y.S.2d 473, 1997 N.Y. App. Div. LEXIS 13085 (N.Y. App. Div. 2d Dep't 1997).

It was proper to grant summary judgment dismissing declaratory judgment action challenging reasonableness and necessity of engineering and legal expense reimbursement imposed by local town law and its enabling resolutions since acts complained of were administrative and not legislative, and thus appropriate procedural vehicle by which to challenge them was CLS CPLR Art 78 proceeding. Home Builders Ass'n v Town of Onondaga, 267 A.D.2d 973, 701 N.Y.S.2d 542, 1999 N.Y. App. Div. LEXIS 13695 (N.Y. App. Div. 4th Dep't 1999).

Although a corporation's action was denominated as an action for a declaratory judgment under N.Y. C.P.L.R. 3001, it was really an action challenging a state agency's decision on the calculation of interest on overpayment of taxes that was cognizable under N.Y. C.P.L.R. 7803(3), and because the corporation did not file its action within four months of the date the agency made its decision, the action was untimely. ABC Radio Network, Inc. v State Dep't of Taxation & Fin., 294 A.D.2d 213, 742 N.Y.S.2d 261, 2002 N.Y. App. Div. LEXIS 5315 (N.Y. App. Div. 1st Dep't 2002).

In a proceeding originally denominated a declaratory judgment seeking the publication of town zoning amendments, the officer whose conduct was to be controlled was the only necessary party respondent in the proceeding, which was converted by the court to an Article 78, and the town was properly made a party to the suit, and the court had jurisdiction to reach the merits; the other owners of land affected by the zoning amendments were not necessary parties thereto.

208 East 30th Street Corp. v North Salem, 88 A.D.2d 281, 452 N.Y.S.2d 902, 1982 N.Y. App. Div. LEXIS 16614 (N.Y. App. Div. 2d Dep't 1982).

Town's declaratory judgment action was improper, and would be converted to article 78 proceeding, where town sought advisory opinion as to propriety of its denial of requests under Freedom of Information Law, since rendering of advisory opinion is not proper subject matter of declaratory judgment action; this was especially true where article 78 proceeding provided complete remedy to parties claiming to be aggrieved by denial of requests and by Town Board meeting allegedly held on improper notice. Woodstock v Goodson-Todman Enterprises, Ltd., 133 Misc. 2d 12, 505 N.Y.S.2d 540, 1986 N.Y. Misc. LEXIS 2959 (N.Y. Sup. Ct. 1986).

Declaratory judgment action, alleging that moratorium on issuing building permits was void and ineffective due to town's failure to follow procedures mandated by CLS Gen Mun § 239-m, did not involve facial validity or constitutionality of local law, and would be converted to Article 78 proceeding where it was commenced within statute of limitations applicable to Article 78 proceedings and thus there was no prejudice to defendants. Caruso v Town of Oyster Bay, 172 Misc. 2d 93, 656 N.Y.S.2d 809, 1997 N.Y. Misc. LEXIS 120 (N.Y. Sup. Ct. 1997), modified in part, aff'd, 250 A.D.2d 639, 672 N.Y.S.2d 418, 1998 N.Y. App. Div. LEXIS 5533 (N.Y. App. Div. 2d Dep't 1998).

"Causes of action for declaratory judgment" were subject to judicial review as Article 78 proceedings where they alleged various procedural defects or violations in administrative process by which state acquired certain real property interests. Aubin v State, 185 Misc. 2d 338, 712 N.Y.S.2d 781, 2000 N.Y. Misc. LEXIS 300 (N.Y. Sup. Ct. 2000), aff'd, 282 A.D.2d 919, 724 N.Y.S.2d 84, 2001 N.Y. App. Div. LEXIS 3937 (N.Y. App. Div. 3d Dep't 2001).

Declaratory judgment action brought by the landowners seeking a determination that they were entitled to oil and gas production revenues as co-owners once an operator had recovered twice its costs was dismissed as a declaratory judgment action was not a proper method of challenging an administrative determination, especially where a legislative enactment was alleged to have been applied in an unconstitutional manner and relief pursuant to N.Y. C.P.L.R.

art. 78 was available. Matter of Caflisch v Crotty, 774 N.Y.S.2d 653, 2 Misc. 3d 786, 2003 N.Y. Misc. LEXIS 1681 (N.Y. Sup. Ct. 2003).

**34. — — —Conversion into declaratory judgment action**

An Article 78 proceeding by former nursing home residents who sought an order directing the Commissioner of Health to appoint a receiver pursuant to Pub Health Law § 2810(2)(a) to oversee the operation of the facility pending completion of the discharge of patients following revocation of the nursing home's operating certificate would be treated as one seeking declaratory relief so that the issue of statutory construction could be reached, since, though the proceeding was moot due to the fact that all the residents of the home had been discharged and transferred, the issue of whether the appointment of a receiver under Pub Health Law § 2810(2)(a) is mandatory or directory potentially affected the health and safety of numerous nursing home patients, and the need for prompt remedial action would likely deprive the Court of Appeals of an opportunity for meaningful review in the likely event that a similar situation later arose, so that recognized exceptions to the mootness doctrine were manifestly applicable. McCormick v Axelrod, 59 N.Y.2d 568, 466 N.Y.S.2d 277, 453 N.E.2d 506, 1983 N.Y. LEXIS 3231 (N.Y. 1983).

Article 78 proceeding for injunction pendente lite against transportation authority's altering bus fares and schedules would be regarded as proceeding for judgment declaring respondent's resolution violative of controlling statutes where proper remedy would have been by way of Article 78 proceeding. County of Rensselaer v Capital Dist. Transp. Authority, 42 A.D.2d 445, 349 N.Y.S.2d 20, 1973 N.Y. App. Div. LEXIS 4568 (N.Y. App. Div. 3d Dep't 1973).

Questions as to whether the City Manager of the City of Long Beach meets the standards set forth in the City Charter and as to whether a contract with the city employing the City Manager was legal are properly within the purview of an action for a declaratory judgment and a proceeding under CPLR article 78 with respect to those questions should be converted to a

declaratory judgment action. Hansell v Long Beach, 61 A.D.2d 84, 401 N.Y.S.2d 271, 1978 N.Y. App. Div. LEXIS 9707 (N.Y. App. Div. 2d Dep't 1978).

Where petitioner challenges the suspension of his driver’s license pursuant to subdivision 4-a of section 510 of the Vehicle and Traffic Law and alleges that the statute is unconstitutionally vague in a proceeding pursuant to CPLR article 78, the appropriate procedure is to convert the matter to a declaratory judgment action and meet the constitutional issues. Harding v Melton, 67 A.D.2d 242, 415 N.Y.S.2d 286, 1979 N.Y. App. Div. LEXIS 10099 (N.Y. App. Div. 3d Dep't 1979), aff'd, 49 N.Y.2d 739, 426 N.Y.S.2d 270, 402 N.E.2d 1171, 1980 N.Y. LEXIS 2108 (N.Y. 1980).

Where petitioner challenges the suspension of his driver’s license pursuant to subdivision 4-a of section 510 of the Vehicle and Traffic Law and alleges that the statute is unconstitutionally vague in a proceeding pursuant to CPLR article 78, the appropriate procedure is to convert the matter to a declaratory judgment action and meet the constitutional issues. Harding v Melton, 67 A.D.2d 242, 415 N.Y.S.2d 286, 1979 N.Y. App. Div. LEXIS 10099 (N.Y. App. Div. 3d Dep't 1979), aff'd, 49 N.Y.2d 739, 426 N.Y.S.2d 270, 402 N.E.2d 1171, 1980 N.Y. LEXIS 2108 (N.Y. 1980).

An Article 78 proceeding brought by a county comptroller against a county executive who, pursuant to a provision in the county administrative code, refused to certify the necessity of filling certain vacancies in the comptroller’s office, which proceeding had become moot when the positions were certified and filled, would be converted pursuant to CPLR § 103(c) to a declaratory judgment action under CPLR § 3001 challenging the validity of the administrative code provision on its face, where substantial questions of public interest were presented and were likely to recur. Slominski v Rutkowski, 91 A.D.2d 202, 458 N.Y.S.2d 757, 1983 N.Y. App. Div. LEXIS 16115 (N.Y. App. Div. 4th Dep't 1983), app. dismissed, 59 N.Y.2d 761, 1983 N.Y. LEXIS 5009 (N.Y. 1983), modified, 62 N.Y.2d 781, 477 N.Y.S.2d 320, 465 N.E.2d 1256, 1984 N.Y. LEXIS 4370 (N.Y. 1984).

A proceeding by a correction officer seeking to annul a determination denying his application for outside employment, alleging that the basis of the denial was an unconstitutional rule, was improperly commenced as an Article 78 proceeding as a constitutional challenge to a legislative enactment or regulation, and would be converted by the reviewing court pursuant to CPLR § 103 to an action for declaratory judgment. Emery v Le Fevre, 97 A.D.2d 931, 470 N.Y.S.2d 772, 1983 N.Y. App. Div. LEXIS 20721 (N.Y. App. Div. 3d Dep't 1983).

Supreme Court properly converted Article 78 proceeding into action for declaratory judgment where sponsors of offering plan for condominium and cooperative housing had initially sought injunctive relief from Attorney-General’s regulations regarding disclosure of presence of asbestos-containing materials, sponsors primarily challenged regulations themselves rather than any particular action taken by Attorney-General, and sponsors relinquished their request for injunctive relief due to court’s willingness to promptly decide case on its merits. Council for Owner Occupied Housing, Inc. v Abrams, 125 A.D.2d 10, 511 N.Y.S.2d 966, 1987 N.Y. App. Div. LEXIS 40591 (N.Y. App. Div. 3d Dep't 1987).

Special Term correctly converted Article 78 proceeding to annul town’s zoning ordinance amendment into declaratory judgment action where petitioners’ primary contention was that amendment constituted constitutionally invalid spot zoning. Nogas v Griffin, 136 A.D.2d 939, 524 N.Y.S.2d 897, 1988 N.Y. App. Div. LEXIS 1460 (N.Y. App. Div. 4th Dep't 1988).

Although company failed to exhaust its administrative remedies and thus could not maintain Article 78 proceeding challenging denial of its certification as minority business under state affirmative action program, company could challenge validity of guidelines promulgated to implement program on grounds of vagueness, lack of statutory authority, improper promulgation as rule or regulation, and inconsistency with Executive Order which created program, since each of those claims was proper subject of declaratory judgment action; thus, pertinent portions of petition would be converted to such action. Eaton Associates, Inc. v Egan, 142 A.D.2d 330, 535 N.Y.S.2d 998, 1988 N.Y. App. Div. LEXIS 13250 (N.Y. App. Div. 3d Dep't 1988).

Supreme Court, which did not convert purported special proceeding to action for declaratory judgment, erroneously entered declaration that employee was entitled to stenographic transcription of arbitration hearing which was to be conducted as part of disciplinary grievance; court should have declined jurisdiction in deference to pending arbitration proceeding. Rhinestone v New York City Transit Authority, 142 A.D.2d 562, 530 N.Y.S.2d 227, 1988 N.Y. App. Div. LEXIS 7295 (N.Y. App. Div. 2d Dep't 1988).

Article 78 proceeding was not proper vehicle for challenging constitutionality of CLS Tax § 605(b)(1)(B) and thus court converted portion of petition which alleged that statute violated Commerce Clause into declaratory judgment action. Tamagni v Tax Appeals Tribunal, 230 A.D.2d 417, 659 N.Y.S.2d 515, 1997 N.Y. App. Div. LEXIS 6712 (N.Y. App. Div. 3d Dep't 1997), aff'd, 91 N.Y.2d 530, 673 N.Y.S.2d 44, 695 N.E.2d 1125, 1998 N.Y. LEXIS 1071 (N.Y. 1998).

People could not bring Article 78 proceeding to prohibit justice from enforcing so much of his orders in capital murder case as declared unconstitutional plea bargain provisions of death penalty statute, which enable defendant charged with capital murder to avoid any possibility of death sentence by entering into plea agreement with People (CLS CPL §§ 220.10(5)(e), 220.30(3)(b)(vii), 220.60(2)(a)); however, court would grant People’s alternative request that proceeding be converted into action to declare challenged plea bargain provisions to be constitutional and valid. Hynes v Tomei, 237 A.D.2d 52, 666 N.Y.S.2d 687, 1997 N.Y. App. Div. LEXIS 13300 (N.Y. App. Div. 2d Dep't 1997), app. denied, 91 N.Y.2d 811, 671 N.Y.S.2d 715, 694 N.E.2d 884, 1998 N.Y. LEXIS 1003 (N.Y. 1998), rev'd, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201, 1998 N.Y. LEXIS 4140 (N.Y. 1998).

Mere fact that petitioners in Article 78 proceeding were not entitled to declaration sought by them did not require dismissal of their causes of action for declaratory judgment where alternative declaratory relief was appropriate. Harden v Town of Mt. Hope, 240 A.D.2d 493, 658 N.Y.S.2d 422, 1997 N.Y. App. Div. LEXIS 6104 (N.Y. App. Div. 2d Dep't 1997).

Conversion of Article 78 proceeding to declaratory judgment action was improper because petition, which alleged that village arbitrarily refused to disconnect or discontinue permanently

water and sewer services to 2 apartments in petitioner's building, did not challenge validity or constitutionality of local laws and did not seek declaratory relief. Burros v Village of Dansville, 242 A.D.2d 935, 662 N.Y.S.2d 959, 1997 N.Y. App. Div. LEXIS 10529 (N.Y. App. Div. 4th Dep't 1997).

In Article 78 proceeding to set aside tax sale, to extent that petition sought declaration that petitioner was record owner of property, that part of petition would be converted to action for declaratory judgment, which relief would be granted where tax sale was invalid for lack of adequate notice. Byrnes v County of Sarasota, 251 A.D.2d 795, 674 N.Y.S.2d 463, 1998 N.Y. App. Div. LEXIS 6763 (N.Y. App. Div. 3d Dep't 1998).

Part of petition in Article 78 proceeding seeking, as alternative to writ of prohibition, conversion of proceeding to declaratory judgment action would be granted where issue of constitutionality of CLS CPL §§ 220.10(5)(e), 220.30(3)(b)(vii), and 220.60(2)(a) was of critical importance and likely to recur. Relin v Connell, 251 A.D.2d 1041, 674 N.Y.S.2d 192, 1998 N.Y. App. Div. LEXIS 7112 (N.Y. App. Div. 4th Dep't), app. denied, 92 N.Y.2d 809, 678 N.Y.S.2d 595, 700 N.E.2d 1231, 1998 N.Y. LEXIS 2887 (N.Y. 1998), rev'd sub nom. Hynes v Tomei, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201, 1998 N.Y. LEXIS 4140 (N.Y. 1998).

Claim that petitioners were not reappointed to their positions at various thoroughbred and harness racetracks following election of new governor in 1994 solely because of their political affiliation, in violation of their rights under Civil Service Law and state and federal constitutions, could be resolved in Article 78 proceeding subject to 4-month statute of limitations, as essence of petitioners' claim was challenge to respondent Racing and Wagering Board's failure to reappoint them; thus, court properly declined to convert Article 78 proceeding into declaratory judgment action. Civil Serv. Emples. Ass'n, Local 1000 v Pataki, 259 A.D.2d 826, 687 N.Y.S.2d 740, 1999 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 3d Dep't 1999).

Appellate Division could, under CLS CPLR § 103, cure procedural infirmity in Article 78 proceeding, which sought prohibition against trial judge's application of allegedly unconstitutional CLS Civ R § 52 in order to televise criminal trial, by converting proceeding to

one for declaratory judgment. Clear Channel Communs., Inc. v Rosen, 263 A.D.2d 663, 692 N.Y.S.2d 812, 1999 N.Y. App. Div. LEXIS 7850 (N.Y. App. Div. 3d Dep't 1999).

Court improperly converted trespass action into declaratory judgment action since issue of width of road would necessarily be resolved on determination of trespass cause of action. Harris v Town of Mendon, 284 A.D.2d 988, 726 N.Y.S.2d 883, 2001 N.Y. App. Div. LEXIS 5796 (N.Y. App. Div. 4th Dep't 2001).

Article 78 form of petitioners' moving papers did not prohibit court from considering alternate relief in nature of declaratory judgment or injunction if petitioners were otherwise entitled thereto. Finkelstein, Mauriello, Kaplan & Levine, P.C. v McGuirk, 90 Misc. 2d 649, 395 N.Y.S.2d 377, 1977 N.Y. Misc. LEXIS 2125 (N.Y. Sup. Ct. 1977).

An Article 78 proceeding for a judicial determination annulling Ch 18 of the Laws of 1983 would be converted into an action for declaratory judgment, inasmuch as that is the appropriate remedy for a determination concerning the validity of a statute. Kessel v Purcell, 119 Misc. 2d 449, 463 N.Y.S.2d 384, 1983 N.Y. Misc. LEXIS 3534 (N.Y. Sup. Ct. 1983).

**35. —Administrative remedies**

In a declaratory judgment action brought by a newspaper publisher challenging the denial of a refund for sales taxes imposed on its local telephone calls, the complaint would be dismissed for failure to exhaust administrative remedies since the declaratory judgment action had been brought without waiting for an administrative review for which the newspaper had petitioned, and since the correctness and applicability of a tax and its formula would be appropriate subjects for review in an Article 78 proceeding. W. T. Wang, Inc. v New York State Dep't of Taxation & Finance, 88 A.D.2d 825, 451 N.Y.S.2d 130, 1982 N.Y. App. Div. LEXIS 17135 (N.Y. App. Div. 1st Dep't 1982), aff'd, 58 N.Y.2d 1021, 462 N.Y.S.2d 437, 448 N.E.2d 1348, 1983 N.Y. LEXIS 2961 (N.Y. 1983).

Plaintiff was not entitled to relief in action for judgment declaring that moratorium provisions of CLS ECL § 15-2710 were unconstitutional since he failed to file complete application with Department of Environmental Conservation for permit exempting him from moratorium and, thus, failed to exhaust administrative remedies. Hawes v State, 161 A.D.2d 745, 556 N.Y.S.2d 101, 1990 N.Y. App. Div. LEXIS 6690 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 76 N.Y.2d 918, 563 N.Y.S.2d 55, 564 N.E.2d 665, 1990 N.Y. LEXIS 3356 (N.Y. 1990).

Action for declaratory judgment was properly dismissed, on ground that plaintiffs did not exhaust their administrative remedies, where plaintiffs did not claim that defendants were acting beyond their grant of power, and although plaintiffs claimed that administrative process did not include means for obtaining interim decision that potentially could reduce number of days consumed by evidentiary hearings, they failed to prove that resort to administrative remedies would be futile. Schauseil v Wing, 251 A.D.2d 1080, 675 N.Y.S.2d 576, 1998 N.Y. App. Div. LEXIS 7194 (N.Y. App. Div. 4th Dep't 1998).

In action seeking declaration of plaintiffs' right to rent stabilization, court erred in granting plaintiffs' motion for preliminary injunction staying all proceedings before Division of Housing and Community Renewal (DHCR) and denying defendants' cross-motion to dismiss where, aside from applicability of rent regulation to aggregated former Mitchell-Lama developments, which was issue of first impression to which doctrine of primary jurisdiction applied, case involved factual evaluations within DHCR's area of expertise, including whether building was subject to rent regulation by virtue of its completion date, and whether Emergency Tenant Protection Act of 1974 (L 1974, ch 576, as amended) applied to horizontal complex of multiple dwellings. Davis v. Waterside Hous. Co., 274 A.D.2d 318, 711 N.Y.S.2d 4, 2000 N.Y. App. Div. LEXIS 7761 (N.Y. App. Div. 1st Dep't), app. denied, 95 N.Y.2d 770, 722 N.Y.S.2d 473, 745 N.E.2d 393, 2000 N.Y. LEXIS 3850 (N.Y. 2000).

**36. — —Exhaustion not required**

Plaintiff, which submitted petitions to Department of Environmental Conservation (DEC) under DEC's Beneficial Use Program (BUD), and which sent demand letters to DEC stating that its pending BUD petitions would be deemed approved under Uniform Procedures Act (UPA) (CLS ECL Art 70), was not required to exhaust its administrative remedies before bringing action seeking declaration that UPA time frames apply to BUD petitions where (1) DEC clearly stated its long-established position that UPA time frames did not apply to BUD petitions, both in correspondence with plaintiff and through affidavit of chief permit administrator, (2) DEC implemented that policy on at least regional basis, and (3) case did not involve new, unarticulated or unsettled policy issue within DEC, case-specific determination on unique facts, decisions issued by low-level DEC employees, or any other circumstance calling for hearing so that clearer formulation of and rationales for DEC policy might be fully aired. Lehigh Portland Cement Co. v New York State Dep't of Envtl. Conservation, 87 N.Y.2d 136, 638 N.Y.S.2d 388, 661 N.E.2d 961, 1995 N.Y. LEXIS 4444 (N.Y. 1995).

Doctrine of exhaustion of administrative remedies would not be applied to action against city for judgment declaring that lease of parking space in residential building did not violate New York City Zoning Resolution § 25-412, and that lease was valid, even though plaintiff would normally be required to bring his claim initially before New York City Board of Standards and Appeals, where only question raised was question of law as to whether plaintiff's lease violated resolution, and thus expertise of board was not involved and had no relevancy. Rosenberg v 135 Willow Co., 130 A.D.2d 566, 515 N.Y.S.2d 507, 1987 N.Y. App. Div. LEXIS 46564 (N.Y. App. Div. 2d Dep't 1987).

