

CPLR ARTICLE 78 PROCEEDINGS AND INTERLOCUTORY  
APPEALS DURING AN ARTICLE 78 PROCEEDING

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I. INTRODUCTION

A proceeding under Article 78 of the New York Civil Practice Law and Rules (“CPLR”) is the primary means for challenging administrative actions by a body or officer in New York State.<sup>1</sup> Judicial review of those actions may result in any number of interlocutory or intermediate determinations by a court, similar to the types of decisions made in a plenary action, which a litigant may want to challenge by immediate appeal.<sup>2</sup> Unlike the broad right of appeals provided for in a plenary action, however, there are very limited grounds for appealing interlocutory orders in an Article 78 proceeding.<sup>3</sup> Those limited grounds include the primary avenue of seeking permission to appeal.<sup>4</sup> Due to the limited circumstances available for appealing an intermediate order in an Article 78 proceeding based upon the nature and purpose of those proceedings,<sup>5</sup> litigants should humbly seek permission to appeal any such order at the outset, rather than risk receiving a dismissal from an unforgiving court.<sup>6</sup>

This article generally discusses the nature and purpose of an Article 78 special proceeding, and the limited circumstances for appealing interlocutory orders made in an Article 78 proceeding due to the nature and purpose of such proceedings.

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<sup>1</sup> See N.Y. C.P.L.R. 7804(a) (McKinney 2013).

<sup>2</sup> See *infra* text accompanying notes 40–48.

<sup>3</sup> See *infra* text accompanying notes 49–54.

<sup>4</sup> See *infra* text accompanying notes 108–09.

<sup>5</sup> See *infra* text accompanying notes 51–54.

<sup>6</sup> See *infra* text accompanying note 116.

## II. THE NATURE AND PURPOSE OF A CPLR ARTICLE 78 PROCEEDING

The CPLR generally provides the procedures governing applications for judicial relief in civil matters.<sup>7</sup> The CPLR directs that “[a]ll civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized.”<sup>8</sup> “An action is the plenary prosecution of a right in a court of law, seeking the vindication of that right in a final judgment.”<sup>9</sup> Conversely, “[a] special proceeding . . . must be based on specific statutory authorization.”<sup>10</sup> Relative here, a proceeding under CPLR Article 78 is expressly identified as “a special proceeding.”<sup>11</sup>

The provisions in CPLR Article 78 constitute the “specific statutory authorization” and provide the primary procedures for challenging certain actions and determinations by a “body or officer” acting on behalf of the State of New York or local agencies.<sup>12</sup> The provisions of Article 78 explain that “[t]he expression ‘body or officer’ includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article.”<sup>13</sup> The statutorily authorized challenges against these governmental bodies or officers include in those categories, *inter alia*, the following:

- (1) whether the body or officer failed to perform a duty enjoined upon it by law; or
- (2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
- (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.<sup>14</sup>

The above provisions of “Article 78 [were] designed to facilitate

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<sup>7</sup> N.Y. C.P.L.R. 101 (McKinney 2013).

<sup>8</sup> N.Y. C.P.L.R. 103(b) (McKinney 2013).

<sup>9</sup> *Freudenthal v. Cnty. of Nassau*, 283 A.D.2d 6, 10, 726 N.Y.S.2d 116, 118 (App. Div. 2d Dep’t 2001) *aff’d*, 99 N.Y.2d 285, 784 N.E.2d 1165, 755 N.Y.S.2d 56 (2003).

<sup>10</sup> *In re Johnstown v. City of Gloversville*, 36 A.D.2d 143, 144, 319 N.Y.S.2d 123, 124 (App. Div. 3d Dep’t 1971).

<sup>11</sup> N.Y. C.P.L.R. 7804(a) (McKinney 2013).

<sup>12</sup> *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 205 (S.D.N.Y. 1998) (“Proceedings under Article 78 ‘are typically the avenue for parties challenging administrative actions by governmental agencies or by the decision making bodies of private entities.’”).

<sup>13</sup> N.Y. C.P.L.R. 7802(a) (McKinney 2013).

<sup>14</sup> N.Y. C.P.L.R. 7803(1)–(3) (McKinney 2013); *see generally* N.Y. C.P.L.R. 7801 (McKinney 2013) (explaining that relief previously obtained by writs of certiorari to review, mandamus, or prohibition may be obtained in a proceeding under Article 78).

requests for relief based on the common-law writs of mandamus, prohibition, and certiorari without regard to the technical distinctions between them.”<sup>15</sup> “[T]he writs evolved primarily as mechanisms to control governmental action.”<sup>16</sup> As explained in the case *Board of Education v. Parsons*,<sup>17</sup> “[t]he remedies of certiorari to review, mandamus and prohibition, which were three distinct remedies, each designed for a different type of wrong, were part of the law of England and became part of the law of New York.”<sup>18</sup> The New York Legislature, however, adopted Article 78 of the CPLR “in order to provide a uniform procedure for judicial review of government action or inaction formally cognizable under the common-law writs of certiorari, mandamus, and prohibition.”<sup>19</sup>

In explaining the purpose of the legislature’s codifications of the common law writs through the former Article 78 of the Civil Practice Act (the predecessor to today’s CPLR Article 78),<sup>20</sup> the New York State Court of Appeals previously explained:

At the same time that the Legislature by article 78 of the Civil Practice Act abolished “the classifications, and writs and orders of certiorari to review, mandamus and prohibition” it provided that “the relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article.” No right to relief theretofore available by certiorari, by mandamus, or by prohibition, for the review of a determination made by a public body or officer or for the annulment of an official act not performed in accordance with law or to “compel performance of a duty specifically enjoined by law” was destroyed. The primary purpose of the new article was to wipe out technical distinctions which had been a snare for suitors approaching the court for relief and which, at times, hampered the court in granting relief for proven grievances.<sup>21</sup>

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<sup>15</sup> *Goldman v. White Plains Ctr. for Nursing Care, L.L.C.*, 9 Misc. 3d 977, 979, 801 N.Y.S.2d 508, 510 (Sup. Ct. N.Y. County 2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Bd. of Educ. v. Parsons*, 61 Misc. 2d 838, 306 N.Y.S.2d 833 (Sup. Ct. Wayne County 1969).

<sup>18</sup> *Id.* at 840, 306 N.Y.S.2d at 836.

<sup>19</sup> *Harvey v. Hynes*, 174 Misc. 2d 174, 176, 665 N.Y.S.2d 1000, 1003 (Sup. Ct. Kings County 1997).

<sup>20</sup> *See* N.Y. C.P.L.R. 101 (McKinney 2013) (“The civil practice law and rules shall succeed the civil practice act and rules of civil practice and shall be deemed substituted therefor throughout the statutes and rules of the state.”).

<sup>21</sup> *Newbrand v. City