In action for judgment declaring CLS Tax former § 182-a inapplicable to plaintiff, and seeking permanent injunction restraining Department of Taxation and Finance from enforcing assessment of taxes pursuant to statute, plaintiff was not required to exhaust available administrative remedies before commencing suit since both constitutional and jurisdictional challenges to statute's application were raised. Northville Industries Corp. v New York State

Dep't of Taxation & Finance, 130 A.D.2d 638, 515 N.Y.S.2d 566, 1987 N.Y. App. Div. LEXIS 46652 (N.Y. App. Div. 2d Dep't 1987).

New York City uniformed services associations were not required to exhaust administrative remedies in seeking declaration as to extent of constructive seniority provision of CLS Civ S § 80 since only question was one of statutory construction. McKechnie v Ortiz, 132 A.D.2d 472, 518 N.Y.S.2d 134, 1987 N.Y. App. Div. LEXIS 49028 (N.Y. App. Div. 1st Dep't 1987), app. dismissed, 71 N.Y.2d 873, 527 N.Y.S.2d 761, 522 N.E.2d 1059, 1988 N.Y. LEXIS 1249 (N.Y. 1988), aff'd, 72 N.Y.2d 969, 534 N.Y.S.2d 358, 530 N.E.2d 1278, 1988 N.Y. LEXIS 2681 (N.Y. 1988).

Landowner was not required first to exhaust his administrative remedies before bringing action where his complaint seeking declaratory judgment against village attacked zoning code both as unconstitutional per se and as applied to him. Mindel v Thomaston, 150 A.D.2d 653, 541 N.Y.S.2d 526, 1989 N.Y. App. Div. LEXIS 6904 (N.Y. App. Div. 2d Dep't 1989).

Attorney who acted as assigned counsel for criminal defendant was not required to exhaust his administrative remedies as prerequisite to legal action in proceeding seeking order compelling payment of compensation awarded by County Court, and seeking declaration that CLS Sup Ct R § 822.4 (22 NYCRR § 822.4), which provides for review of excess fees by Presiding Judge of Appellate Division, is in irreconcilable conflict with CLS County § 722-b, since attorney had challenged “the very authority” of Presiding Judge to review counsel fees administratively. Kindlon v County of Rensselaer, 158 A.D.2d 178, 558 N.Y.S.2d 286, 1990 N.Y. App. Div. LEXIS 8127 (N.Y. App. Div. 3d Dep't 1990).

Action seeking judgment declaring that marketing reports prepared for corporate plaintiff were excluded from sales tax under CLS Tax § 1105 was not subject to dismissal for failure to exhaust administrative remedies where only issue raised was application of statute to reports furnished to plaintiff. Westwood Pharmaceuticals, Inc. v Chu, 164 A.D.2d 462, 564 N.Y.S.2d 1020, 1990 N.Y. App. Div. LEXIS 16553 (N.Y. App. Div. 4th Dep't 1990), app. denied, 77 N.Y.2d 807, 569 N.Y.S.2d 610, 572 N.E.2d 51, 1991 N.Y. LEXIS 605 (N.Y. 1991).

Declaratory judgment action by Superintendent of State Police for declaration as to whether hiring practices of Division of State Police were governed by CLS Exec § 215(3), which provided that applicants must be between 21 and 29 years of age, or by CLS Exec § 296(3-a)(a), which prohibited age discrimination, was not subject to exhaustion of administrative remedies doctrine since it would have been futile to await final determinations by Commissioner of Human Rights in various age discrimination complaints filed against superintendent where (1) protracted delays in proceedings on complaints lent air of uncertainty to superintendent's hiring practices, and (2) superintendent could not obtain adequate relief in administrative process as final determinations in favor of superintendent would not prevent further disruption of hiring practices. Constantine v White, 166 A.D.2d 59, 569 N.Y.S.2d 765, 1991 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div. 3d Dep't 1991).

Taxpayer's action, seeking declaration that enforcement of New York City general corporation tax was unconstitutional, was not premature since exhaustion of administrative remedies is not required where agency's action is challenged as unconstitutional or beyond authority granted to agency. Banfi Prods. Corp. v O'Cleireacain, 182 A.D.2d 465, 582 N.Y.S.2d 695, 1992 N.Y. App. Div. LEXIS 6017 (N.Y. App. Div. 1st Dep't 1992).

In action relating to applicability of CLS Tax § 1105(b), taxpayer was not obligated to exhaust its administrative remedies since it was not challenging amount of tax assessment but was instead challenging statute's constitutionality and applicability. Empire State Bldg. Co. v New York State Dep't of Taxation & Fin., 185 A.D.2d 201, 586 N.Y.S.2d 597, 1992 N.Y. App. Div. LEXIS 9077 (N.Y. App. Div. 1st Dep't 1992), aff'd, 81 N.Y.2d 1002, 599 N.Y.S.2d 536, 615 N.E.2d 1020, 1993 N.Y. LEXIS 1173 (N.Y. 1993).

Where controversy concerned applicability and constitutionality of CLS Tax § 1105(b), plaintiffs were not required to exhaust their administrative remedies before instituting action. Two Twenty East Ltd. Partnership v New York State Dep't of Taxation & Finance, 185 A.D.2d 202, 586 N.Y.S.2d 596, 1992 N.Y. App. Div. LEXIS 9098 (N.Y. App. Div. 1st Dep't 1992).

Plaintiffs were not required to exhaust their administrative remedies before bringing action for judgment declaring that property tax assessment of their property was jurisdictionally defective. K. Capolino Design & Renovation, Ltd. v Assessors of Yonkers, 138 Misc. 2d 811, 525 N.Y.S.2d 461, 1987 N.Y. Misc. LEXIS 2814 (N.Y. Sup. Ct. 1987).

Declaratory judgment action by commercial tenant challenging right of State Department of Taxation and Finance to impose and collect sales tax on payments made by tenant to its landlord for overtime heating, ventilation and air conditioning, as being beyond Department's grant of power under CLS Tax § 1105(b), would not be dismissed on ground that tenant failed to exhaust administrative remedies; doctrine of exhaustion of remedies is inapplicable where agency's action is challenged as wholly beyond it grant of power. Debevoise & Plimpton v New York State Dep't of Taxation & Finance, 149 Misc. 2d 571, 565 N.Y.S.2d 973, 1991 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1991), aff'd, 183 A.D.2d 521, 584 N.Y.S.2d 298, 1992 N.Y. App. Div. LEXIS 7364 (N.Y. App. Div. 1st Dep't 1992).

Where plaintiffs challenged applicability of CLS Tax § 1105(c)(8), declaratory judgment was appropriate, and plaintiffs were not required to first exhaust their administrative remedies. Compass Adjusters & Investigators v Commissioner of Taxation & Fin., 159 Misc. 2d 138, 604 N.Y.S.2d 468, 1993 N.Y. Misc. LEXIS 422 (N.Y. Sup. Ct. 1993), aff'd, 197 A.D.2d 38, 610 N.Y.S.2d 625, 1994 N.Y. App. Div. LEXIS 3856 (N.Y. App. Div. 3d Dep't 1994).

Newspaper publishers did not have to exhaust administrative remedies or bring CLS CPLR Article 78 proceeding before commencing action seeking declaration of unconstitutionality of CLS Tax § 1115(i)(C); however, to extent that they were seeking review of any administrative factual determination as to their shopping paper, or unconstitutionality of Tax Law provisions as applied to it, such factual issues and review of administrative determination were outside scope of declaratory judgment action. Stahlbrodt v Commissioner of Taxation & Fin., 171 Misc. 2d 571, 654 N.Y.S.2d 938, 1996 N.Y. Misc. LEXIS 549 (N.Y. Sup. Ct. 1996), aff'd, 246 A.D.2d 793, 666 N.Y.S.2d 526, 1998 N.Y. App. Div. LEXIS 331 (N.Y. App. Div. 3d Dep't 1998).

**37. —Pending federal action**

Fact that plaintiffs initially challenged ruling of Commissioner of Education in federal court on constitutional grounds regarding entitlement of their child to tuition-free education, and then brought declaratory judgment action to resolve issue of state law on which federal courts had abstained, did not result in different standard of review than that which would have been applied had plaintiffs sought direct state court review of determination—that is, whether determination was arbitrary and capricious and without rational basis. Catlin v Sobol, 77 N.Y.2d 552, 569 N.Y.S.2d 353, 571 N.E.2d 661, 1991 N.Y. LEXIS 525 (N.Y. 1991).

Rational basis test should be applied to review of interpretation by Commissioner of Education of CLS Educ § 3202(4)(b), and of determination that student was not entitled to tuition-free education in school district in which he physically resided, where parents, dissatisfied with commissioner's determination, decided to challenge constitutionality of statute in federal court rather than seek state court review of determination, federal court abstained on ground that issue was potentially controlled by question of state law, and parents then brought plenary action for declaratory relief in state court; parents were not entitled to judicial construction of statute and judicial resolution of student's residency. Catlin v Sobol, 155 A.D.2d 24, 553 N.Y.S.2d 501, 1990 N.Y. App. Div. LEXIS 2943 (N.Y. App. Div. 3d Dep't 1990), rev'd, 77 N.Y.2d 552, 569 N.Y.S.2d 353, 571 N.E.2d 661, 1991 N.Y. LEXIS 525 (N.Y. 1991).

An action seeking to declare invalid a county local law authorizing the district attorney to prosecute civil actions under the Federal Racketeer Influenced and Corrupt Organizations Act (18 USCS § 1964(c)) would not be dismissed on the basis of the pendency of the county's Federal civil action against plaintiffs for treble damages in connection with a construction project, where all legal and factual issues would not be determined in the pending civil action and the remedy sought in that action would not be as adequate or effective as that sought in the instant proceeding; while, as a general rule, it is an abuse of discretion for a court to entertain jurisdiction of a declaratory action when another action is pending in which all factual and legal issues can be determined, a declaratory judgment may not be refused on the basis of the

pendency of another suit if all legal and factual issues cannot be determined. Davis Constr. Corp. v County of Suffolk, 112 Misc. 2d 652, 447 N.Y.S.2d 355, 1982 N.Y. Misc. LEXIS 3178 (N.Y. Sup. Ct. 1982), aff'd, 95 A.D.2d 819, 464 N.Y.S.2d 519, 1983 N.Y. App. Div. LEXIS 18752 (N.Y. App. Div. 2d Dep't 1983).

Court would not assume jurisdiction over action by dealers in United States government securities for judgment declaring their nonliability for fraud and breach of fiduciary duty claims asserted against them in federal action pending in West Virginia, since full and adequate remedy could be afforded in traditional form of action; New York's interest in maintaining its status as preeminent commercial and financial center does not require exclusive New York jurisdiction over cases involving financial markets. Salomon Bros., Inc. v West Virginia State Bd. of Inv., 152 Misc. 2d 289, 575 N.Y.S.2d 993, 1990 N.Y. Misc. LEXIS 751 (N.Y. Sup. Ct.), aff'd, 168 A.D.2d 384, 563 N.Y.S.2d 714, 1990 N.Y. App. Div. LEXIS 15956 (N.Y. App. Div. 1st Dep't 1990).

**38. Effect of judgment**

Subcontractor's liability insurance carrier was not collaterally estopped from seeking declaratory judgment that it was entitled to contribution from general contractor's liability carrier based on prior lawsuit in which Supreme Court ruled that it was obligated to defend and indemnify general contractor in underlying wrongful death action, because "identicality of issue" was lacking, where dispositive issue in prior lawsuit was its obligation to defend and indemnify general contractor, not whether general contractor's liability carrier was coinsurer with duty of contribution. National Union Fire Ins. Co. v Hartford Ins. Co., 93 N.Y.2d 983, 695 N.Y.S.2d 740, 717 N.E.2d 1077, 1999 N.Y. LEXIS 1426 (N.Y. 1999).

Issue of permissive use, which would be decided in negligence action already pending, would not be decided in declaratory judgment action as to liability of insurer, but issues as to coverage in the event of permissive use and duty of insurer to defend would be decided. Downey v Merchants Mut. Ins. Co., 30 A.D.2d 171, 291 N.Y.S.2d 726, 1968 N.Y. App. Div. LEXIS 3638

(N.Y. App. Div. 4th Dep't 1968), aff'd, 23 N.Y.2d 989, 298 N.Y.S.2d 998, 246 N.E.2d 757, 1969 N.Y. LEXIS 1533 (N.Y. 1969).

Where objectants to zoning change were successful in their action for declaratory judgment to have zoning change declared unconstitutional and void on grounds that it constituted illegal spot zoning, such judgment did not have collateral estoppel effect in subsequent action brought by franchisor of store operated on affected property to have variance issued to permit store's continued operation. Kasten v Zoning Bd. of Appeals, 47 A.D.2d 766, 365 N.Y.S.2d 254, 1975 N.Y. App. Div. LEXIS 9066 (N.Y. App. Div. 2d Dep't 1975).

In action by bank to recover on instruments for payment of sums of money, plus attorneys' fees, defendants' prayer for declaratory relief in counterclaims against bank, which counterclaims raised no issues which were not considered in main action, was inappropriate; further, any and all relief which defendants might properly expect to flow from success of their counterclaims was available in conjunction with disposition of main action, including defendants' affirmative defenses; declaratory relief was unavailable under such circumstances and hence it was unnecessary for judgment to make declarations with respect to rights of parties. National Bank of Westchester v Pisani, 58 A.D.2d 597, 395 N.Y.S.2d 487, 1977 N.Y. App. Div. LEXIS 12640 (N.Y. App. Div. 2d Dep't 1977).

It was error to extend scope of declaratory judgment (respecting mental patients' rights to have counsel present during preretention hearing examinations) to patients other than plaintiffs, in absence of order certifying case as class action under CLS CPLR Art 9; however, similarly situated patients would be protected by principles of stare decisis, since case involved governmental action. Ughetto v Acrish, 130 A.D.2d 12, 518 N.Y.S.2d 398, 1987 N.Y. App. Div. LEXIS 45060 (N.Y. App. Div. 2d Dep't), app. dismissed, 70 N.Y.2d 871, 523 N.Y.S.2d 497, 518 N.E.2d 8, 1987 N.Y. LEXIS 19077 (N.Y. 1987).

In declaratory judgment action involving employment contract of former executive director of local housing authority, court order granting various termination benefits under contract was not inconsistent with prior order invalidating extended tenure provision of contract, and consequently

both orders would be affirmed. Lake v Binghamton Housing Authority, 130 A.D.2d 913, 516 N.Y.S.2d 324, 1987 N.Y. App. Div. LEXIS 46900 (N.Y. App. Div. 3d Dep't 1987).

Judicial declaration that regulation adopted by Commissioner of Education was invalid because it violated equal protection, by denying plaintiffs' eligibility for "excellence in teaching" salary supplements (CLS Educ §§ 1950 and 3602) solely on basis of their nonmembership in teachers' bargaining unit, should be applied prospectively only, in view of demonstrated hardship and fiscal confusion which would result from retroactive application. Schneider v Ambach, 135 A.D.2d 284, 526 N.Y.S.2d 857, 1988 N.Y. App. Div. LEXIS 2057 (N.Y. App. Div. 3d Dep't 1988).

Prior unsuccessful declaratory judgment action against village planning board, brought by objectors to developers' subdivision application, precluded later Article 78 action against board where both actions were based on claim that board did not technically consider developers' application prior to change in "flag lot" law. Bauer v Planning Bd. of Scarsdale, 186 A.D.2d 129, 587 N.Y.S.2d 726, 1992 N.Y. App. Div. LEXIS 10482 (N.Y. App. Div. 2d Dep't 1992).

In consolidated actions for judgment declaring rights of parties with respect to condominium unit, plaintiffs' causes of action challenging formation of condominium, validity of certain by-law provisions, and whether Board of Managers was validly constituted were barred by collateral estoppel where plaintiffs, who were defendants in prior action for foreclosure of common-charge lien, had full and fair opportunity to present those claims. Cornwall Warehousing v Town of New Windsor, 238 A.D.2d 370, 656 N.Y.S.2d 329, 1997 N.Y. App. Div. LEXIS 3803 (N.Y. App. Div. 2d Dep't 1997).

In action for declaratory judgment involving parties' possessory rights to apartment, law of case barred defendants' arguments, decided on prior appeal, that stipulation of settlement was not ambiguous in requiring particular defendant to occupy apartment for at least some portion of each year, that defendants were in breach of that requirement, that plaintiffs' motion to vacate stipulation's stay of defendants' eviction from apartment should have been granted because of such breach, and that defendants' claims of plaintiffs' laches and failure to comply with CLS Unif Tr Ct Rls § 202.48 (22 NYCRR § 202.48) lacked merit. Sharp v Stavisky, 242 A.D.2d 447, 662

N.Y.S.2d 39, 1997 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 956, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 913 (N.Y. 1998).

Court erred in declaring defendant to be sole stockholder of corporations in question where, in prior CLS Art 78 proceedings to permit inspection of corporate books and records in accordance with CLS Bus Corp § 624, plaintiff's decedent had been found to be shareholder of at least 5 percent of corporations; since defendant was afforded full and fair opportunity to contest decedent's claims in prior litigation, court was collaterally estopped from finding that defendant was sole shareholder. Blank v Blank, 256 A.D.2d 688, 681 N.Y.S.2d 377, 1998 N.Y. App. Div. LEXIS 12975 (N.Y. App. Div. 3d Dep't 1998).

In declaratory judgment action challenging town's appropriation of up to $1,021,259 from water district capital reserve fund account for costs related to agreements with county water authority for construction and lease of water facilities and operation of all town water districts, court properly ruled that use of water fund was controlled by CLS Town § 198(3)(d) which states that money collected from water charges "shall be applied toward the maintenance, operation, enlargement and improvement of the water system" and for payment of principal and interest of bonds issued for such purposes; thus, while some Town Law provisions require expenses to be apportioned on correlative benefit basis (e.g., CLS Town §§ 202, 202-a, 202-b, 208), there was no such restriction on expenditure of funds generated from town's sale of water. Langdon v Town of Webster, 270 A.D.2d 896, 706 N.Y.S.2d 547, 2000 N.Y. App. Div. LEXIS 3413 (N.Y. App. Div. 4th Dep't), app. denied, 710 N.Y.S.2d 238, 2000 N.Y. App. Div. LEXIS 10439 (N.Y. App. Div. 4th Dep't 2000), app. denied, 95 N.Y.2d 766, 716 N.Y.S.2d 641, 739 N.E.2d 1146, 2000 N.Y. LEXIS 2944 (N.Y. 2000).

Declaratory judgment of New York Supreme Court that ex parte divorce obtained by husband in Florida was void and that marriage between plaintiff and husband continued to be valid, was binding on Secretary of Health, Education and Welfare in subsequent proceeding by plaintiff to obtain social security benefits as wage earner's wife. Zeldman v Celebrezze, 252 F. Supp. 167, 1965 U.S. Dist. LEXIS 6915 (E.D.N.Y. 1965).

**39. —Affirmative relief**

The court may grant affirmative relief in actions for declaratory judgment. Figari v New York Tel. Co., 32 A.D.2d 434, 303 N.Y.S.2d 245, 1969 N.Y. App. Div. LEXIS 3265 (N.Y. App. Div. 2d Dep't 1969).

Court erred in failing to make declaration when it awarded summary judgment to plaintiffs where they had sought declaratory relief. Kuntz v National Grange Mut. Ins. Co., 224 A.D.2d 1029, 638 N.Y.S.2d 385, 1996 N.Y. App. Div. LEXIS 1731 (N.Y. App. Div. 4th Dep't 1996).

In action for judgment declaring that plaintiffs had prescriptive easement over portion of defendants' adjacent property in order to access piazza on their property, preliminary injunction was improperly granted since plaintiffs' likelihood of success was uncertain, and there was no showing of irreparable harm. Gold v Berkowitz, 235 A.D.2d 455, 652 N.Y.S.2d 992, 1997 N.Y. App. Div. LEXIS 417 (N.Y. App. Div. 2d Dep't 1997).

In action for judgment declaring parties' ownership interests in realty corporation, defendants' motion to vacate judgment was properly denied where they failed to present either (1) new evidence that would have produced different result if introduced at trial or (2) any evidence of fraud by plaintiffs. Walker v Weinstock, 255 A.D.2d 508, 680 N.Y.S.2d 177, 1998 N.Y. App. Div. LEXIS 12667 (N.Y. App. Div. 2d Dep't 1998).

Plaintiffs should have been granted summary judgment declaring that defendants could not erect fence on property in question where restrictive covenant prohibited erection of building or structure thereon, and plain and natural interpretation of use of term "structure" in restrictive covenant prohibited erection of fence. Freedman v Kittle, 262 A.D.2d 909, 693 N.Y.S.2d 651, 1999 N.Y. App. Div. LEXIS 7492 (N.Y. App. Div. 3d Dep't 1999).

**40. —Awards of costs or fees**

In action by government-sponsored cooperative housing corporation for declaration that shareholders/proprietary lessees could be required to sell their shares because they were not occupying their apartments as primary residences, court properly awarded attorneys' fees to lessees in conjunction with declaration in their favor where cooperative's action was based in part on argument that it was requirement of lease that tenants occupy their apartments as their primary residences and that lessees were in violation of their leases. Grinnell Hous. Dev. Fund Corp. v Jones, 214 A.D.2d 340, 625 N.Y.S.2d 25, 1995 N.Y. App. Div. LEXIS 3711 (N.Y. App. Div. 1st Dep't 1995).

Court properly awarded insured his costs in defending declaratory judgment action since insurers cast him in defensive posture by legal steps they took in trying to free themselves from their policy obligations. Empire Ins. Co. v Silbowitz, 243 A.D.2d 251, 663 N.Y.S.2d 7, 1997 N.Y. App. Div. LEXIS 9284 (N.Y. App. Div. 1st Dep't 1997).

Fact that insurer initially paid for insured's defense in underlying personal injury action did not preclude insured from recovering attorney's fees and costs incurred in subsequent declaratory judgment action whereby insurer sought reimbursement for defense and indemnification provided in underlying action; by commencing declaratory judgment action, insurer cast its insured in defensive posture by legal steps it took in unsuccessful effort to free itself from its policy obligations. United States Fid. & Guar. Co. v New York, Susquehanna & W. Ry. Corp., 277 A.D.2d 1026, 716 N.Y.S.2d 181, 2000 N.Y. App. Div. LEXIS 11407 (N.Y. App. Div. 4th Dep't 2000).

In combined Article 78 proceeding and declaratory judgment action, where respondent department of social services restored petitioner's Medicaid benefits almost immediately after commencement of proceeding and court thus dismissed as moot petitioner's request for judgment declaring that respondent's method of terminating benefits was unconstitutional, petitioner was not prevailing party entitled to award of attorney's fees under 42 USCS § 1988 and CLS CPLR § Art 86 since court did not issue enforceable judgment on merits and argument that filing of petition was "catalyst" for remedial action has been rejected by United States

Supreme Court. Auguste v Hammons, 285 A.D.2d 417, 727 N.Y.S.2d 880, 2001 N.Y. App. Div. LEXIS 7646 (N.Y. App. Div. 1st Dep't 2001), abrogated, Matter of Solla v Berlin, 106 A.D.3d 80, 961 N.Y.S.2d 55, 2013 N.Y. App. Div. LEXIS 1311 (N.Y. App. Div. 1st Dep't 2013).

Insured was not entitled to attorneys' fees in its declaratory judgment suit against an insurer seeking to compel coverage for environmental pollution claims because, even though the insurer asserted a late notice defense, the insured was not cast in a defensive posture and there was no exception to the American Rule that permitted recovery of fees here. Estee Lauder, Inc. v Onebeacon Ins. Group, LLC, 918 N.Y.S.2d 825, 31 Misc. 3d 379, 2011 N.Y. Misc. LEXIS 231 (N.Y. Sup. Ct. 2011).

**B. Particular Rulings**

**41. In general**

Organization suing on behalf of school districts, taxpayers, parents and students failed to state cause of action in which it sought declaration that state's system for financing its public elementary and secondary schools was unconstitutional violation of Education Article of state constitution, despite allegations of gross disparities between amount of money spent on students in property-poor school districts and property-rich districts, since constitution does not contain egalitarian component and instead requires only that school districts provide sound basic education. Reform Educ. Fin. Inequities Today v Cuomo, 86 N.Y.2d 279, 631 N.Y.S.2d 551, 655 N.E.2d 647, 1995 N.Y. LEXIS 1137 (N.Y. 1995).

Wife could not maintain action against her father-in-law for declaratory judgment and for specific enforcement of terms of father-in-law's alleged oral promise that he would support her and her children if she would marry his son, since such alleged promise was void under CLS Gen Oblig § 5-701 where not made in writing. Tutak v Tutak, 123 A.D.2d 758, 507 N.Y.S.2d 232, 1986 N.Y. App. Div. LEXIS 60899 (N.Y. App. Div. 2d Dep't 1986).

In action to declare rights of parties with respect to parcel of property in which court determined that title to parcel was held by defendant school district subject to public trust to devote property solely to library purposes, and that exclusive control, use and occupancy of property rested with plaintiff library, judgment would be modified to delete reference to devotion of property solely to library purposes since such language could be construed as unduly circumscribing broad range of library-related and community functions to which parcel had been devoted in past. Merrick Library v Merrick Union Free School Dist., 143 A.D.2d 647, 533 N.Y.S.2d 14, 1988 N.Y. App. Div. LEXIS 9333 (N.Y. App. Div. 2d Dep't 1988).

Enforcement of purported “agreement” to sell former school site was barred by statute of frauds, and thus board of education was entitled to summary judgment dismissing potential purchasers’ action to declare purported contract to be valid and enforceable, where (1) request for proposals stated that no offer would be deemed to be binding commitment until written contract was executed by board and that no proposal for sale would be entertained unless it called for minimum cash down payment on execution of contract of 10 percent of purchase price, (2) purchasers’ plans for site were approved and board informed them that contract would have to entered into within 30 days or board could withdraw for any reason whatsoever, (3) board approved contract and sent it to purchasers for signature, (4) purchasers returned signed contract with numerous changes, including deletion of down payment by check clause and deletion of time of essence clause, and (5) board terminated negotiations after 30 days passed. Feldman v Miller, 168 A.D.2d 597, 563 N.Y.S.2d 434, 1990 N.Y. App. Div. LEXIS 16033 (N.Y. App. Div. 2d Dep't 1990).

Action for constructive trust, and for judgment declaring that plaintiffs owned ½ interest in premises in which they resided with defendants, was barred by doctrine of unclean hands where complaint alleged that plaintiffs had previously transferred their interest in premises to defendants in reliance on defendants’ promise to reconvey property on demand, and that defendants had induced plaintiffs to transfer their interest to defendants to keep premises safe

from creditors. Lagonegro v Lagonegro, 187 A.D.2d 490, 589 N.Y.S.2d 571, 1992 N.Y. App. Div. LEXIS 12772 (N.Y. App. Div. 2d Dep't 1992).

Court properly set aside jury verdict in combined Article 78 and declaratory judgment action brought by campground worker against Department of Environmental Conservation, claiming that department had violated CLS NY Const Art V § 6 and CLS Pub O § 74(3)(f) by giving employment preference to friends and relatives of campground supervisor, where jury's special verdict found that special preferences had been given to supervisor's brother for employment during particular year, but evidence showed that brother had not accepted any position during that year, and thus could not have been given preferential treatment; moreover, witnesses related rational explanation of department's hiring policies and practices at campground operations, and thus Supreme Court correctly determined that department's actions were not arbitrary or capricious. Barboza v Department of Envtl. Conservation, 216 A.D.2d 817, 628 N.Y.S.2d 460, 1995 N.Y. App. Div. LEXIS 7460 (N.Y. App. Div. 3d Dep't 1995).

In action seeking declaration that insurance policy was void due to insureds' false and fraudulent statements as to cause of fire, court properly granted insureds' motion for directed verdict given thinness of insurer's proof on issue of motive, along with its failure to produce any evidence showing that either of insureds, or anyone who might have been acting on their behalf or at their direction, had opportunity to set fire, or was seen on or near premises on day it occurred. Chenango Mut. Ins. Co. v Charles, 235 A.D.2d 667, 652 N.Y.S.2d 134, 1997 N.Y. App. Div. LEXIS 99 (N.Y. App. Div. 3d Dep't 1997).

In action for declaratory judgment involving parties' possessory rights to apartment, defendants' argument that plaintiffs waived defendants' breach of stipulation by accepting "rent" with knowledge of breach was improperly raised for first time in defendants' motion to reargue/renew made after prior appeal on remittal of matter to IAS Court. Sharp v Stavisky, 242 A.D.2d 447, 662 N.Y.S.2d 39, 1997 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 956, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 913 (N.Y. 1998).

In action for declaratory judgment involving parties' possessory rights to apartment, defendants, who prevailed on IAS Court to deny plaintiffs' original motion to vacate stay of eviction, were not entitled to reargue or renew that court's order, because to allow this would be to permit them to challenge appellate court's subsequent reversal of that order. Sharp v Stavisky, 242 A.D.2d 447, 662 N.Y.S.2d 39, 1997 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1st Dep't 1997), app. dismissed, 91 N.Y.2d 956, 671 N.Y.S.2d 717, 694 N.E.2d 886, 1998 N.Y. LEXIS 913 (N.Y. 1998).

In combined Article 78 proceeding and action for judgment declaring null and void particular local law of town and any subdivision approval granted under that law, and for injunction against clearing of any land that had received such subdivision approval, to extent that petitioners asserted that Appellate Division's prior decision, which remitted matter to Supreme Court for analysis under CLS CPLR § 1001(b) as to whether petitioners should be allowed to maintain proceeding in absence of necessary parties, their proper remedy was motion to reargue. Llana v Town of Pittstown, 245 A.D.2d 968, 667 N.Y.S.2d 112, 1997 N.Y. App. Div. LEXIS 13631 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 812, 672 N.Y.S.2d 848, 695 N.E.2d 717, 1998 N.Y. LEXIS 1054 (N.Y. 1998).

**42. Dismissal of complaint**

Judges' declaratory judgment actions against the state, alleging that the Unified Court Budget Act denied them equal protection by providing higher salaries for judges in certain counties in the New York City area, would not be dismissed on the ground that the state was not a proper party to the actions, since the state is a proper party to a declaratory judgment action in the Supreme Court in view of its interest in the right to be heard on matters concerning the constitutionality of its statutes. Cass v State, 58 N.Y.2d 460, 461 N.Y.S.2d 1001, 448 N.E.2d 786, 1983 N.Y. LEXIS 2940 (N.Y. 1983).

When court resolves merits of declaratory judgment action against plaintiff, proper course is not to dismiss complaint but to issue declaration in favor of defendant. Maurizzio v Lumbermens

Mut. Casualty Co., 73 N.Y.2d 951, 540 N.Y.S.2d 982, 538 N.E.2d 334, 1989 N.Y. LEXIS 371 (N.Y. 1989).

Action for declaratory judgment should not be dismissed where plaintiff is not entitled to a declaration in his favor, but a judgment should be made setting forth a declaration of the rights of the parties. Town Board of Poughkeepsie on behalf of Arlington Water Dist. v Poughkeepsie, 22 A.D.2d 270, 255 N.Y.S.2d 549, 1964 N.Y. App. Div. LEXIS 2457 (N.Y. App. Div. 2d Dep't 1964).

It is error to dismiss a complaint for declaratory judgment merely because plaintiff is not entitled to the declaration sought by him and a declaration should be made in favor of defendants. Gates of Woodbury Co. v Oyster Bay, 29 A.D.2d 943, 289 N.Y.S.2d 379, 1968 N.Y. App. Div. LEXIS 4327 (N.Y. App. Div. 2d Dep't 1968).

When, in an action for declaratory judgment, plaintiff is not entitled to declaration sought, complaint should not be dismissed but court should declare parties' rights with respect to the subject matter of the litigation. Brookhaven v Parr Co. of Suffolk, Inc., 47 A.D.2d 554, 363 N.Y.S.2d 640, 1975 N.Y. App. Div. LEXIS 8625 (N.Y. App. Div. 2d Dep't 1975).

Where complaint in action for declaratory judgment sets forth a justiciable controversy, it is error to dismiss it merely because facts alleged therein show that plaintiff is not entitled to a declaration of rights as plaintiff claims them to be. Travelers Ins. Co. v Diamond, 50 A.D.2d 845, 377 N.Y.S.2d 110, 1975 N.Y. App. Div. LEXIS 11715 (N.Y. App. Div. 2d Dep't 1975), app. dismissed, 39 N.Y.2d 802, 385 N.Y.S.2d 759, 351 N.E.2d 426, 1976 N.Y. LEXIS 2748 (N.Y. 1976).

Court should have granted motion by Department of Insurance Litigation Bureau to dismiss or sever declaratory judgment action against insolvent medical malpractice insurer, and to refer matter to court supervising insurer's ancillary receivership, since ancillary receivership order included permanent stay of any actions against insurer. Whitney M. Young, Jr. Health Center,

Inc. v New York State Dep't of Ins. Liquidation Bureau, 155 A.D.2d 742, 547 N.Y.S.2d 454, 1989 N.Y. App. Div. LEXIS 13838 (N.Y. App. Div. 3d Dep't 1989).

In action wherein court determined that sublease of hospital operated by New York City Health and Hospitals Corporation (HHC) to for-profit entity was ultra vires because it absolved HHC from responsibility for day-to-day administration or operation of hospital, court should have dismissed demands for declaratory judgment with respect to whether provisions of Uniform Land Use Review Procedure (NYC Charter § 197-c) applied to sublease and whether City Council approval of sublease was required. Council of New York v Giuliani, 231 A.D.2d 178, 662 N.Y.S.2d 216, 662 N.Y.S.2d 516, 1997 N.Y. App. Div. LEXIS 8589 (N.Y. App. Div. 2d Dep't 1997), aff'd, 93 N.Y.2d 60, 687 N.Y.S.2d 609, 710 N.E.2d 255, 1999 N.Y. LEXIS 226 (N.Y. 1999).

County and its police department were entitled to dismissal of action for judgment declaring that employment contracts existed between plaintiffs and department, despite department’s extension of conditional employment offers, where plaintiffs were mere eligible candidates, and there was no breach of any final, enforceable employment contracts. Jackson v Nassau County, 245 A.D.2d 264, 666 N.Y.S.2d 11, 1997 N.Y. App. Div. LEXIS 12117 (N.Y. App. Div. 2d Dep't 1997).

In combined Article 78 proceeding and action for judgment declaring null and void particular local law of town and any subdivision approval granted under that law, and for injunction against clearing of any land that had received such subdivision approval, all property owners to whom such approval had been granted were necessary and indispensable parties, and thus dismissal was required, where they clearly would be prejudiced if proceeding were allowed to go forward without them, their rights would not be adequately protected by town, and, given nature of relief sought, no effective judgment could be made in their absence. Llana v Town of Pittstown, 245 A.D.2d 968, 667 N.Y.S.2d 112, 1997 N.Y. App. Div. LEXIS 13631 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 812, 672 N.Y.S.2d 848, 695 N.E.2d 717, 1998 N.Y. LEXIS 1054 (N.Y. 1998).

In declaratory judgment action involving question of statutory interpretation only, proper procedure was to deny motion to dismiss complaint for failure to state cause of action, thereby retaining jurisdiction of controversy, and then to declare rights of parties. Washington County Sewer Dist. No. 2 v White, 177 A.D.2d 204, 581 N.Y.S.2d 485, 1992 N.Y. App. Div. LEXIS 4146 (N.Y. App. Div. 3d Dep't 1992).

Since no questions of fact were presented by a property owner's cause of action seeking a declaration that any attempt by the county legislature to exercise approval over a contract for the connection of property to a sewer district was beyond its authority, and the county demonstrated that the owner was not entitled to a favorable declaration on the law, the supreme court should have deemed its motion to dismiss to be for a declaratory judgment in favor of the county and granted it. Matter of 22-50 Jackson Ave. Assoc., L.P. v County of Suffolk, 216 A.D.3d 943, 190 N.Y.S.3d 101, 2023 N.Y. App. Div. LEXIS 2668 (N.Y. App. Div. 2d Dep't 2023).

In an declaratory action filed by two registered voters who were not enrolled with any party, the court granted the republican state committee's motion to dismiss for failure to state a claim the voters, as independent voters, did not have a constitutionally protected right by which they could demand participation in the affairs of a political party; hence, no cause of action was stated as to any of the political parties named as defendants in the action. Van Allen v Democratic State Comm. of N.Y., 771 N.Y.S.2d 285, 1 Misc. 3d 734, 2003 N.Y. Misc. LEXIS 1209 (N.Y. Sup. Ct.), transferred, 1 N.Y.3d 545, 775 N.Y.S.2d 237, 807 N.E.2d 287, 2003 N.Y. LEXIS 4013 (N.Y. 2003).

In an declaratory action filed by two registered voters who were not enrolled with any party, the court held that the state election board's motion to dismiss was moot as to the voters' claim that the voters were already parties to an action in federal court on the same claim because, in the same proceedings, the court had granted another parties' motion to dismiss that part of the complaint. Van Allen v Democratic State Comm. of N.Y., 771 N.Y.S.2d 285, 1 Misc. 3d 734, 2003 N.Y. Misc. LEXIS 1209 (N.Y. Sup. Ct.), transferred, 1 N.Y.3d 545, 775 N.Y.S.2d 237, 807 N.E.2d 287, 2003 N.Y. LEXIS 4013 (N.Y. 2003).

In an action filed by two registered voters who were not enrolled with any party seeking a declaration that certain election laws were unconstitutional, the court denied the motions to dismiss filed by the state attorney general and an election board because a recent rule change adopted by the Independence Party, under which non-party-affiliated voters could vote in the Independence Party's primary, resulted in the creation of a bona fide controversy as to constitutionality of the election laws that prohibited such voters from voting in primaries. Van Allen v Democratic State Comm. of N.Y., 771 N.Y.S.2d 285, 1 Misc. 3d 734, 2003 N.Y. Misc. LEXIS 1209 (N.Y. Sup. Ct.), transferred, 1 N.Y.3d 545, 775 N.Y.S.2d 237, 807 N.E.2d 287, 2003 N.Y. LEXIS 4013 (N.Y. 2003).

**43. —Properly granted**

A judgment in a declaratory judgment action finding that plaintiff was not entitled to the relief requested should include a provision dismissing the action. Ramm v Ramm, 34 A.D.2d 667, 310 N.Y.S.2d 111, 1970 N.Y. App. Div. LEXIS 5133 (N.Y. App. Div. 2d Dep't 1970), aff'd, 28 N.Y.2d 892, 322 N.Y.S.2d 726, 271 N.E.2d 558, 1971 N.Y. LEXIS 1338 (N.Y. 1971).

Assuming that declaratory judgment action for relief from determination of zoning board of appeals could be instituted notwithstanding dismissal of prior Article 78 proceeding seeking same relief, action for declaratory judgment was properly dismissed where plaintiffs had been guilty of laches and plaintiffs were not aggrieved parties who properly could seek to annul zoning board of appeal's determination. Island Park Taxpayers & Property Owners Asso. v Sacino, 42 A.D.2d 729, 345 N.Y.S.2d 664, 1973 N.Y. App. Div. LEXIS 3829 (N.Y. App. Div. 2d Dep't 1973).

In an action to declare a county fire prevention ordinance unconstitutional, the complaint would be dismissed where it had been error for the trial court to entertain jurisdiction inasmuch as the constitutional claims raised by plaintiff should have been adjudicated in the pending criminal proceeding against it for violation of the ordinance. Island Swimming Sales, Inc. v County of

Nassau, 88 A.D.2d 990, 452 N.Y.S.2d 68, 1982 N.Y. App. Div. LEXIS 17385 (N.Y. App. Div. 2d Dep't 1982).

Although suits against the state primarily seeking money damages should be brought in the Court of Claims, a declaratory judgment action in the Supreme Court is an appropriate means to attack the constitutionality of a statute. However, a complaint challenging Chapter 221 of the Laws of 1980, amending subdivision (d) of § 558 of the New York City Charter, failed to state a cause of action where there was no assertion that the state was responsible for the enforcement of the statute or the imposition of any penalties under it, and the trial court erred in denying the state's motion to dismiss the complaint. New York State Restaurant Asso. v State, 105 A.D.2d 619, 481 N.Y.S.2d 351, 1984 N.Y. App. Div. LEXIS 20719 (N.Y. App. Div. 1st Dep't 1984).

Action for declaratory judgment establishing that judicial enforcement of criminal defendant's exercise of racially motivated peremptory challenges constituted equal protection violation was properly dismissed, since Appellate Division had thoroughly reviewed and decided issue in previous decision. Holtzman v Supreme Court of State, 152 A.D.2d 724, 545 N.Y.S.2d 40, 1989 N.Y. App. Div. LEXIS 10655 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 616, 550 N.Y.S.2d 276, 549 N.E.2d 478, 1989 N.Y. LEXIS 3355 (N.Y. 1989).

Service of requisite notice of intent not to renew lease on rent-stabilized apartment is precondition to maintenance of nonprimary residence action, whether by way of holdover proceeding or declaratory judgment action; thus, landlord's action for declaratory judgment determining right to possession of rent-stabilized apartment was properly dismissed. Herrick v Debard, 155 A.D.2d 320, 547 N.Y.S.2d 291, 1989 N.Y. App. Div. LEXIS 14088 (N.Y. App. Div. 1st Dep't 1989).

In action against several insurers seeking judgment declaring that they were obligated to indemnify insureds for amount of judgment in underlying tort action, Supreme Court properly dismissed complaint as against excess insurer where (1) total of underlying property damage settlement and judgment awarding damages did not exhaust limit of liability of primary coverage, and (2) language of primary insurance policy relieved excess insurer from any potential liability

for part of costs incurred in defense of underlying action after property damage claim was settled. Lavanant v General Acci. Ins. Co., 164 A.D.2d 73, 561 N.Y.S.2d 164, 1990 N.Y. App. Div. LEXIS 12981 (N.Y. App. Div. 1st Dep't 1990), app. dismissed, 77 N.Y.2d 939, 569 N.Y.S.2d 612, 572 N.E.2d 53, 1991 N.Y. LEXIS 498 (N.Y. 1991), aff'd, 79 N.Y.2d 623, 584 N.Y.S.2d 744, 595 N.E.2d 819, 1992 N.Y. LEXIS 1534 (N.Y. 1992).

In Article 78 proceeding by nursing home for judgment declaring 10 NYCRR § 51.11(d)(10) invalid, respondent Department of Health was entitled to dismissal based on failure to exhaust administrative remedies where regulation had been relied on by administrative law judge in interlocutory ruling in proceeding against nursing home for improper withdrawals of equity; nursing home was required to go forward with underlying proceeding and could challenge regulation on direct appeal in event of adverse determination. Patchogue Nursing Ctr. v New York State Dep't of Health, 189 A.D.2d 1054, 592 N.Y.S.2d 900, 1993 N.Y. App. Div. LEXIS 784 (N.Y. App. Div. 3d Dep't), app. denied, 81 N.Y.2d 711, 601 N.Y.S.2d 580, 619 N.E.2d 658, 1993 N.Y. LEXIS 1848 (N.Y. 1993).

Court properly dismissed action for judgment declaring invalidity of special meeting at which temple members decided not to renew plaintiff’s contract as rabbi where (1) temple’s constitution and by-laws specifically provided for manner in which special meetings were to be called and held, and thus failure to renew plaintiff’s contract could only be judged in terms of whether temple’s constitution and by-laws were complied with, and (2) record established that special meeting had been called and held in accordance with temple’s constitution and by-laws. Feldbin v Temple Beth-El, 210 A.D.2d 374, 620 N.Y.S.2d 113, 1994 N.Y. App. Div. LEXIS 12938 (N.Y. App. Div. 2d Dep't 1994).

New York State Insurance Fund was entitled to summary judgment dismissing action by contractor’s insurance company for judgment declaring that state fund was obligated to reimburse insurer for costs it incurred in action against contractor by workers who sustained job-related injuries, where insurer claimed that state fund, as contractor’s workers’ compensation carrier, failed to fulfill its alleged contractual liability to defend contractor in workers’ actions; in

absence of common-law indemnity claim against contractor (which contractor's insurer was barred from asserting), insurer had no independent basis on which to seek contribution from state fund. Avalanche Wrecking Corp. v New York State Ins. Fund, 211 A.D.2d 551, 621 N.Y.S.2d 74, 1995 N.Y. App. Div. LEXIS 531 (N.Y. App. Div. 1st Dep't 1995).

Court properly dismissed, for failure to state cause of action, combined Article 78 proceeding and declaratory judgment action in which petitioners sought to recover from town officials amounts that town paid for legal fees in connection with 2 lawsuits against those officials, where local law authorized town to pay counsel fees incurred for defense of officers and employees "in any civil action or proceeding" arising out of that party's public employment or duties in accordance with CLS Pub O § 18; town did not improperly expend funds in underlying lawsuits, which arose out of officials' public employment, and town was not forbidden from providing defense simply because officials' acts could be characterized as intentional wrongdoing. Bauernfeind v Doetsch (In re Schulz), 217 A.D.2d 861, 629 N.Y.S.2d 841, 1995 N.Y. App. Div. LEXIS 8171 (N.Y. App. Div. 3d Dep't 1995).

Trial court properly dismissed the insured's declaratory judgment action against the insurers as policy exclusions precluded coverage on the arbitration claims brought against the insured for its construction work. Pavarini Constr. Co. v Cont'l Ins. Co., 304 A.D.2d 501, 759 N.Y.S.2d 56, 2003 N.Y. App. Div. LEXIS 4468 (N.Y. App. Div. 1st Dep't 2003).

Dismissal of an owner's claim for declaratory relief under N.Y. C.P.L.R. 3001 relating to a foundation's refusal to authenticate the owner's artwork was proper because the law did not give a clear legal right to a declaration of authenticity when such a declaration by definition would not have been definitive; disputes concerning authenticity of artwork were particularly ill-suited to resolution by declaratory judgment. Thome v Alexander & Louisa Calder Found., 70 A.D.3d 88, 890 N.Y.S.2d 16, 2009 N.Y. App. Div. LEXIS 8707 (N.Y. App. Div. 1st Dep't 2009), app. denied, 15 N.Y.3d 703, 906 N.Y.S.2d 817, 933 N.E.2d 216, 2010 N.Y. LEXIS 1383 (N.Y. 2010).

**44. —Improperly granted**

In an action seeking a declaration that an ordinance regulating signs within a municipality was unconstitutional, an order dismissing the complaint should be modified to the extent of declaring that the ordinance is constitutional insofar as it regulates commercial speech, since the proper disposition of the municipality's motion for summary judgment should have been a declaration that the ordinance was constitutional rather than a dismissal of the complaint. Syracuse Sav. Bank v De Witt, 56 N.Y.2d 671, 451 N.Y.S.2d 713, 436 N.E.2d 1315, 1982 N.Y. LEXIS 3341 (N.Y.), app. dismissed, 459 U.S. 803, 103 S. Ct. 25, 74 L. Ed. 2d 41, 1982 U.S. LEXIS 2968 (U.S. 1982).

In an action brought by former special deputies of the county whose positions were eliminated, and whose failure to pass an examination resulted in reassignment as criminal deputies, the resolution of the county legislature eliminating the position of special deputy would be declared valid where the action had been for declaratory judgment, where dismissal of the complaint had been an improper disposition of the action, and where the validity of the resolution had been supported by the county charter's specification that the position of special deputy would be a temporary assignment made by the sheriff from the ranks of criminal deputies. Miller v Braun, 89 A.D.2d 787, 453 N.Y.S.2d 504, 1982 N.Y. App. Div. LEXIS 17903 (N.Y. App. Div. 4th Dep't 1982).

In action seeking judgment declaring town resolution null and void, court erred in granting summary judgment dismissing complaint without declaring validity of resolution, since declaratory relief was sought. Kaplen v Haverstraw, 126 A.D.2d 606, 511 N.Y.S.2d 44, 1987 N.Y. App. Div. LEXIS 41741 (N.Y. App. Div. 2d Dep't 1987).

Special Term erred in summarily dismissing declaratory judgment action brought to annul town's zoning ordinance amendment where no motion to dismiss action, or for summary judgment, was before court which would provide procedural vehicle for summary disposition, no notice was given to parties that court was contemplating summary disposition, and allegations of petition presented factual issues which prevented summary dismissal of spot zoning claim. Nogas v

Griffin, 136 A.D.2d 939, 524 N.Y.S.2d 897, 1988 N.Y. App. Div. LEXIS 1460 (N.Y. App. Div. 4th Dep't 1988).

In action for judgment declaring certain parcels of real property exempt from real property taxes, it was error to dismiss complaint against school district, although it did not render determination that plaintiff was ineligible for tax-exempt status, since plaintiff alleged that substantial portion of taxes paid by it consisted of school taxes collected in violation of CLS RPTL §§ 420-a(1)(a) and 1308, and school district would be liable for return of tax moneys in event plaintiff prevailed. Living Springs Retreat v County of Putnam, 159 A.D.2d 693, 553 N.Y.S.2d 52, 1990 N.Y. App. Div. LEXIS 3620 (N.Y. App. Div. 2d Dep't 1990).

It was error to grant summary judgment dismissing action seeking declaration that licensee had no further obligation to pay royalties under parties' agreement where lack of clarity of agreement made it susceptible to construction proffered by both parties, so that parties' intent could only be determined by evidence outside agreement, thereby raising fact issue. Arrow Communication Lab. v Pico Prods., 206 A.D.2d 922, 615 N.Y.S.2d 187, 1994 N.Y. App. Div. LEXIS 7862 (N.Y. App. Div. 4th Dep't 1994).

Where complaint sought declaratory judgment, inter alia, court erred in granting in its entirety defendant's motion seeking dismissal of complaint, and Appellate Division would reinstate that part of complaint seeking declaratory judgment. Ted's Jumbo Red Hots v Benderson Dev. Co., 216 A.D.2d 939, 628 N.Y.S.2d 893, 1995 N.Y. App. Div. LEXIS 7275 (N.Y. App. Div. 4th Dep't), app. denied, 86 N.Y.2d 710, 634 N.Y.S.2d 444, 658 N.E.2d 222, 1995 N.Y. LEXIS 3772 (N.Y. 1995).

In action for judgment declaring that equal protection was violated by disparity between salaries paid to Erie County Family Court judges and salaries paid to Family Court judges in Sullivan, Putnam, and Suffolk Counties pursuant to CLS Jud § 221-e, it was error to dismiss complaint based on stare decisis, collateral estoppel or res judicata predicated on previous salary disparity cases, where none of those cases involved Erie County Family Court judges. Killeen v Crosson,

218 A.D.2d 217, 638 N.Y.S.2d 531, 1996 N.Y. App. Div. LEXIS 1660 (N.Y. App. Div. 4th Dep't 1996).

In action for judgment declaring that equal protection was violated by disparity between salaries paid to Erie County Family Court judges and salaries paid to Family Court judges in Sullivan, Putnam, and Suffolk Counties pursuant to CLS Jud § 221-e, it was error to dismiss complaint for failure to state cause of action where statistical charts and financial data submitted by parties raised substantial issues as to whether rational basis existed for salary disparities raised by plaintiffs. Killeen v Crosson, 218 A.D.2d 217, 638 N.Y.S.2d 531, 1996 N.Y. App. Div. LEXIS 1660 (N.Y. App. Div. 4th Dep't 1996).

In action to declare deed null and void, court erred in dismissing complaint where fact issues existed as whether deed was delivered and accepted. Dingle v Glass, 247 A.D.2d 507, 668 N.Y.S.2d 478, 1998 N.Y. App. Div. LEXIS 1493 (N.Y. App. Div. 2d Dep't 1998).

In action for judgment declaring that village acquired ownership of certain valves and water lines located in defendant town, motion for preliminary injunction enjoining town and county water authority from interfering with subject valves and lines was properly denied on ground that village was not entitled to relief sought in complaint, but court erred in dismissing complaint rather than declaring parties' rights. Village of Webster v Town of Webster, 270 A.D.2d 910, 705 N.Y.S.2d 774, 2000 N.Y. App. Div. LEXIS 3556 (N.Y. App. Div. 4th Dep't), app. denied, 710 N.Y.S.2d 238, 2000 N.Y. App. Div. LEXIS 10449 (N.Y. App. Div. 4th Dep't 2000), app. denied, 95 N.Y.2d 901, 716 N.Y.S.2d 639, 739 N.E.2d 1143, 2000 N.Y. LEXIS 2947 (N.Y. 2000).

When homeowners sought declaratory judgments that (1) the homeowners had the right to select a certain school district, under N.Y. Educ. Law § 3203(1), and (2) the school district and a board of education were estopped from denying the homeowners this choice, it was error to dismiss the homeowners' claims because the homeowners' allegations presented justiciable controversies sufficient to invoke the trial court's power to render a declaratory judgment, under N.Y. C.P.L.R. 3001. Palm v Tuckahoe Union Free School Dist., 95 A.D.3d 1087, 944 N.Y.S.2d 291, 2012 N.Y. App. Div. LEXIS 3804 (N.Y. App. Div. 2d Dep't 2012).

Amended complaint was sufficient to invoke the trial court's power to render a declaration as to whether the tenants were unlawfully harassed by the owner, in violation of New York City, N.Y., Admin. Code § 27-2005(d), and the trial court erred in granting the owner's cross motion which was to dismiss the third cause of action insofar as asserted against it; however, the amended complaint was insufficient to state a cause of action against the counseling center based on an alleged violation of § 27-2005(d), and the trial court correctly granted that branch of the counseling center's motion to dismiss the third cause of action insofar as asserted against it. DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 A.D.3d 725, 958 N.Y.S.2d 417, 2013 N.Y. App. Div. LEXIS 174 (N.Y. App. Div. 2d Dep't 2013).

Tenants' first cause of action was sufficient to invoke the trial court's power to render a declaration that the single-occupancy rooms in which they were living were subject to rent stabilization, New York City, N.Y., Admin. Code § 26-506, and as to whether the tenants were permanent tenants; since a declaration of this nature would have resolved an actual controversy between the tenants and the owner, as well as between the tenants and the counseling center, in its capacity as the alleged sublessor of the disputed rooms, N.Y. Comp. Codes R. & Regs. tit. 9, § 2505.7(b), dismissal the first cause of action was error. The second cause of action was sufficient to invoke the trial court's power to render a declaration as to whether the alleged agreement between the owner and the counseling center constituted an illusory tenancy, and dismissal of this claim was also error. DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 A.D.3d 725, 958 N.Y.S.2d 417, 2013 N.Y. App. Div. LEXIS 174 (N.Y. App. Div. 2d Dep't 2013).

Sixth, seventh, and eighth causes of action were sufficient to invoke the trial court's power to render a declaration as to whether the transitional residency agreements were void pursuant to N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.13, invalid as against public policy, and void as unconscionable contracts of adhesion, respectively; since the amended complaint effectively alleged that the owner and the counsel center participated in the enforcement of the transitional residency agreements, the trial court erred in directing the dismissal of the sixth, seventh, and

eighth causes of action insofar as asserted against those defendants. Furthermore, since the material allegations of the complaint, taken as true, implicated factual issues such that the rights of the parties could not have been determined as a matter of law, the trial court erred by, in effect, purporting to make a declaration, upon these cross motions to dismiss the complaint, that the remaining occupants of the premises leased by the owner and the counseling center were licensees of the counseling center and were not tenants at the subject premises DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 A.D.3d 725, 958 N.Y.S.2d 417, 2013 N.Y. App. Div. LEXIS 174 (N.Y. App. Div. 2d Dep't 2013).

Sixth, seventh, and eighth causes of action were sufficient to invoke the trial court's power to render a declaration as to whether the transitional residency agreements were void pursuant to N.Y. Comp. Codes R. & Regs. tit. 9, § 2520.13, invalid as against public policy, and void as unconscionable contracts of adhesion, respectively; since the amended complaint effectively alleged that the owner and the counsel center participated in the enforcement of the transitional residency agreements, the trial court erred in directing the dismissal of the sixth, seventh, and eighth causes of action insofar as asserted against those defendants. Furthermore, since the material allegations of the complaint, taken as true, implicated factual issues such that the rights of the parties could not have been determined as a matter of law, the trial court erred by, in effect, purporting to make a declaration, upon these cross motions to dismiss the complaint, that the remaining occupants of the premises leased by the owner and the counseling center were licensees of the counseling center and were not tenants at the subject premises DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 A.D.3d 725, 958 N.Y.S.2d 417, 2013 N.Y. App. Div. LEXIS 174 (N.Y. App. Div. 2d Dep't 2013).

Tenants' first cause of action was sufficient to invoke the trial court's power to render a declaration that the single-occupancy rooms in which they were living were subject to rent stabilization, New York City, N.Y., Admin. Code § 26-506, and as to whether the tenants were permanent tenants; since a declaration of this nature would have resolved an actual controversy between the tenants and the owner, as well as between the tenants and the counseling center,

in its capacity as the alleged sublessor of the disputed rooms, N.Y. Comp. Codes R. & Regs. tit. 9, § 2505.7(b), dismissal the first cause of action was error. The second cause of action was sufficient to invoke the trial court's power to render a declaration as to whether the alleged agreement between the owner and the counseling center constituted an illusory tenancy, and dismissal of this claim was also error. DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 A.D.3d 725, 958 N.Y.S.2d 417, 2013 N.Y. App. Div. LEXIS 174 (N.Y. App. Div. 2d Dep't 2013).

Amended complaint was sufficient to invoke the trial court's power to render a declaration as to whether the tenants were unlawfully harassed by the owner, in violation of New York City, N.Y., Admin. Code § 27-2005(d), and the trial court erred in granting the owner's cross motion which was to dismiss the third cause of action insofar as asserted against it; however, the amended complaint was insufficient to state a cause of action against the counseling center based on an alleged violation of § 27-2005(d), and the trial court correctly granted that branch of the counseling center's motion to dismiss the third cause of action insofar as asserted against it. DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 A.D.3d 725, 958 N.Y.S.2d 417, 2013 N.Y. App. Div. LEXIS 174 (N.Y. App. Div. 2d Dep't 2013).

**45. — —Declaration of rights of parties**

In a declaratory judgment action challenging Medicaid reimbursement rates, the appellate court's judgment that granted summary judgment to defendant dismissing the complaint would be modified, by declaring the rights of the parties, since the appellate court should have directed the entry of a declaration in favor of the prevailing party, rather than dismissal of the complaint. Holliswood Care Center v Whalen, 58 N.Y.2d 1001, 461 N.Y.S.2d 1009, 448 N.E.2d 794, 1983 N.Y. LEXIS 2948 (N.Y. 1983).

In an action for declaratory judgment, where the disposition is on the merits, the court should make a declaration, even though the plaintiff is not entitled to the declaration he seeks. Accordingly, in an action to declare plaintiff the sole lawful owner of certain real property by

reason of defendant's forfeiture for failure to make payments due, an order dismissing the complaint would be modified by substituting therefor a declaration that plaintiff was not the owner, nor possessed of any right, title or interest held by defendant in a consolidated mortgage provided defendant against tendered payments due, since the parties' course of conduct indicated waiver of the time periods for repayment as established under the original loan agreement and option agreement which provided that time was of the essence only as to the last payment, which was due on a legal holiday, and thus tender of the final payment on the day after the holiday was timely. Hirsch v Lindor Realty Corp., 63 N.Y.2d 878, 483 N.Y.S.2d 196, 472 N.E.2d 1024, 1984 N.Y. LEXIS 4685 (N.Y. 1984).

Dismissal of complaint of licensees of retail liquor package store for declaration that amendment to rule 17 of the rules of state liquor authority was invalid and void was error since they were entitled to a declaration of their rights. Cantlin v State Liquor Authority, 23 A.D.2d 930, 259 N.Y.S.2d 310, 1965 N.Y. App. Div. LEXIS 4303 (N.Y. App. Div. 3d Dep't), aff'd, 16 N.Y.2d 155, 262 N.Y.S.2d 809, 210 N.E.2d 133, 1965 N.Y. LEXIS 1193 (N.Y. 1965).

In an action for declaratory judgment, even if plaintiff does not prevail, the complaint should not be dismissed and judgment should be entered setting forth a declaration of the rights of the parties. Connolly v East Hills, 32 A.D.2d 664, 300 N.Y.S.2d 619, 1969 N.Y. App. Div. LEXIS 3886 (N.Y. App. Div. 2d Dep't 1969), aff'd, 26 N.Y.2d 801, 309 N.Y.S.2d 223, 257 N.E.2d 666, 1970 N.Y. LEXIS 1533 (N.Y. 1970).

In an action by a liability insurance company against a car dealership for a judgment declaring that the dealership had breached the cooperation clause of the company's policy of liability insurance so as to warrant disclaimer by the company, the complaint should not have been dismissed since in an action for declaratory judgment the rights of the parties should be declared. Balboa Ins. Co. v Berland Lincoln-Mercury, Inc., 81 A.D.2d 626, 438 N.Y.S.2d 121, 1981 N.Y. App. Div. LEXIS 11126 (N.Y. App. Div. 2d Dep't 1981).

Upon determining that a challenged disclaimer of liability was proper and effective, the trial court in actions, inter alia, for declaratory judgments should have made appropriate declarations

rather than dismissing the complaints in their entirety. Josephs v Reliance Ins. Co., 84 A.D.2d 547, 443 N.Y.S.2d 179, 1981 N.Y. App. Div. LEXIS 15607 (N.Y. App. Div. 2d Dep't 1981).

In an action for a declaratory judgment seeking to determine the rights and obligations of the parties under an insurance policy, the trial court erred in dismissing the complaint on the basis that plaintiff was not entitled to the declaration, since in a declaratory judgment action the court should declare the rights of the parties. Foremost Ins. Co. v Rios, 85 A.D.2d 677, 445 N.Y.S.2d 511, 1981 N.Y. App. Div. LEXIS 16502 (N.Y. App. Div. 2d Dep't 1981).

Although Trial Term properly concluded that an article of a town's zoning ordinance was not null and void as applied to plaintiffs, the court erred in dismissing plaintiffs' cause for a declaratory judgment merely because plaintiffs were not entitled to the declaration sought by them; a declaration as to the rights of the parties should have been made by the court. Greene v Southeast, 86 A.D.2d 650, 446 N.Y.S.2d 407, 1982 N.Y. App. Div. LEXIS 15195 (N.Y. App. Div. 2d Dep't), dismissed, Greene v Town of Southeast, 56 N.Y.2d 804, 1982 N.Y. LEXIS 5918 (N.Y. 1982).

In an action to declare that the defendant was obligated to defend and indemnify the plaintiffs in a lawsuit against them, pursuant to a policy of liability insurance, a judgment which dismissed the complaint would be modified by substituting a provision declaring that the defendant was not obligated to defend and indemnify the plaintiffs in the underlying personal injury action since the court should not have dismissed the complaint in its entirety, but, rather should have declared the rights of the parties. Highland Ave. Baptist Church v Liberty Mut. Ins. Co., 90 A.D.2d 495, 454 N.Y.S.2d 750, 1982 N.Y. App. Div. LEXIS 18520 (N.Y. App. Div. 2d Dep't 1982), app. denied, 58 N.Y.2d 610, 462 N.Y.S.2d 1027, 449 N.E.2d 427, 1983 N.Y. LEXIS 3847 (N.Y. 1983).

In an action seeking declaratory judgment of the rights of the parties to an oral modification of agreements between them, the trial court erred in granting plaintiffs' motion to dismiss the complaint, where issues of fact existed as to whether defendants either had waived or should be estopped from enforcing certain terms of the agreements, and where the proper procedure was

to deny the motion to dismiss the complaint, thereby retaining jurisdiction of the controversy, and then to declare the rights of the parties. Nadel v Costa, 91 A.D.2d 976, 457 N.Y.S.2d 345, 1983 N.Y. App. Div. LEXIS 16270 (N.Y. App. Div. 2d Dep't 1983).

In an action by note holders concerning their rights to interest payments, a cause of action seeking a judgment declaring plaintiff's right to future interest installments was improperly dismissed and would be reinstated and the rights of the parties declared, where the trial court had determined the limited circumstances under which the trustees could withhold interest installments in the future. Shapiro v United States Trust Co., 94 A.D.2d 603, 461 N.Y.S.2d 842, 1983 N.Y. App. Div. LEXIS 18013 (N.Y. App. Div. 1st Dep't 1983).

Although the trial court, in deciding adversely to plaintiffs, was correct on the merits of a declaratory judgment action concerning plaintiffs' performance in their civil service positions, it erred in dismissing the complaints, and instead should have made a declaration favorable to defendants. Murphy v Cass, 104 A.D.2d 405, 478 N.Y.S.2d 726, 1984 N.Y. App. Div. LEXIS 19865 (N.Y. App. Div. 2d Dep't 1984).

In declaratory judgment action in which it was determined that plaintiff was not entitled to relief sought, Special Term should not have dismissed complaint, but should have issued declaration in defendant's favor. Rochester Gas & Electric Corp. v Public Service Com., 119 A.D.2d 353, 507 N.Y.S.2d 305, 1986 N.Y. App. Div. LEXIS 60632 (N.Y. App. Div. 3d Dep't 1986), aff'd, 71 N.Y.2d 313, 525 N.Y.S.2d 809, 520 N.E.2d 528, 1988 N.Y. LEXIS 86 (N.Y. 1988).

In declaratory judgment action, court properly determined that plaintiff's decedent did not hold $^1/_3$ interest in defendant company by fact that (1) he was never named as partner nor signed any papers in such capacity, (2) he was always listed in payroll books as employee, (3) his duties never included tasks which could be considered management responsibilities, and (4) neither his nor partnership's tax returns demonstrated any partnership profits being paid to him; however, court erred in dismissing complaint without declaring rights of parties, and thus judgment would be modified by declaring that plaintiff's decedent was not partner in company.

Alleva v Alleva Dairy, 129 A.D.2d 663, 514 N.Y.S.2d 422, 1987 N.Y. App. Div. LEXIS 45347 (N.Y. App. Div. 2d Dep't 1987).

Although court properly determined that deed was valid, it should have made declaration to that effect rather than dismissing complaint in action to declare deed void. Costello v O'Toole, 149 A.D.2d 396, 539 N.Y.S.2d 501, 1989 N.Y. App. Div. LEXIS 4428 (N.Y. App. Div. 2d Dep't 1989).

Supreme Court should have declared rights of parties, rather than dismissing complaint in its entirety, where religious sect brought hybrid action for declaratory judgment and proceeding under Article 78 seeking declaration that Department of Education regulation requiring instruction regarding AIDS was unconstitutional as applied to them. Ware v Valley Stream High School Dist., 150 A.D.2d 14, 545 N.Y.S.2d 316, 1989 N.Y. App. Div. LEXIS 11235 (N.Y. App. Div. 2d Dep't), app. denied, 545 N.Y.S.2d 539, 1989 N.Y. App. Div. LEXIS 16840 (N.Y. App. Div. 2d Dep't 1989), app. denied, 74 N.Y.2d 829, 546 N.Y.S.2d 339, 545 N.E.2d 629, 1989 N.Y. LEXIS 2832 (N.Y. 1989), modified, 75 N.Y.2d 114, 551 N.Y.S.2d 167, 550 N.E.2d 420, 1989 N.Y. LEXIS 4380 (N.Y. 1989).

In declaratory judgment action in which Supreme Court decided matter in favor of defendants, court erred in dismissing complaint rather than in issuing declaration in favor of defendants, and matter would be reversed in order to make appropriate declaration. Kiamesha Concord, Inc. v Chairman of Bd. of Supervisors, 166 A.D.2d 70, 569 N.Y.S.2d 494, 1991 N.Y. App. Div. LEXIS 6707 (N.Y. App. Div. 3d Dep't 1991).

In action seeking declaratory judgment that town’s abandonment of road was void for noncompliance with CLS High § 205(1), court erred in granting judgment dismissing complaint rather than declaring rights of parties. Pless v Town of Royalton, 185 A.D.2d 659, 585 N.Y.S.2d 650, 1992 N.Y. App. Div. LEXIS 9196 (N.Y. App. Div. 4th Dep't 1992), aff'd, 81 N.Y.2d 1047, 601 N.Y.S.2d 455, 619 N.E.2d 392, 1993 N.Y. LEXIS 1747 (N.Y. 1993).

County Court should have made declaration of parties’ rights in action under CLS RPAPL Art 15 seeking declaration of prescriptive easement rather than dismissing complaint on finding that

plaintiffs had never asserted that their use was hostile or adverse. Duke v Sommer, 205 A.D.2d 1009, 613 N.Y.S.2d 985, 1994 N.Y. App. Div. LEXIS 7018 (N.Y. App. Div. 3d Dep't 1994).

In action brought by former village employees, seeking to enjoin their discharge and to declare such discharge improper, court properly denied employees' application for injunctive relief, but it was inappropriate to dismiss action in its entirety without also declaring parties' rights. Hudson v Murray, 207 A.D.2d 508, 207 A.D.2d 527, 616 N.Y.S.2d 386, 1994 N.Y. App. Div. LEXIS 8585 (N.Y. App. Div. 2d Dep't 1994).

In the absence of a holding that a dispute is not ripe for adjudication, the court should not dismiss a complaint in a declaratory judgment action, but should declare the parties' rights. Thus, in an action to declare the rights of parties in leased premises, the trial court properly treated defendant's motion to dismiss the complaint as a motion for declaration in its favor. McKinsey & Co. v Olympia & York 245 Park Ave. Co., 79 A.D.2d 557, 433 N.Y.S.2d 802, 1980 N.Y. App. Div. LEXIS 13862 (N.Y. App. Div. 1st Dep't 1980).

Trial court dismissed the petition/complaint, but did not issue a declaration as was required in a declaratory judgment action; the appellate court therefore declared that a board's resolution setting sewer rates was valid. Matter of Shellard v Town Bd. of the Town of Queensbury, 70 A.D.3d 1288, 895 N.Y.S.2d 595, 2010 N.Y. App. Div. LEXIS 1570 (N.Y. App. Div. 3d Dep't 2010).

In a usual case it is error for a court to dismiss a cause of action for declaratory judgment; rather, the rights of the parties should be declared. Hering v Canandaigua, 52 Misc. 2d 98, 275 N.Y.S.2d 56, 1966 N.Y. Misc. LEXIS 1277 (N.Y. Sup. Ct. 1966).

Where an adverse possession action was, in part, a declaratory judgment action, the trial court should have made a declaration in favor of the landlord rather than dismissing the tenant's complaint. Katz v Max Mgmt. Corp., 302 A.D.2d 496, 755 N.Y.S.2d 282, 2003 N.Y. App. Div. LEXIS 1672 (N.Y. App. Div. 2d Dep't 2003), app. denied, 1 N.Y.3d 501, 775 N.Y.S.2d 238, 807

N.E.2d 288, 2003 N.Y. LEXIS 3918 (N.Y. 2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2420, 158 L. Ed. 2d 982, 2004 U.S. LEXIS 3858 (U.S. 2004).

In an action by plaintiff child, by and through the child's father, seeking a declaration that defendant insurer had a duty to provide personal liability coverage to defendant, its insured, in an underlying personal injury action brought on behalf of the child, the trial court correctly concluded that the relevant homeowner's insurance policy issued by the insurer unambiguously excluded coverage for injury to the child, a person under the age of 21 in the care of the policy holder, but the trial court erred in dismissing the child's complaint rather than declaring the rights of the parties; the trial court should have entered a judgment in the insurer's favor declaring that the insurer had no duty to provide personal liability coverage to the insured in the underlying personal injury action. Qiu v Livingston Mut. Ins. Co., 305 A.D.2d 1104, 759 N.Y.S.2d 727, 2003 N.Y. App. Div. LEXIS 4768 (N.Y. App. Div. 4th Dep't 2003).

*Unpublished decision:* While a school board member sought dismissal of an insurer's counterclaim to deny insurance coverage, the mere dismissal of a pleading was not an affirmative declaration of the parties' rights pursuant to N.Y. C.P.L.R. 3001. Thus, the court at summary judgment deemed the board member's motion to dismiss as a request for declaratory relief similar to that of the other school board members. Barkan v N.Y. Sch. Ins. Reciprocal, 237 N.Y.L.J. 75, 2007 N.Y. Misc. LEXIS 2818 (N.Y. Sup. Ct. Mar. 22, 2007), aff'd in part, modified, app. dismissed in part, 65 A.D.3d 1061, 886 N.Y.S.2d 414, 2009 N.Y. App. Div. LEXIS 6433 (N.Y. App. Div. 2d Dep't 2009).

**46. Summary judgment**

In declaratory judgment action seeking access to right-of-way over defendants' properties, defendants were not entitled to summary judgment on merger grounds where plaintiffs made prima facie showing of their right to easement at issue, and there was no proof that all dominant and servient estates had vested in one owner. Will v Gates, 89 N.Y.2d 778, 658 N.Y.S.2d 900, 680 N.E.2d 1197, 1997 N.Y. LEXIS 759 (N.Y. 1997).

In action to enforce restrictive covenant which restrained former employees from providing accountancy services to plaintiff's local clients for 18 months, plaintiff was entitled to partial summary judgment declaring that agreement was valid and enforceable except to extent that it required former employees to compensate plaintiff for lost patronage of clients with whom they did not acquire relationship through direct provision of substantive accounting services during their employment with plaintiff, as goodwill of such clients was not acquired by expenditure of plaintiff's resources. BDO Seidman v Hirshberg, 93 N.Y.2d 382, 690 N.Y.S.2d 854, 712 N.E.2d 1220, 1999 N.Y. LEXIS 860 (N.Y. 1999).

City Court Judge of New Rochelle was entitled to summary judgment in action to declare CLS Jud § 221-i unconstitutional insofar as it provided for unfavorable salary differentials between himself and City Court Judges of White Plains, since state failed to establish rational basis for statutorily mandated disparate financial treatment of similarly situated judges of 2 cities located within 10 miles of each other in same county having true unity of judicial interest indistinguishable by separate geographic considerations; thus, statute violated equal protection. Mackston v State, 126 A.D.2d 710, 510 N.Y.S.2d 912, 1987 N.Y. App. Div. LEXIS 41855 (N.Y. App. Div. 2d Dep't 1987).

Defendant was entitled to summary judgment dismissing plaintiffs' action for judgment declaring existence of easement across defendant's property, and denying plaintiffs' motion for permission to enter property to install sewer line, since (1) subdivision plat showing proposed sewer which, if built, would have traversed defendant's property and run into property now owned by plaintiffs did not establish existence of easement, absent any representations to plaintiffs that sewer line had been or would be built, and (2) plaintiffs failed to establish implied easement by necessity where alternative means of sewer hookup was available 72 feet from their property. Nieto v Ceraso, 134 A.D.2d 579, 521 N.Y.S.2d 481, 1987 N.Y. App. Div. LEXIS 50788 (N.Y. App. Div. 2d Dep't 1987).

In action for judgment declaring deed to be void, defendants were entitled to summary judgment dismissing plaintiff's causes of action alleging that deed was not delivered or accepted, where

deed was dated August 8, 1986 and was recorded in September of 1986, one defendant stated that deed was delivered to him and was accepted by him on date it was executed, and plaintiff failed to offer any evidence to rebut defendant's statement or to rebut presumption of delivery resulting from recording of deed. Moczan v Moczan, 135 A.D.2d 692, 522 N.Y.S.2d 591, 1987 N.Y. App. Div. LEXIS 47785, 1987 N.Y. App. Div. LEXIS 52634 (N.Y. App. Div. 2d Dep't 1987).

In action for judgment declaring resolution and map adopted by city board of estimate unconstitutional as applied to plaintiffs' property (on ground that $^1/_3$ of plaintiffs' property and 50 percent of their house were in mapped bed of street which was proposed to be widened by 40 feet), city was entitled to summary judgment where plaintiffs had not sought either permit to build in bed of mapped street (under CLS Gen City § 35) or "demapping" of street (pursuant to city charter) since (1) mere mapping of street did not constitute final administrative action, and its impact on plaintiffs' property was not direct and immediate, and thus issues tendered by plaintiffs were not ripe for review, and (2) even if mapping were deemed final administrative action subject to review, plaintiffs would be required to exhaust their administrative remedies, absent evidence that resort to those remedies would necessarily prove futile. Petosa v New York, 135 A.D.2d 800, 522 N.Y.S.2d 904, 1987 N.Y. App. Div. LEXIS 52733 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 807, 530 N.Y.S.2d 110, 525 N.E.2d 755, 1988 N.Y. LEXIS 1070 (N.Y. 1988).

Defendant was entitled to summary judgment declaring that plaintiff had assigned his right, title and interest in lease to defendant despite lease provision stating that if lease were assigned, term "tenant" therein would be deemed to include both assignee and assignor, since that provision was for benefit of landlord in retaining plaintiff's liability under lease despite assignment, whereas rights and liabilities between plaintiff and defendant were controlled by terms of assignment, which was otherwise clear, unequivocal and contained no reservations. Capoccia v Brognano, 135 A.D.2d 1010, 522 N.Y.S.2d 733, 1987 N.Y. App. Div. LEXIS 52891 (N.Y. App. Div. 3d Dep't 1987), app. dismissed, 71 N.Y.2d 1022, 530 N.Y.S.2d 557, 526 N.E.2d 48, 1988 N.Y. LEXIS 2106 (N.Y. 1988).

County was entitled to summary judgment declaring that disabled correction officer, and those similarly situated, could not recover nightshift differential payments while disabled since (1) CLS Gen Mun § 207-c provides that sheriff's department corrections officers injured in performance of duties shall be paid "regular salary or wages," (2) there was nothing in parties' collective bargaining agreement allowing for shift differential payments during disability, and (3) payment of shift differential to disabled public employees covered by § 217-c would unfairly discriminate against persons actually working undesirable shifts and suffering inconveniences attendant thereto. Benson v County of Nassau, 137 A.D.2d 642, 524 N.Y.S.2d 733, 1988 N.Y. App. Div. LEXIS 1782 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 809, 534 N.Y.S.2d 666, 531 N.E.2d 298, 1988 N.Y. LEXIS 2722 (N.Y. 1988).

Property owners were entitled to summary judgment declaring that it was arbitrary, capricious and abuse of discretion for county to deny their application to recover 4 parcels of real estate obtained by county for delinquent real property taxes where county had granted owners' application for redemption of 9 other properties they owned within previous 5 months, and county failed to offer any rational explanation for its inconsistent conduct. Staller v County of Suffolk, 139 A.D.2d 726, 527 N.Y.S.2d 477, 1988 N.Y. App. Div. LEXIS 4469 (N.Y. App. Div. 2d Dep't), app. denied, 73 N.Y.2d 701, 536 N.Y.S.2d 60, 532 N.E.2d 1288, 1988 N.Y. LEXIS 3398 (N.Y. 1988).

Tenants were entitled to summary judgment declaring their entitlement to protection of Loft Law since landlord voluntarily registered building as interim multiple dwelling and failed to challenge coverage within 30 days of registration as required under New York City Loft Board Regulations § 2(A)(5), and landlord subsequently filed 2 renewal applications certifying that information contained in original—that space utilized by tenants was residentially occupied—remained "true and correct." Mongelli v Sharp, 140 A.D.2d 273, 528 N.Y.S.2d 571, 1988 N.Y. App. Div. LEXIS 5555 (N.Y. App. Div. 1st Dep't 1988).

Landlord was entitled to summary judgment in tenant's action for judgment declaring tenant's right to renewal of lease where it was undisputed that as of last date on which tenant could

timely exercise renewal option, several building, fire and environmental control board violations, issued against tenant from its use of premises, remained on record, which violated lease provision requiring tenant to “comply with all laws...and regulations...applicable to the demised premises,” thereby failing to satisfy condition of renewal option that tenant not be in default under lease; landlord did not waive tenant’s default by waiting until expiration of lease term to notify tenant of basis for rejecting exercise of option since landlord was not aware of violations until after option was to be exercised, and lease contained nonwaiver clause. TSS-Seedman's, Inc. v Nicholas, 143 A.D.2d 223, 531 N.Y.S.2d 827, 1988 N.Y. App. Div. LEXIS 8736 (N.Y. App. Div. 2d Dep't 1988).

Insurance companies were entitled to summary judgment declaring that they were not liable to defend or indemnify their insured under boiler and machinery policies, which covered losses relating to designated machinery, in connection with potential cleanup of hazardous waste site since facts alleged clearly did not bring case within coverage of policies and mere speculation as to possibility that additional facts might later be developed would not trigger duty. Warrensburg Bd. & Paper Corp. v Unigard Mut. Ins. Co., 143 A.D.2d 602, 533 N.Y.S.2d 422, 1988 N.Y. App. Div. LEXIS 10292 (N.Y. App. Div. 1st Dep't 1988).

Plaintiff attorneys in Washington, D.C. law firm were entitled to summary judgment in action for declaration that imposition by State Tax Commission of nonresident partner income taxes against them violated CLS Tax §§ 632 and 637, and their constitutional due process and equal protection rights, where plaintiff’s law firm had been associated with New York City law firm in attempt to encourage reciprocal referral of clients, but firms were managed separately, had their own clients, collected their own fees, paid their own expenses and distributed their own income to their own partners. Farmer v State Tax Com., 144 A.D.2d 720, 535 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 10937 (N.Y. App. Div. 3d Dep't 1988).

Daughter of deceased rent-stabilized tenant was entitled to summary judgment declaring that she was entitled to renewal of lease pursuant to 9 NYCRR 2523.5(b)(2) where daughter moved in with parents in mid-1960’s, father died in 1976, mother continued to renew lease, last lease

was to expire 1987, mother died in 1985, and daughter requested lease be changed to her name on renewal in 1987; Supreme Court's holding that 9 NYCRR 2523.5(b)(2) was invalid, since daughter was not named tenant in lease, was erroneous. Cohen v Berger, 153 A.D.2d 920, 545 N.Y.S.2d 728, 1989 N.Y. App. Div. LEXIS 11963 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 75 N.Y.2d 809, 552 N.Y.S.2d 111, 551 N.E.2d 604, 1990 N.Y. LEXIS 72 (N.Y. 1990), app. dismissed, 76 N.Y.2d 971, 563 N.Y.S.2d 765, 565 N.E.2d 514, 1990 N.Y. LEXIS 3519 (N.Y. 1990).

Employee was entitled to summary judgment declaring that he was not bound by restrictive covenant entered into between himself and employer where there was no showing that employee was in possession of any trade secrets or other confidential information not available to public at large, that employee's services were unique or extraordinary to extent that would "make his replacement impossible or that the loss of such services would cause the employer irreparable injury," or that geographic scope (entire world) was reasonable. Garfinkle v Pfizer, Inc., 162 A.D.2d 197, 556 N.Y.S.2d 322, 1990 N.Y. App. Div. LEXIS 7082 (N.Y. App. Div. 1st Dep't 1990).

Tenant was entitled to summary judgment declaring that it had right to continued occupancy of commercial premises, and to renewal of lease, where (1) its failure to timely exercise option to renew lease was inadvertent and excusable, (2) default would result in forfeiture of its investment in wholesale beer and soda business, which it had purchased from defendant landlord, (3) landlord was not prejudiced by tenant's delay in exercising renewal option, (4) landlord had apparently acted in bad faith by using last-minute violations of lease to deny tenant's right to renew, and (5) tenant had acted promptly to cure cited violations and thus was in substantial compliance with lease terms. Souslian Wholesale Beer & Soda, Inc. v 380-4 Union Ave. Realty Corp., 166 A.D.2d 435, 560 N.Y.S.2d 491, 1990 N.Y. App. Div. LEXIS 11825 (N.Y. App. Div. 2d Dep't 1990), app. denied, 78 N.Y.2d 858, 575 N.Y.S.2d 454, 580 N.E.2d 1057, 1991 N.Y. LEXIS 4088 (N.Y. 1991).

Partnership was entitled to summary judgment dismissing action by limited partner for judgment declaring conveyance of partnership property to be void, despite contention of limited partner that limited partners had not agreed to sale and that sale made it impossible for partnership to carry on business, where (1) partnership agreement gave general partner right to sell property with consent of at least 51 percent of limited partners, (2) partnership presented consents from 75 percent of limited partners, and (3) all limited partners except plaintiff had accepted distribution of proceeds of sale. Alexandru v Berritt, 168 A.D.2d 472, 562 N.Y.S.2d 712, 1990 N.Y. App. Div. LEXIS 15407 (N.Y. App. Div. 2d Dep't 1990).

Plaintiffs were entitled to summary judgment declaring that CLS Tax § 651(b)(2) violated due process insofar as it required nonresident spouse of nonresident taxpayer to file joint state income tax return if couple filed joint federal tax return; out-of-state cohabitation with spouse having New York income, and filing joint federal income tax return with that spouse, did not constitute necessary minimum connection to support extraterritorial exercise of New York's taxing power. Brady v State, 172 A.D.2d 17, 576 N.Y.S.2d 896, 1991 N.Y. App. Div. LEXIS 15096 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 915, 581 N.Y.S.2d 667, 590 N.E.2d 252, 1992 N.Y. LEXIS 5035 (N.Y. 1992), aff'd, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060, 1992 N.Y. LEXIS 4241 (N.Y. 1992).

State was entitled to summary judgment declaring that CLS Tax § 601(e), which establishes 2-step process to calculate income tax due from nonresidents, did not violate due process rights of nonresident taxpayers on ground that its inclusion of nonresident's non-New York income in initial determination of tax before applying apportionment formula was functional equivalent of tax on out-of-state income, since income from non-New York sources was not used in any respect other than measurement of tax due on New York income. Brady v State, 172 A.D.2d 17, 576 N.Y.S.2d 896, 1991 N.Y. App. Div. LEXIS 15096 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 915, 581 N.Y.S.2d 667, 590 N.E.2d 252, 1992 N.Y. LEXIS 5035 (N.Y. 1992), aff'd, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060, 1992 N.Y. LEXIS 4241 (N.Y. 1992).

State was entitled to summary judgment declaring that CLS Tax § 601(e) does not discriminate against nonresident taxpayers in favor of New York residents by using nonresident's income from New York sources to determine appropriate tax rate to be applied to nonresident's New York income, since applicable tax rate for both residents and nonresidents is derived in same manner, and both are derived from federal adjusted gross income, which generally constitutes income from all sources; resident and nonresident taxpayers similarly situated in terms of ability to pay taxes out of all sources of income are treated same within parameters of New York's progressive income taxation system. Brady v State, 172 A.D.2d 17, 576 N.Y.S.2d 896, 1991 N.Y. App. Div. LEXIS 15096 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 915, 581 N.Y.S.2d 667, 590 N.E.2d 252, 1992 N.Y. LEXIS 5035 (N.Y. 1992), aff'd, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060, 1992 N.Y. LEXIS 4241 (N.Y. 1992).

State was entitled to summary judgment declaring that CLS Tax § 601(e) is not unconstitutional on ground that it imposes tax on unearned income on nonresidents from non-New York sources, since statute, by its own terms, does not apply directly to nonresident taxpayers; inclusion of non-New York income to calculate nonresident's tax liability merely serves to add marginally to tax rate applied to nonresident's New York income, and validity of such use has been sustained. Brady v State, 172 A.D.2d 17, 576 N.Y.S.2d 896, 1991 N.Y. App. Div. LEXIS 15096 (N.Y. App. Div. 3d Dep't 1991), app. dismissed, 79 N.Y.2d 915, 581 N.Y.S.2d 667, 590 N.E.2d 252, 1992 N.Y. LEXIS 5035 (N.Y. 1992), aff'd, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060, 1992 N.Y. LEXIS 4241 (N.Y. 1992).

Defendant was entitled to summary judgment dismissing complaint for declaration that plaintiff's air space had been invaded by machinery and parapets constructed on roof of defendant's building where (1) rights to air space had been granted to plaintiff's predecessor in interest to give it sufficient interest in adjacent property to enable it to qualify as single owner under zoning ordinance, and (2) defendant's encroachment on air space was de minimis as matter of law and did not affect plaintiff's status under zoning ordinance. Wing Ming Properties, Ltd. v Mott Operating Corp., 172 A.D.2d 301, 568 N.Y.S.2d 605, 1991 N.Y. App. Div. LEXIS 4738 (N.Y.

App. Div. 1st Dep't 1991), aff'd, 79 N.Y.2d 1021, 584 N.Y.S.2d 427, 594 N.E.2d 921, 1992 N.Y. LEXIS 1289 (N.Y. 1992).

Defendants were entitled to summary judgment declaring that plaintiff landowners did not have easement over vacant land to east of their lot based on language in 1897 deed conveying land to defendant's apparent predecessor in interest, and containing language "[e]xcepting therefrom...a strip three rods wide and extending across this track northerly and southerly and for highway purposes" since, even assuming language was intended to create easement benefitting plaintiffs' property, grantor who executed deed did not own land which so-called easement was intended to benefit, and deed with reservation or exception by grantor in favor of third party stranger thereto does not create valid interest in favor of third party. Lechtenstein v P.E.F. Enters., Ltd., 189 A.D.2d 858, 592 N.Y.S.2d 777, 1993 N.Y. App. Div. LEXIS 640 (N.Y. App. Div. 2d Dep't 1993).

Plaintiff was entitled to summary judgment declaring that his land was benefited by right-of-way and easement crossing defendants' land where (1) abstract of title and survey maps of plaintiff's land, together with topographical map of county, indicated that plaintiff's and defendants' title could be traced to common grantor, who owned both land and roadbed in fee, (2) when parcel was conveyed to plaintiff's predecessors in title, use of roadbed as means of accessing new highway was necessary to enjoyment of retained land, and (3) defendants proffered no evidence to establish any intention of plaintiff or his predecessors in title to relinquish their rights in easement. D'Ambro v Squire, 204 A.D.2d 921, 612 N.Y.S.2d 269, 1994 N.Y. App. Div. LEXIS 5637 (N.Y. App. Div. 3d Dep't), app. dismissed, 84 N.Y.2d 850, 617 N.Y.S.2d 139, 641 N.E.2d 160, 1994 N.Y. LEXIS 2724 (N.Y. 1994).

In action involving dispute as to ownership of certain real property that originally had been conveyed to plaintiff's mother and his sister (defendant) as cotenants, plaintiff was entitled to summary judgment declaring that he and defendant were each owners of undivided ½ interest in property pursuant to 1980 will whereby their mother devised all of her right, title and interest in property to him, and defendant was erroneously granted summary judgment based on 1969

conveyance whereby mother conveyed her entire interest in property to defendant without any consideration, since 1976 agreement executed by defendant and parties' mother, indicating that mother did not intend 1969 conveyance to be gift of her interest in property and that she was "retaining her undivided ½ beneficial therein," constituted conveyance which re-established mother's undivided ½ interest in property. Edelstein v Lieb, 205 A.D.2d 491, 612 N.Y.S.2d 654, 1994 N.Y. App. Div. LEXIS 5967 (N.Y. App. Div. 2d Dep't 1994), app. denied, 85 N.Y.2d 802, 624 N.Y.S.2d 372, 648 N.E.2d 792, 1995 N.Y. LEXIS 208 (N.Y. 1995).

Court erred in denying county's motion for summary judgment in action seeking declaration that county illegally discriminated against plaintiff when it rejected his application for employment as county police officer where medical evidence established that upon repeated testing plaintiff's ability to hear in his right ear fell below acceptable limits set by New York State Municipal Police Training Council, and it was also established that his hearing loss would impair his ability to perform particular police duties in reasonable manner; fact that plaintiff had in interim obtained employment as New York City Police Officer and, according to his own self-serving statement, was performing police duties adequately, was insufficient to raise fact issue. McCarthy v Nassau County, 208 A.D.2d 810, 617 N.Y.S.2d 860, 1994 N.Y. App. Div. LEXIS 10065 (N.Y. App. Div. 2d Dep't 1994).

Defendants were not entitled to summary judgment in action to declare that plaintiffs had acquired title to parcel by adverse possession under written instrument where opinion of plaintiffs' expert as to correct location of boundary line at issue was not "merely conclusory," but was based on description of line and its terminus found in relevant deed and on expert's interpretation of monuments and landmarks found in field, and although expert's analysis did not take into account one aspect of deed description, defendants' expert had done same. Whipple v Trail Props., 235 A.D.2d 795, 652 N.Y.S.2d 657, 1997 N.Y. App. Div. LEXIS 329 (N.Y. App. Div. 3d Dep't 1997).

Court should have granted plaintiff's motion for summary judgment declaring that royalties were to be calculated based only on amounts collected by plaintiff, where parties' agreements clearly

defined “collections” on which royalties were to be based as payments received by plaintiff, not, as asserted by defendant, based on all fees collected for licensing maintenance of product, regardless of whether such fees were collected by plaintiff or plaintiff’s distributors. Computer Assocs. Int'l v Com-Tech Assocs., 239 A.D.2d 379, 658 N.Y.S.2d 322, 1997 N.Y. App. Div. LEXIS 5109 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 801, 666 N.Y.S.2d 563, 689 N.E.2d 533, 1997 N.Y. LEXIS 4170 (N.Y. 1997).

In action brought by insurer seeking declaration that it was not obligated to continue paying certain of insured’s medical costs, court should have granted insurer’s summary judgment motion dismissing insureds’ claim that insurer fraudulently induced them to discontinue personal injury action by pledging to “continue” full payment of medical expenses, while intending to subsequently reduce reimbursement to providers to less than full payment, since there was no sound basis to derive fraud claim from agreement, concededly honored pending only outcome of instant judicial proceedings, specifically turning on whether medical expenses were reasonable and necessary under specific body of law; even to extent that insureds read stipulation as requiring continuation of then-current payments, as contrasted with continuation of payments that were determined to be reasonable and necessary, that presented, at most, issue of contract interpretation rather than fraud, regardless of insurer’s intentions when entering agreement. Massachusetts Bay Ins. Co. v Stamm, 256 A.D.2d 181, 683 N.Y.S.2d 20, 1998 N.Y. App. Div. LEXIS 13723 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1999 N.Y. App. Div. LEXIS 5187 (N.Y. App. Div. 1st Dep't Apr. 27, 1999).

Court should have granted defendant’s summary judgment motion declaring that its mortgage had priority over plaintiff’s mortgage, even though defendant’s mortgage was recorded after plaintiff recorded its mortgage, where property owner’s attorney executed mortgage to plaintiff under power of attorney purportedly executed by property owner, but it was uncontroverted that power of attorney was forgery. Greenpoint Bank v Parissi, 256 A.D.2d 548, 682 N.Y.S.2d 437, 1998 N.Y. App. Div. LEXIS 14006 (N.Y. App. Div. 2d Dep't 1998).

**47. —Properly granted**

In tenant's action for declaratory judgment, landlord was entitled to summary judgment nullifying lease and directing tenant to vacate premises, since force majeure clause of lease did not excuse tenant's failure to maintain liability insurance as required by lease, even though tenant asserted that its failure to maintain insurance was caused by "liability insurance crisis" beyond its control; inability to procure and maintain insurance was not among those circumstances expressly covered by force majeure clause, and catchall "other similar causes beyond the control of such party" did not apply since events listed in clause—such as interruptions in availability of labor, materials and utility services—were different in kind and nature from inability to maintain insurance. Kel Kim Corp. v Central Markets, Inc., 70 N.Y.2d 900, 524 N.Y.S.2d 384, 519 N.E.2d 295, 1987 N.Y. LEXIS 19945 (N.Y. 1987).

In action to invalidate regulations promulgated by Office of Mental Health (OMH) pertaining to experimental medical research on patients or residents of OMH facilities deemed incapable of giving consent, plaintiffs received complete relief sought, and thus had no grounds for appeal, where court granted their summary judgment motion to extent of declaring that challenged regulations were invalid because OMH lacked statutory authority to promulgate them; it was unnecessary, under circumstances, for court to have prospectively declared regulations invalid on additional common-law, statutory or constitutional grounds. T.D. v New York State Office of Mental Health, 91 N.Y.2d 860, 668 N.Y.S.2d 153, 690 N.E.2d 1259, 1997 N.Y. LEXIS 3721 (N.Y. 1997).

Retired judge was entitled to summary judgment in action to declare CLS Jud § 39 unconstitutional insofar as it promulgated salary differentials between City Court Judges of Mount Vernon and City Court Judges of White Plains and Yonkers; since all 3 cities are virtually contiguous and located in same county, and judges' functions, duties and caseloads are substantially same, no rational basis exists for geographic salary classifications and thus statutorily mandated disparate treatment violated equal protection. Kendall v Evans, 126 A.D.2d 703, 510 N.Y.S.2d 910, 1987 N.Y. App. Div. LEXIS 41849 (N.Y. App. Div. 2d Dep't 1987), app.

dismissed, 69 N.Y.2d 984, 516 N.Y.S.2d 1027, 509 N.E.2d 362, 1987 N.Y. LEXIS 16766 (N.Y. 1987), aff'd, 72 N.Y.2d 963, 534 N.Y.S.2d 662, 531 N.E.2d 294, 1988 N.Y. LEXIS 3297 (N.Y. 1988).

Public Health Council lacked authority to enact 10 NYCRR part 25, restricting tobacco use in indoor public areas, since it effectuated profound change in public policy and thus was not mere public health measure; dramatic changes in public policy are province of legislature, not administrative agency, and thus petitioners were entitled to summary judgment declaring part 25 void. Boreali v Axelrod, 130 A.D.2d 107, 518 N.Y.S.2d 440, 1987 N.Y. App. Div. LEXIS 45072 (N.Y. App. Div. 3d Dep't), aff'd, 71 N.Y.2d 1, 523 N.Y.S.2d 464, 517 N.E.2d 1350, 1987 N.Y. LEXIS 19259 (N.Y. 1987).

In action for judgment declaring that nonoccupant’s 10-year lease of parking space in residential building did not violate New York City Zoning Resolution § 25-412, and that lease was valid, city was entitled to summary judgment since resolution specifically provided that nonoccupant of building could not rent parking space for period of more than one month. Rosenberg v 135 Willow Co., 130 A.D.2d 566, 515 N.Y.S.2d 507, 1987 N.Y. App. Div. LEXIS 46564 (N.Y. App. Div. 2d Dep't 1987).

In action for judgment declaring that defendants’ erection of second one-family dwelling on their property violated restrictive covenant contained in deed to property, summary judgment was properly granted to defendants since language of restrictive covenant, that property could be used only for “residential purposes for one family,” did not clearly establish numerical limitation on number of one-family residences which could be built and thus would be read only to prohibit construction of multiple-family dwellings; interpretation of restrictive covenant may not be extended beyond clear meaning of its terms. Thrun v Stromberg, 136 A.D.2d 543, 523 N.Y.S.2d 163, 1988 N.Y. App. Div. LEXIS 280 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs were entitled to summary judgment declaring that they had easement over portion of private road owned by defendant called “Lot Avenue,” which ran along northerly boundary of their adjoining lots, where (1) original grantor had created, at time of subdivision, 3 private roads

providing prospective lot owners with access to nearest public road, thus indicating his intent that all lots be benefitted by easements over abutting private roads, (2) deeds effecting original conveyances referred to filed subdivision map and lot numbers, and described lot 5 (plaintiffs' lot) and lot 6 (defendant's lot) as bounded by Lot Avenue, and (3) Lot Avenue was initially sold to owner of lot 5 as separate parcel subject to "right of way" of owner of lot 6, and when it was later sold to owner of lot 6, deeds of 2 of defendant's immediate predecessors in title recognized rights of owners of lot 5 to use it as road; fact that Lot Avenue was not open at time of original grant, and was never dedicated or improved, did not prevent easement by grant from arising by implication. Fischer v Liebman, 137 A.D.2d 485, 524 N.Y.S.2d 720, 1988 N.Y. App. Div. LEXIS 775 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs were properly granted summary judgment declaring that they had easement over portion of private road owned by defendant called "Lot Avenue," which ran along northerly boundary of their adjoining lots, even though first deed from grantor did not expressly grant easement over Lot Avenue in favor of their lot, since (1) original grantor clearly intended to grant easement by conveying lot with reference to filed subdivision map, and (2) plaintiffs' lot had been repeatedly sold with reference to subdivision map and Lot Avenue, giving each grantee easement in Lot Avenue without need for express grant in their deeds; where lot is conveyed by deed describing it by reference to map, fact that map shows lot as bounded by street may give grantee easement of way through street, as shown, even where street is not mentioned in conveyance. Fischer v Liebman, 137 A.D.2d 485, 524 N.Y.S.2d 720, 1988 N.Y. App. Div. LEXIS 775 (N.Y. App. Div. 2d Dep't 1988).

Plaintiffs were properly granted summary judgment declaring that property purchased by them from judgment debtor was free and clear of defendants' judgment liens, where purchase contract provided that judgment debtor would receive no funds from sale, purchase price was amount required to satisfy existing mortgages of record, and purchase contract was recorded prior to time defendants' judgments were docketed; defendants' lien attached only to rights in premises to which judgment debtor was entitled when lien was filed, which was nothing, since

plaintiffs had agreed to pay fair price for property when they entered into lease containing purchase option, and thus purchase contract was supported by valid consideration, and plaintiffs became equitable owners of property on exercising purchase option. Barringer v European American Bank & Trust Co., 138 A.D.2d 437, 526 N.Y.S.2d 16, 1988 N.Y. App. Div. LEXIS 2886 (N.Y. App. Div. 2d Dep't 1988).

Landlord was properly granted partial summary judgment declaring that he was entitled to take 100 square feet of leased premises to cure violation of state and local building codes, where lease permitted him to take part of leased premises to comply with “any law, ordinance or order of a governmental authority,” since (1) lease provision was unambiguous on its face and thus no triable issue of fact was presented, (2) even if ambiguity existed, tenant failed to submit any parol evidence on landlord’s motion for partial summary judgment, and (3) tenant was deemed to have admitted existence and extent of violations alleged by landlord, having failed in first instance to controvert landlord’s supporting papers. Posh Pillows, Ltd. v Hawes, 138 A.D.2d 472, 525 N.Y.S.2d 877, 1988 N.Y. App. Div. LEXIS 2900 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff who leased store in defendant’s shopping mall was properly granted summary judgment declaring that defendant had duty to provide defense in negligence action commenced against them by person who slipped and fell on sidewalk in common area of mall near entrance to plaintiff’s store, where parties’ lease contained insurance provision whereby defendant was obligated to maintain personal injury liability insurance on common areas for benefit of both plaintiff and itself; however, any declaration as to plaintiff’s right to be indemnified by defendant in event of judgment against them in underlying action would be speculative and premature, since lease did not clearly indicate that parties intended that defendant indemnify plaintiff for plaintiff’s own negligence. Fay's Drug Co. v British American Dev. Corp., 140 A.D.2d 810, 528 N.Y.S.2d 201, 1988 N.Y. App. Div. LEXIS 5017 (N.Y. App. Div. 3d Dep't 1988).

In individual property owner’s action against property owners’ association pursuant to CLS RPAPL Art 15, seeking declaration that plaintiff could sell portion of his property notwithstanding restrictive covenant against subdivision of lot or sale of portion thereof, court properly granted

summary judgment for defendants and declared that restrictive covenant applied to plaintiff's property, even though plaintiff's holding consisted of parcel comprising 2 original lots, since plaintiff did not seek to sell portion of property corresponding to original lot and thus holding that restrictive covenant applied only separately to particular lots would not afford plaintiff relief he desired. Deak v Heathcote Asso., 141 A.D.2d 493, 529 N.Y.S.2d 335, 1988 N.Y. App. Div. LEXIS 6344 (N.Y. App. Div. 2d Dep't 1988).

State was properly granted summary judgment declaring that CLS Soc Serv § 390 preempted local regulation of family day-care homes, thereby invalidating town zoning ordinance which purported to set performance standards relative to day-care homes; town's regulations were more detailed and restrictive than state standard and would tend to inhibit operation of state's general law and thwart operation of state's overriding policy concerns. People v Clarkstown, 160 A.D.2d 17, 559 N.Y.S.2d 736, 1990 N.Y. App. Div. LEXIS 8766 (N.Y. App. Div. 2d Dep't 1990).

Tenant was properly granted summary judgment declaring that landlord was required to bear cost of encapsulating or removing asbestos-containing material in demised premises since remedial measures were mandated by supervening change in governmental policy reflecting awareness of dangers of asbestos, and were not within purview of lease provision requiring tenant to keep premises in good repair; governmental compliance clause in parties' lease was designed to protect landlord against assumption of any additional burden that might be imposed by necessity to comply with laws and regulations governing tenant's particular use of premises, and was ineffective to shift burden of abating asbestos condition onto tenant. Wolf v 2539 Realty Assoc., 161 A.D.2d 11, 560 N.Y.S.2d 24, 1990 N.Y. App. Div. LEXIS 10928 (N.Y. App. Div. 1st Dep't 1990).

Tenant was entitled to summary judgment declaring that it validly exercised option in parties' lease permitting it to defer portion of rent due during first renewal period of lease, for when tenant exercised its option to extend lease term, it also stated that rent for such term shall be paid "as modified" in certain provision of lease, and inasmuch as rent payment deferral was only rent modification contained in that lease provision, notice of renewal, read fully and fairly, could

only be seen as expression of parties' mutual understanding that rent "shall be paid" in modified manner; further, lease did not demand use of any particular format to exercise deferral payment option, and landlord's acknowledgement of option exercise, made without any qualification, clearly indicated that tenant complied with lease requirements. Shubert Foundation, Inc. v 1700 Broadway Co., 173 A.D.2d 126, 578 N.Y.S.2d 148, 1992 N.Y. App. Div. LEXIS 53 (N.Y. App. Div. 1st Dep't 1992), app. dismissed, 80 N.Y.2d 826, 587 N.Y.S.2d 908, 600 N.E.2d 635, 1992 N.Y. LEXIS 1759 (N.Y. 1992), app. denied, 81 N.Y.2d 704, 595 N.Y.S.2d 398, 611 N.E.2d 299, 1993 N.Y. LEXIS 232 (N.Y. 1993).

Defendant, as widow of tenant of record, was entitled to summary judgment dismissing landlord's action seeking to recover possession of rent-controlled apartment in New York City where landlord had failed to give 30-day notice of intention to commence action as required by Rent Control Law; landlord's assertion—that notice was unnecessary since he was not endeavoring to recover possession on grounds of non-primary residence, but was instead requesting declaration that defendant could not succeed to rights of rent-controlled tenant—was mere semantic distinction without substance. Louis v Barthelme, 179 A.D.2d 604, 579 N.Y.S.2d 656, 1992 N.Y. App. Div. LEXIS 912 (N.Y. App. Div. 1st Dep't 1992).

Defendant homeowners' association was entitled to summary judgment declaring that it was authorized to install drainage culvert in subdivision common area over which plaintiff lot owners had easement of enjoyment, where "Declaration of Covenants, Conditions and Restrictions" to which all property owners were subject specifically permitted association to install sewer and water lines in common area, since installation of culvert was akin to and no more invasive than installation of sewer and water lines. Klein v Trout Lake Preserve Homeowners' Ass'n, 179 A.D.2d 967, 579 N.Y.S.2d 230, 1992 N.Y. App. Div. LEXIS 907 (N.Y. App. Div. 3d Dep't 1992).

Regional synod of national church organization was properly granted summary judgment declaring that it was entitled to all right, title and interest in property and assets of local church, including fire insurance proceeds, under provisions of constitutional documents of local church, constitution of national church organization, and CLS Relig Corp § 17-c authorizing synod to

take control of congregation's property where necessary to protect it from waste, where evidence showed that endowment fund of local church had been completely exhausted, that local church was $26,000 in debt, that gas and electric service to property had been terminated for nonpayment, that national church organization and synod had provided considerable financial assistance in effort to save church, that synod had paid premium for property and liability insurance on premises, and that before fire church had discontinued worship services. Upstate New York Synod of Evangelical Lutheran Church v Christ Evangelical Lutheran Church, 185 A.D.2d 693, 585 N.Y.S.2d 919, 1992 N.Y. App. Div. LEXIS 9249 (N.Y. App. Div. 4th Dep't 1992).

In action under CLS RPAPL Art 15, plaintiff landowners were properly granted summary judgment declaring that they had implied easement in private road of defendant abutting their lot, although quitclaim deed by which they had acquired lot in 1977 tax sale contained no reference to either road or 1946 subdivision map from common grantor showing road, and although subdivision map was not filed until 1983, since (1) fact that subsequent grantor makes no reference to subdivision map or private streets in conveyance of one lot has no bearing on issue of original grantor's intent and whether implied easement was created by original grant, and (2) although fact that common grantor did not file subdivision map may have had some bearing on his intention to subdivide property in accordance with map, fact that he actually sold number of individual lots in accordance with plan shown on map left little doubt as to his intent to conform to map plan. Clegg v Grasso, 186 A.D.2d 909, 588 N.Y.S.2d 948, 1992 N.Y. App. Div. LEXIS 12355 (N.Y. App. Div. 3d Dep't 1992).

In action for judgment declaring plaintiff to be rightful owner of motor vehicle which defendant had entrusted to dealer pursuant to consignment agreement, defendant was properly granted summary judgment since (1) dealer's transfer of vehicle to plaintiff violated CLS Veh & Tr § 2113 and 15 NYCRR §§ 78.10 and 78.40 because defendant never delivered certificate of title to dealer, (2) plaintiff did not act in good faith in purchasing vehicle without inspecting records of title and prior ownership, especially as vehicle had private plates, not dealer plates, (3) plaintiff

never saw any evidence that dealer actually owned vehicle, and (4) there was no indication that defendant expressly ratified dealer's actions. Kaminsky v Karmin, 187 A.D.2d 488, 589 N.Y.S.2d 588, 1992 N.Y. App. Div. LEXIS 12771 (N.Y. App. Div. 2d Dep't 1992).

Property owners were properly granted summary judgment declaring and holding tenant statutorily liable for all cleanup and removal costs and other damages incurred by leaking of gasoline from underground storage tank where it was established that tank, once abandoned by third party, became trade fixture owned by tenant, and that tenant was in exclusive possession control, use, and operation of tank throughout its tenancy. Drouin v Ridge Lumber, 209 A.D.2d 957, 619 N.Y.S.2d 433, 1994 N.Y. App. Div. LEXIS 11959 (N.Y. App. Div. 4th Dep't 1994).

Plaintiffs were entitled to summary judgment declaring that they had right to exclude public from 28-acre pond surrounded by their property, despite defendants' claim that pond was (or might be) open to public as navigable waters, where it was undisputed that plaintiffs owned land under pond, and evidence showed that actual and potential use of pond was limited to recreation; even if public could access pond from public highway, absence of second access was further evidence that pond was not suited for trade, commerce or travel. Hanigan v State, 213 A.D.2d 80, 629 N.Y.S.2d 509, 1995 N.Y. App. Div. LEXIS 7766 (N.Y. App. Div. 3d Dep't 1995).

Defendants were properly granted summary judgment declaring that they were owners in fee simple absolute of disputed property where they established that, between 1967 and 1987, they exclusively and under claim of right possessed all land on which 2 walnut trees in question were located; trees were located on defendants' side of established fence which they honestly believed reflected boundary of their property, and one defendant had maintained disputed area and pruned subject trees during 20-year period. John Peruso Constr. Co. v Nick, 222 A.D.2d 655, 636 N.Y.S.2d 91, 1995 N.Y. App. Div. LEXIS 13955 (N.Y. App. Div. 2d Dep't 1995).

Broome County Family Court judges were entitled to summary judgment declaring that no rational basis existed for statutory pay disparity between Broome County and Erie and Monroe counties and that disparity violated equal protection, where uncontroverted expert analysis revealed only insignificant differences in consumer price index, median price of homes, and

other relevant statistics for Broome, Erie and Monroe counties. Dickinson v Crosson, 219 A.D.2d 50, 640 N.Y.S.2d 339, 1996 N.Y. App. Div. LEXIS 3452 (N.Y. App. Div. 3d Dep't 1996).

In action to enforce stipulation of settlement entered in mechanic's lien foreclosure action, whereby owner of property agreed to pay plaintiff $30,400 in installments and agreed that foreclosure action would not be discontinued until first installment was paid and letter of credit to guarantee remaining payments was received, plaintiff was properly granted summary judgment declaring validity of its lien where property owner made no payments under settlement agreement, and owner and surety that issued bond to discharge lien had each waived their right to challenge validity of lien. Charles A. Gaetano Constr. Corp. v Citizens Developers, 223 A.D.2d 866, 636 N.Y.S.2d 208, 1996 N.Y. App. Div. LEXIS 121 (N.Y. App. Div. 3d Dep't 1996).

Court properly granted plaintiffs' summary judgment motion declaring that defendants, who issued liability policy to plaintiffs, were obligated to defend plaintiffs in underlying action for trademark infringement, trademark dilution, false advertising, unfair competition, and counterfeiting, where "advertising injury" coverage provided by policy included "misappropriation of advertising ideas or style of doing business" as category of "advertising injury," which could include alleged misuse of another's trademark, and there was sufficient causal connection between injury alleged in underlying action and plaintiffs' advertising activities to afford coverage under policy. Allou Health & Beauty Care, Inc. v Aetna Cas. & Sur. Co., 269 A.D.2d 478, 703 N.Y.S.2d 253, 2000 N.Y. App. Div. LEXIS 1948 (N.Y. App. Div. 2d Dep't 2000).

Unilateral modifications to residential contract of sale made by defendant sellers constituted counteroffer, which was expressly rejected by plaintiff purchasers; thus, court should have granted plaintiffs' summary judgment motion declaring that no binding contract was entered into between parties and that plaintiffs were entitled to return of their down payment. Harper v Rodriguez, 272 A.D.2d 372, 707 N.Y.S.2d 362, 2000 N.Y. App. Div. LEXIS 5115 (N.Y. App. Div. 2d Dep't 2000).

Defendants, insurance company and its agent, were properly granted summary judgment in action seeking to declare that automobile insurance policy was in full force and effect on date of

accident where policy cancellation notice plainly recited that policy would be canceled if total premium due was not paid on or before certain date, and insured failed to make such payment prior to that date; insured's history with defendants, which included series of policy cancellations and reinstatements, did not, by itself, raise fact issue as to equitable estoppel since insured acknowledged both receipt of cancellation notice and that she understood import thereof. Ferber v Farm Family Cas. Ins. Co., 272 A.D.2d 747, 707 N.Y.S.2d 545, 2000 N.Y. App. Div. LEXIS 5699 (N.Y. App. Div. 3d Dep't 2000).

Defendant commercial tenant's leasehold interest did not terminate on plaintiff landlord's conveyance of property to third party where reference in "Third" paragraph of lease to cessation of tenant's obligation on sale of property was, when read in context of entire paragraph, meant to refer to sale to tenant on exercise of right of first refusal, reference in "Fourth" paragraph to termination of lease related to landlord's ownership of tenant's improvements to property when lease ended, and its subsequent reference to landlord's sale of property when tenant had not exercised its right of first refusal concerned landlord's obligation to reimburse tenant for cost of such improvements; thus, defendant was properly granted summary judgment dismissing action seeking ruling that defendant had no right to occupy premises after property was conveyed to third party. Graystone Ltd. Pshp. v Church Oil Co., 274 A.D.2d 637, 710 N.Y.S.2d 680, 2000 N.Y. App. Div. LEXIS 7591 (N.Y. App. Div. 3d Dep't 2000).

Court improperly denied plaintiff insurer's summary judgment motion in action for declaration that it was entitled to offset amounts received by defendant from his workers' compensation carrier where arbitration clauses of subject insurance policies limited arbitration to controversies as to issues of fault and damages, and thus question of whether plaintiff was entitled to offset any supplemental underinsured motorist benefits to which defendant might be entitled under his policies with plaintiff by amount of workers' compensation benefits paid, or to be paid, to defendant, was for court to determine, and under plaintiff's contract with insured, plaintiff was entitled to offset benefits paid under its policies with defendant by amount of workers' compensation benefits received to date and those he received in future. Travelers Prop. Cas.

Corp. v Saraniti, 286 A.D.2d 256, 728 N.Y.S.2d 664, 2001 N.Y. App. Div. LEXIS 8057 (N.Y. App. Div. 1st Dep't 2001).

Trial court properly granted summary judgment to a city pursuant to N.Y. C.P.L.R. 3212 in an action against an insurance company pursuant to N.Y. C.P.L.R. 3001 (2003) seeking a declaration that the insurance company was obligated to defend and, if necessary, indemnify the city in an underlying action, as the insurance company did not show that there was no possible basis upon which it might eventually be obligated to indemnify the city, or that the allegations therein fell wholly within a policy exclusion. City of New York v Ins. Corp., 305 A.D.2d 443, 758 N.Y.S.2d 817, 2003 N.Y. App. Div. LEXIS 5422 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly dismissed the insured’s declaratory judgment action against the insurers as policy exclusions precluded coverage on the arbitration claims brought against the insured for its construction work. Pavarini Constr. Co. v Cont'l Ins. Co., 304 A.D.2d 501, 759 N.Y.S.2d 56, 2003 N.Y. App. Div. LEXIS 4468 (N.Y. App. Div. 1st Dep't 2003).

Trial court properly granted summary judgment pursuant to N.Y. C.P.L.R. 3212 to an insurer in a declaratory judgment action pursuant to N.Y. C.P.L.R. 3001 concerning insurance coverage; the insurer was not given timely notice of a personal injury claim under the policy, and this vitiated the policy. Pile Found. Constr. Co. v Investors Ins. Co. of Am., 2 A.D.3d 611, 769 N.Y.S.2d 290, 2003 N.Y. App. Div. LEXIS 13357 (N.Y. App. Div. 2d Dep't 2003).

Trial court did not err in granting a landlord summary judgment and dismissing the tenants' suit seeking a judgment declaring that they were not in breach of their obligations under commercial leases because a lease provision by which the tenants waived the right to declarative relief was enforceable since the lease was negotiated at arm's length by commercial tenants. 159 MP Corp. v Redbridge Bedford, LLC, 160 A.D.3d 176, 71 N.Y.S.3d 87, 2018 N.Y. App. Div. LEXIS 557 (N.Y. App. Div. 2d Dep't 2018), aff'd, 33 N.Y.3d 353, 128 N.E.3d 128, 104 N.Y.S.3d 1, 2019 N.Y. LEXIS 1310 (N.Y. 2019).

Trial court did not err in granting a landlord summary judgment and dismissing the tenants' suit seeking a Yellowstone injunction and a judgment declaring that they were not in breach of their commercial leases; the lease provision by which the tenants waived the right to declarative relief did not violate public policy because declaratory and Yellowstone remedies were rights private to the tenants that they could freely, voluntarily, and knowingly waive. 159 MP Corp. v Redbridge Bedford, LLC, 160 A.D.3d 176, 71 N.Y.S.3d 87, 2018 N.Y. App. Div. LEXIS 557 (N.Y. App. Div. 2d Dep't 2018), aff'd, 33 N.Y.3d 353, 128 N.E.3d 128, 104 N.Y.S.3d 1, 2019 N.Y. LEXIS 1310 (N.Y. 2019).

**48. —Improperly granted**

In landlord’s action to declare applicability of Loft Law, court erred by granting tenants’ motion for summary judgment to dismiss complaint, since proper remedy in such actions is not to dismiss complaint, but to declare parties’ rights. Mongelli v Sharp, 140 A.D.2d 273, 528 N.Y.S.2d 571, 1988 N.Y. App. Div. LEXIS 5555 (N.Y. App. Div. 1st Dep't 1988).

CLS Pub Health § 3387(3), which provides for seizure of products “used, or intended for use...in...administering a controlled substance,” was not unconstitutionally vague on its face, and court erred in granting summary judgment to owners of retail stores in their declaratory judgment action arising from seizure by police of glass pipes suitable for “freebasing” crack cocaine, since statute was rationally related to legislative objective to ban sale of drug-related paraphernalia, ordinary person would be put on notice by statute that displaying of crack pipes in his store would subject these items to seizure by police, and lack of legitimate use for seized crack pipes obviated any question concerning arbitrary or discriminatory enforcement of statute. Stallone v Abrams, 183 A.D.2d 555, 584 N.Y.S.2d 535, 1992 N.Y. App. Div. LEXIS 7334 (N.Y. App. Div. 1st Dep't 1992).

It was error to grant defendant’s motion for summary judgment declaring priority of its mortgage where neither party had submitted completed evidence sufficient to determine, as matter of law, whether mortgages were executed simultaneously, and although defendant, as assignee of

vendor of property, had actual notice of plaintiff's mortgage, it was unclear whether plaintiff had or should have had notice of defendant's interest. Citibank, N.A. v Restrepo, 226 A.D.2d 575, 641 N.Y.S.2d 120, 1996 N.Y. App. Div. LEXIS 4349 (N.Y. App. Div. 2d Dep't 1996).

Court erred in granting summary judgment declaring that town violated memorandum agreement by depriving police officer and all those similarly situated of 8 percent pay differential where language in agreement was ambiguous as to whether pay differential applied immediately on employee's return to active duty "after 18 days of combined sick days and LOD absences cumulative or otherwise." Ramapo Police Benevolent Ass'n ex rel. Sweeney v Town of Ramapo, 228 A.D.2d 426, 643 N.Y.S.2d 665, 1996 N.Y. App. Div. LEXIS 6230 (N.Y. App. Div. 2d Dep't 1996).

Court erred in granting landlord's summary judgment motion dismissing tenant's action to declare that landlord's refusal to consent to sublease was unreasonable, on ground that proposed use of premises under sublease for packaging and mailing service did not conform to purpose clause of lease allowing "only" retail bedding business, since pertinent covenants of lease did not contain any express language contractually limiting tenant's right to sublet to those engaged in retail bedding business, nor was purpose clause of lease expressly incorporated therein. Astoria Bedding v Northside Pshp., 239 A.D.2d 775, 657 N.Y.S.2d 796, 1997 N.Y. App. Div. LEXIS 5228 (N.Y. App. Div. 3d Dep't 1997).

In action to determine ownership of real property, defendants' motion for summary judgment should have been denied where there were questions of fact as to whether first defendant was aware of and approved second defendant's assignment to plaintiff of contract to purchase property and, if so, whether first defendant committed actionable conduct by transferring property to second defendant, and as to whether second defendant committed actionable conduct both by accepting transfer of property from first defendant after assignment of second defendant's rights to plaintiff and by subsequently transferring property to third defendant. Stern v Jiab Realty Corp., 242 A.D.2d 701, 664 N.Y.S.2d 952, 1997 N.Y. App. Div. LEXIS 9159 (N.Y. App. Div. 2d Dep't 1997).

Court erred in granting defendant's motion for summary judgment declaring it to be owner of subject property, even though defendant established 4 of 5 elements of adverse possession, where fact issue as to whether it possessed property under claim of right was raised by map, drawn before end of applicable limitations period, clearly depicting that property was excluded from property then owned by defendant's predecessor in interest. MAG Assocs. v SDR Realty, 247 A.D.2d 516, 669 N.Y.S.2d 314, 1998 N.Y. App. Div. LEXIS 1468 (N.Y. App. Div. 2d Dep't 1998).

Court improperly granted insurer's summary judgment motion declaring that it had no duty to defend or indemnify its insureds in underlying action alleging that child was injured as result of negligent care and supervision exercised by defendants while they were providing child care, despite insurer's contention that defendants were engaged in business of child care as to child and that such activity fell squarely within subject policy's express exclusion for coverage of injuries "(a)rising out of the business pursuits of an insured," where there was nothing in nature of child's injuries themselves implying that they could have been sustained only as result of conduct intrinsic to provision of child care. Tenkate v Moore, 274 A.D.2d 934, 711 N.Y.S.2d 587, 2000 N.Y. App. Div. LEXIS 8264 (N.Y. App. Div. 3d Dep't 2000).

Summary judgment was improvidently granted when it was simply inserted into a ruling on a tenant's motion for injunctive relief regarding a stay of action on a notice of termination of its lease; there were enough fact questions surrounding the request for a declaration of invalidity that trial was required, and, in the meantime, the tenant had more than satisfied the requirements for a grant of temporary injunctive relief. Oriburger, Inc. v B.W.H.N.V. Assocs., 305 A.D.2d 275, 760 N.Y.S.2d 444, 2003 N.Y. App. Div. LEXIS 5849 (N.Y. App. Div. 1st Dep't 2003).

Trial court erred in granting summary judgment pursuant to N.Y. C.P.L.R. 3212 to plaintiff in a declaratory judgment action pursuant to N.Y. C.P.L.R. 3001 concerning insurance coverage; the collapse of the roof of a parking garage was not a result of the use of a building as a garage, but rather was caused by a structural defect which the owner of the building was required to repair, and therefore an additional insured clause in defendant's policy issued to the operator of the

garage was not triggered. Greater N.Y. Mut. Ins. Co. v Mut. Marine Office, Inc., 3 A.D.3d 44, 769 N.Y.S.2d 234, 2003 N.Y. App. Div. LEXIS 13316 (N.Y. App. Div. 1st Dep't 2003).

**49. — —Existence of issue of fact**

It was error to grant summary judgment declaring that tenant was entitled to Loft Law protection where fact issue existed as to whether her occupancy was residential. Mongelli v Sharp, 140 A.D.2d 273, 528 N.Y.S.2d 571, 1988 N.Y. App. Div. LEXIS 5555 (N.Y. App. Div. 1st Dep't 1988).

Court erred in granting defendants' motion for summary judgment declaring that plaintiffs had not acquired title to parcel by adverse possession under written instrument where fact issue existed as to whether deed relied on by plaintiffs indicated actual location and boundaries of parcel with enough certainty to support their claim. Whipple v Trail Props., 235 A.D.2d 795, 652 N.Y.S.2d 657, 1997 N.Y. App. Div. LEXIS 329 (N.Y. App. Div. 3d Dep't 1997).

Court improperly granted defendants' summary judgment motion declaring that they were rightful owners of subject bank accounts created by their father, even though accounts were created in defendants' names, since fact questions existed as to whether father had donative intent necessary to effectuate valid inter vivos gift. North Fork Bank v Plechner, 269 A.D.2d 509, 704 N.Y.S.2d 493, 2000 N.Y. App. Div. LEXIS 1996 (N.Y. App. Div. 2d Dep't 2000).

Court improperly granted plaintiffs' summary judgment motion declaring that defendant insurer was obligated to defend and indemnify plaintiffs' landlord in action for injuries sustained from lead-paint ingestion where fact issues existed as to timeliness of notice of claim and defendant's ensuing disclaimer. Dumet v TIG Ins. Co., 272 A.D.2d 111, 710 N.Y.S.2d 18, 2000 N.Y. App. Div. LEXIS 5377 (N.Y. App. Div. 1st Dep't 2000).

Court improperly granted defendants' summary judgment motion in action to declare extent of easement over plaintiffs' property, despite defendants' contention that they were successors in interest to grantees of easement in question, where it was not shown that real property lots identified in defendants' deeds were same lots as those benefited by easement, and that

easement remained in existence as to each lot. Henricksen v Trails End Co., 272 A.D.2d 295, 707 N.Y.S.2d 889, 2000 N.Y. App. Div. LEXIS 4815 (N.Y. App. Div. 2d Dep't 2000).

Insurance carrier was improperly granted summary judgment declaring that it was not obligated to indemnify insureds in underlying personal injury action where (1) affidavit stating that insureds did not receive notice of claim until more than 3 years after incident, and that they notified insurer 5 weeks later, raised issue of fact as to whether they provided requisite notice "as soon as practicable," and (2) conclusory statement in affidavit of insurer's liability specialist, that policy limits had been exhausted, was insufficient to establish exhaustion of policy as matter of law. Hoverson v Herbert Constr. Co., 283 A.D.2d 237, 725 N.Y.S.2d 320, 2001 N.Y. App. Div. LEXIS 5106 (N.Y. App. Div. 1st Dep't 2001).

In combined Article 78 proceeding and action for declaratory judgment to annul determination of town board which refused to deem public road abandoned, Supreme Court erred in granting summary judgment declaring road to be abandoned by nonuse, in absence of clarifying testimony as to condition and use of roadway, where (1) photographs submitted by parties at court's request showed barricades located at various points along road, but also depicted clearly defined (albeit ancient) unpaved road through area overgrown with brush and thick woods on both sides, precluding travel other than on road except with extreme difficulty, and (2) abutting owner barricaded road numerous times, but those obstructions were either removed or knocked down so as to access road's year-round recreational use. Smigel v Town of Rensselaerville, 283 A.D.2d 863, 725 N.Y.S.2d 138, 2001 N.Y. App. Div. LEXIS 5425 (N.Y. App. Div. 3d Dep't 2001).

Court erred in summarily declaring plaintiffs to be title owners to property, even though it was undisputed that required easement was never obtained and deed conveying property to defendant lacked acknowledgement which rendered it unrecordable, where there was no evidence that defendant expressly rejected deed on either of those grounds after receiving it, defendant expressly confirmed in contemporaneous letter to plaintiffs that he was purchasing and accepting property in "AS IS" condition, and defendant later admitted in another letter to one plaintiff that he had transmitted deed to plaintiffs' attorneys for purpose of having it recorded.

Janian v Barnes, 284 A.D.2d 717, 727 N.Y.S.2d 182, 2001 N.Y. App. Div. LEXIS 6219 (N.Y. App. Div. 3d Dep't 2001).

Court improperly granted defendants' summary judgment motion in action alleging that their cellular telephone tower was erected in violation of town code where fact issues were raised as to whether location of tower created hazard as to use of plaintiff's airport, in violation of town code. Sirianno v N.Y. RSA No. 3 Cellular P'ship, 284 A.D.2d 913, 727 N.Y.S.2d 568, 2001 N.Y. App. Div. LEXIS 5782 (N.Y. App. Div. 4th Dep't 2001).

**50. —Properly denied**

In oil company's action against county, seeking declaration that county was liable to reimburse oil company for gross receipts tax which oil company had paid to state on account of company's sales of petroleum to county, county was not entitled to summary judgment since such tax may be passed along to purchaser, even if purchaser is state or one of its political subdivisions; neither was oil company entitled to summary judgment, since tax may be charged to purchaser only if contract provides therefor, and record before court did not reveal terms of pertinent contract. Belcher Co. of New York, Inc. v County of Nassau, 126 A.D.2d 504, 510 N.Y.S.2d 624, 1987 N.Y. App. Div. LEXIS 41646 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff was not entitled to summary judgment declaring him to be sole owner of certain property under terms of contract by which he had provided funds for its purchase on condition that property would be forfeited to him if not resold within specific time, where (1) plaintiff contended that contract constituted partnership with defendants, under which property was purchased as joint venture, (2) defendants contended that transaction constituted usurious mortgage loan by plaintiff, and (3) one defendant submitted affidavit raising questions of fact regarding preliminary negotiations between parties, going directly to issue of intent. Boyarsky v Froccaro, 131 A.D.2d 710, 516 N.Y.S.2d 775, 1987 N.Y. App. Div. LEXIS 48174 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff was not entitled to summary judgment declaring that local law enacted by town was invalid because it was not made in accordance with "comprehensive plan" as required by CLS

Town § 263, since town has authority under CLS Mun H R § 10 to enact local laws which supersede provisions of Town Law, and § 263 was inapplicable where town board exercised its supersession power. Weinstein Enterprises, Inc. v Kent, 135 A.D.2d 625, 522 N.Y.S.2d 204, 1987 N.Y. App. Div. LEXIS 52563 (N.Y. App. Div. 2d Dep't 1987), app. denied, 72 N.Y.2d 801, 530 N.Y.S.2d 553, 526 N.E.2d 44, 1988 N.Y. LEXIS 1060 (N.Y. 1988).

Plaintiff was not entitled to summary judgment declaring that local law enacted by resolution of town board was invalid because board's resolution lacked statement of reasons for acting contrary to county planning agency's recommendation, as required by CLS Gen Mun § 239-m, since county planning agency's memorandum to board which purported to approve proposed law "with modifications" did not sufficiently articulate modifications, in that it did not suggest specific modifications or otherwise clearly and unequivocally prescribe course of action for board to follow prior to enacting local law. Weinstein Enterprises, Inc. v Kent, 135 A.D.2d 625, 522 N.Y.S.2d 204, 1987 N.Y. App. Div. LEXIS 52563 (N.Y. App. Div. 2d Dep't 1987), app. denied, 72 N.Y.2d 801, 530 N.Y.S.2d 553, 526 N.E.2d 44, 1988 N.Y. LEXIS 1060 (N.Y. 1988).

In action commenced by bank, as cotrustee, for judgment declaring invalidity of purported amendments to 2 inter vivos trust agreements on ground that individual appointed as sole trustee under amendments was benefiting by amendments and was unduly influencing grantor to make them, court properly denied grantor's motion for summary judgment since (1) complaint was not rendered moot by grantor's execution of new amendments which, inter alia, revoked amendments at issue and designated new corporate trustee instead of bank to serve as cotrustee with individual trustee, in view of existence of issue as to presence of undue influence which would void amendments ab initio, and (2) fact issues existed as to whether amendments were in grantor's best interest and whether they violated original trust agreements and court-ordered stipulation that had resulted from prior attempt to amend trust agreements, which stated that bank's continuance as corporate trustee was in grantor's best interest. Barclays Bank of New York, N.A. v Tutter, 137 A.D.2d 473, 524 N.Y.S.2d 452, 1988 N.Y. App. Div. LEXIS 679 (N.Y. App. Div. 2d Dep't 1988).

Plaintiff was not entitled to summary judgment declaring that he had right to prepay mortgage since mortgage contained no clause which expressly authorized prepayment and prepayment was neither authorized nor required by statute; presence in mortgage of ambiguous phrase “unless sooner paid” did not provide basis on which to conclude that right to prepay was readily discernible from mortgage instrument. Troncone v Canelli, 147 A.D.2d 633, 538 N.Y.S.2d 39, 1989 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 2d Dep't 1989).

Plaintiffs, who owned and operated elevator, were not entitled to summary judgment declaring that defendant maintenance company had contractual duty to indemnify them in underlying action to recover damages for its alleged negligent failure to inspect and maintain elevator where underlying complaint also alleged that plaintiffs were independently liable for failing to respond to injured party’s calls for assistance while trapped in elevator. American Home Assurance Co. v Mainco Contractor Corp., 204 A.D.2d 500, 611 N.Y.S.2d 305, 1994 N.Y. App. Div. LEXIS 5277 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff was not entitled to summary judgment declaring that he was vested with absolute unencumbered title in fee in certain property, despite his submission of deed, abstract of title, survey map, and numerous supporting affidavits, where defendants, in opposition, submitted 3 affidavits, including one from licensed land surveyor, raising fact issues as to ownership of subject land. Lico v Tarantelli, 215 A.D.2d 999, 627 N.Y.S.2d 126, 1995 N.Y. App. Div. LEXIS 5627 (N.Y. App. Div. 3d Dep't 1995).

In action for judgment declaring that plaintiff was rightful owner of purported 1974 “Pantera” automobile purchased by him, which had been confiscated by defendant Department of Motor Vehicles (DMV) under authority of CLS Veh & Tr § 423-a, DMV was not entitled to summary judgment based on forensic reports concluding that vehicle identification number (VIN) on car had been ground off and replaced by different number, where plaintiff submitted documents apparently tracing chain of title of 1971 Pantera with same VIN as his from manufacturer in Italy to its subsequent purchase by plaintiff; it was for trier of fact to resolve effect to be given inconsistent certificate of title indicating that Pantera purchased by plaintiff was 1974 model.

Carlone v Adduci, 222 A.D.2d 754, 634 N.Y.S.2d 876, 1995 N.Y. App. Div. LEXIS 12668 (N.Y. App. Div. 3d Dep't 1995).

In action to declare plaintiffs' rights to easements over defendant's property, defendant was not entitled to summary judgment based on claim that easements, although granted by deed, had been extinguished by adverse possession, since fact issues existed as to extent, duration, and effectiveness of defendant's attempts to exclude plaintiffs from defendant's property. Cassidy v Reydon Shores Prop. Owners Ass'n, 233 A.D.2d 359, 650 N.Y.S.2d 586, 1996 N.Y. App. Div. LEXIS 11600 (N.Y. App. Div. 2d Dep't 1996).

Medical college was not entitled to summary judgment declaring that county was obligated to defend and indemnify college and members of its contract professional staff (plaintiffs) under certain affiliation agreements where agreements provided that county would defend and indemnify plaintiffs for liabilities they might incur as result of, inter alia, their rendering professional or medical services, and it was not unequivocally clear from agreements or other proof submitted that parties intended to include medical research in their definition of such services. New York Med. College v County of Westchester, 243 A.D.2d 693, 664 N.Y.S.2d 566, 1997 N.Y. App. Div. LEXIS 10711 (N.Y. App. Div. 2d Dep't 1997).

When homeowners sought a declaratory judgment that the homeowners had the right to select a certain school district, under N.Y. Educ. Law § 3203(1), it was not error to deny the homeowners' summary judgment motion because the homeowners did not eliminate triable fact issues concerning whether a school district boundary line intersected the homeowners' property in order to qualify the homeowners' homes as boundary properties under the statute. Palm v Tuckahoe Union Free School Dist., 95 A.D.3d 1087, 944 N.Y.S.2d 291, 2012 N.Y. App. Div. LEXIS 3804 (N.Y. App. Div. 2d Dep't 2012).

When homeowners sought a declaratory judgment that a school district and a board of education were estopped from denying the homeowners the right to select the school district, under N.Y. Educ. Law § 3203(1), it was not error to deny the homeowners' summary judgment motion because the homeowners' evidence did not eliminate triable fact issues concerning

whether there were “exceptional circumstances” allowing the assertion of estoppel against a governmental unit. Palm v Tuckahoe Union Free School Dist., 95 A.D.3d 1087, 944 N.Y.S.2d 291, 2012 N.Y. App. Div. LEXIS 3804 (N.Y. App. Div. 2d Dep't 2012).

Trial court properly denied summary judgment pursuant to N.Y. C.P.L.R. 3212 to a reinsurer in an action by a law firm pursuant to N.Y. C.P.L.R. 3001 for a declaration that the reinsurer had to defend and indemnify the firm in an underlying legal malpractice action; the trial court properly found that a claim in the underlying action did not arise before the retroactive date of the policy in question, and the reinsurer could not be relieved of its duty to defend and indemnify the firm on that ground, and in addition, there were triable issues of fact that could not be determined as a matter of law, including whether the prior knowledge exclusion in the insurance policy could free the reinsurer of its duty to defend and indemnify the firm. Campagna & Langella v Certain Underwriters at Lloyd's, London, 305 A.D.2d 526, 759 N.Y.S.2d 346, 2003 N.Y. App. Div. LEXIS 5642 (N.Y. App. Div. 2d Dep't 2003).

**51. — —Existence of issue of fact**

City Court Judge of Long Beach was not entitled to summary judgment in action to declare CLS Jud § 221-i unconstitutional insofar as is provided for unfavorable salary differentials between himself and City court Judges of White Plains, where fact issue was raised as to whether disparities in population, caseload, and cost of living between those 2 cities demonstrated that rational basis existed for salary differentials. Mackston v State, 126 A.D.2d 710, 510 N.Y.S.2d 912, 1987 N.Y. App. Div. LEXIS 41855 (N.Y. App. Div. 2d Dep't 1987).

In action for judgment declaring that plaintiff retained interest in partnership, documentary proof raised factual issues, precluding summary judgment in favor of defendants, where (1) check and promissory note purportedly given to plaintiff in 1981 as consideration for his 25 percent partnership interest were endorsed by plaintiff to partnership and funds were deposited in partnership account, (2) 2 subsequent amendments to limited partnership certificate listed plaintiff as retaining 25 percent interest, and plaintiff raised factual issue as to validity of third

amendment which indicated that he had withdrawn from partnership, and (3) partnership's 1982 tax return and plaintiff's tax returns for 1981-1984 indicated that plaintiff retained 10 percent interest in partnership. Pross v Jadam Equities, Ltd., 134 A.D.2d 154, 520 N.Y.S.2d 390, 1987 N.Y. App. Div. LEXIS 50350 (N.Y. App. Div. 1st Dep't 1987).

Employees, who sold their business to parent corporation under asset purchase agreement, executed by parent corporation's wholly owned subsidiary, in which parent corporation agreed to be jointly liable for any obligations and payments, were not entitled to summary judgment declaring that parent corporation was jointly liable for their salaries and bonuses under separate employment agreements they entered into with subsidiary, since fact issue existed as to whether parties intended for parent corporation's liability to apply to obligations contained in employment contracts. Poley v Rochester Community Sav. Bank, 140 A.D.2d 933, 529 N.Y.S.2d 614, 1988 N.Y. App. Div. LEXIS 5787 (N.Y. App. Div. 4th Dep't 1988).

In action for declaratory judgment regarding entitlement to pension fund from New York City fire department, defendant was not entitled to summary judgment granting pension fund to her since questions of fact existed as to whether she and decedent were validly married where (1) their marriage occurred after California interlocutory judgment of dissolution of marriage between decedent and former wife, but before final judgment of dissolution, and (2) interlocutory judgment stated that it did not constitute final dissolution of marriage and that parties could not remarry until final judgment of dissolution was entered. Kulaka v Fire Dep't Article 1 Pension Fund, 145 A.D.2d 538, 535 N.Y.S.2d 750, 1988 N.Y. App. Div. LEXIS 13615 (N.Y. App. Div. 2d Dep't 1988).

County was not entitled to summary judgment declaring that boundary line between it and defendant county was straight line along area in dispute, although analysis of enactments dealing with boundary showed legislative intent to have boundary run in straight line, since factual question existed as to location of original confluence of 2 rivers forming one endpoint of boundary line, given that channels of rivers had changed over time from original point of

confluence. County of Chenango v County of Broome, 180 A.D.2d 319, 585 N.Y.S.2d 577, 1992 N.Y. App. Div. LEXIS 8183 (N.Y. App. Div. 3d Dep't 1992).

Factual questions were presented precluding grant of summary judgment to defendant on counterclaim seeking declaration that he was joint tenant of cooperative apartment where plaintiff alleged that (1) he provided money to defendant for defendant's share of apartment, pursuant to oral agreement by which defendant agreed to hold title to apartment as his agent, and (2) purpose of alleged oral agreement was to avoid currency requirements under Indian law which would have required repatriation of money and payment of 70 percent tax. Hira v Bajaj, 182 A.D.2d 435, 582 N.Y.S.2d 197, 1992 N.Y. App. Div. LEXIS 5744 (N.Y. App. Div. 1st Dep't 1992).

Defendants, owners of parcels of real property which abutted golf course, were not entitled to summary judgment dismissing action for wrongful possession and for judgment declaring that they were rightful owners of disputed property by adverse possession where plaintiffs submitted deposition testimony indicating that defendants' fence was located over 40 feet from manicured edges of golf club, that 40 or more feet were covered by overgrown vegetation and creek which made area inaccessible, and that defendants' fence was not visible from golf club, thus raising fact issue as to whether defendants' possession was under claim of right and open and notorious. Weinstein Enters. v Pesso, 231 A.D.2d 516, 647 N.Y.S.2d 260, 1996 N.Y. App. Div. LEXIS 8837 (N.Y. App. Div. 2d Dep't 1996).

Plaintiff was not entitled to summary judgment in declaratory judgment action seeking exemption from posting under CLS Veh & Tr § 1650(a)(4-a) as to road which provided direct access to state route, despite contention that alternate road was not safe for truck traffic and had itself been posted with similar weight limits, where fact question existed as to condition of alternate road and its suitability for truck traffic, and posting as to alternate road did not appear on its face to be authorized by CLS Veh & Tr § 1650(a)(4-a). Troy Sand & Gravel Co. v Rensselaer County, 235 A.D.2d 813, 652 N.Y.S.2d 651, 1997 N.Y. App. Div. LEXIS 315 (N.Y. App. Div. 3d Dep't 1997).

Neither insurer nor insureds were entitled to summary judgment in action seeking declaration that insurer had properly disclaimed liability and had no duty to indemnify insureds for supplementary underinsured motorist coverage where fact issue existed as to reasonableness of delay in disclaiming coverage as measured from 3 potential dates offered by parties, be it 42 days, 32 days, or 25 days. State Farm Mut. Auto. Ins. Co. v Clift, 249 A.D.2d 800, 671 N.Y.S.2d 843, 1998 N.Y. App. Div. LEXIS 4517 (N.Y. App. Div. 3d Dep't 1998).

In cooperative housing corporation’s action for declaratory judgment that defendants were not entitled to elect to purchase apartment occupied by their father prior to his death because they did not use it as their primary residence and thus were not “immediate family” within meaning of cooperative’s by-laws, factual issues existed as to intent of bylaws to restrict transfer where (1) cooperative corporation’s federally subsidized mortgage had been satisfied and original by-laws permitted transfer by shareholder to issue without claimed restriction, and (2) while original occupancy agreement executed by defendants’ father permitted transfer only to “immediate family,” occupancy agreement executed by defendants’ mother did not contain such restriction. Knolls Coop. Section No. 2, Inc. v Cohen, 277 A.D.2d 30, 715 N.Y.S.2d 45, 2000 N.Y. App. Div. LEXIS 11261 (N.Y. App. Div. 1st Dep't 2000).

Upon reconsideration, the trial court properly denied summary judgment to a casualty company as to a lighting company’s declaratory judgment action pursuant to N.Y. C.P.L.R. 3001, because there was a question of fact precluding summary judgment as to whether the casualty company’s excess insurance policy was implicated. Long Is. Light. Co. v Allianz Underwriters Ins. Co., 35 A.D.3d 253, 826 N.Y.S.2d 55, 2006 N.Y. App. Div. LEXIS 14844 (N.Y. App. Div. 1st Dep't 2006), app. dismissed, 8 N.Y.3d 956, 836 N.Y.S.2d 535, 868 N.E.2d 215, 2007 N.Y. LEXIS 935 (N.Y. 2007), app. dismissed, 9 N.Y.3d 1003, 850 N.Y.S.2d 391, 880 N.E.2d 877, 2007 N.Y. LEXIS 4061 (N.Y. 2007).

**52. Injunctions**

In action against town for judgment declaring that plaintiff's use of barn to house his plumbing business constituted preexisting nonconforming use, court properly dismissed complaint and denied plaintiff's motion for temporary restraining order enjoining town from enforcing residential zoning requirements against him since (1) scope of preexisting nonconforming use of barn for commercial storage was being exceeded by plaintiff's current operation of retail store and business office, as well as second business called "Fixzit Man," on premises, and (2) zoning board had exclusive authority to determine extent to which nonconforming use could be extended, under town zoning ordinance. Hull v Ithaca, 139 A.D.2d 887, 527 N.Y.S.2d 617, 1988 N.Y. App. Div. LEXIS 4558 (N.Y. App. Div. 3d Dep't 1988).

In action for declaratory judgment and to permanently enjoin adjacent landowner and contract vendee from subdividing lot, plaintiff was entitled to summary judgment where defendants' claim—that limitation in restrictive covenant was merely permissive and that unlimited subdivision and residential development of property was thus permissible—was clearly untenable in light of unambiguous language used. Blind Brook Club, Inc. v Murray, 255 A.D.2d 347, 679 N.Y.S.2d 671, 1998 N.Y. App. Div. LEXIS 11805 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff was entitled to summary judgment declaring that defendants had no legal right to barricade road that abutted their property, and permanently enjoining defendants' future blockade of said road, where plaintiff's title to segment of road in question was established by recorded deed, while deeds conveying title to defendants did not purport to transfer title to any portion of road. Eliopoulos v Miller, 259 A.D.2d 943, 686 N.Y.S.2d 910, 1999 N.Y. App. Div. LEXIS 2525 (N.Y. App. Div. 3d Dep't 1999).

Plaintiffs were not entitled to declaratory judgment enjoining defendants from using their adjoining property as horse farm where defendants had obtained special use permit to do so from town planning board, and proper method to obtain review of board's decision was to commence Article 78 proceeding, which plaintiffs also did. Schneider v Eagan, 281 A.D.2d 408, 721 N.Y.S.2d 287, 2001 N.Y. App. Div. LEXIS 2114 (N.Y. App. Div. 2d Dep't 2001).

Where a city's common council had failed to take the required hard look at fire and noise hazards associated with a plan to build hospital heliport in a residential neighborhood, the court set treated its issuance of site approval as a nullity, temporarily enjoined commencement of construction, and remanded the matter to the common council for proper environmental quality review. Wright v 299 Union Ave. Corp., 288 A.D.2d 382, 733 N.Y.S.2d 223, 2001 N.Y. App. Div. LEXIS 11268 (N.Y. App. Div. 2d Dep't 2001).

Trial court did not err denying plaintiffs' motion for a Yellowstone injunction because such a preemptive action to have the court determine that the leases had not been breached was in the nature of declaratory judgment, and the lease provision by which plaintiffs waived the right to declarative relief was valid because the lease was negotiated at arm's length by commercial tenants. 159 MP Corp. v Redbridge Bedford, LLC, 160 A.D.3d 176, 71 N.Y.S.3d 87, 2018 N.Y. App. Div. LEXIS 557 (N.Y. App. Div. 2d Dep't 2018), aff'd, 33 N.Y.3d 353, 128 N.E.3d 128, 104 N.Y.S.3d 1, 2019 N.Y. LEXIS 1310 (N.Y. 2019).

Declaratory judgment with the equitable relief of a permanent injunction was warranted in a matter involving a mental patient stalking a famous singer because without a permanent injunction, the patient could legally continue to annoy, harass, or intimidate the singer, regardless of any lack of intent, and the singer had the right to be free from the fear of sexual assault, serious physical injury or death, and to the quiet enjoyment of her real property free of nuisance. Matter of Kevin M. v South Beach Psychiatric Ctr., 999 N.Y.S.2d 696, 46 Misc. 3d 455, 2014 N.Y. Misc. LEXIS 4755 (N.Y. Sup. Ct. 2014), app. dismissed, 136 A.D.3d 827, 24 N.Y.S.3d 519, 2016 N.Y. App. Div. LEXIS 961 (N.Y. App. Div. 2d Dep't 2016), rev'd in part, 136 A.D.3d 826, 26 N.Y.S.3d 84, 2016 N.Y. App. Div. LEXIS 964 (N.Y. App. Div. 2d Dep't 2016).

## Opinion Notes

## Research References & Practice Aids

§ 3001. Declaratory judgment



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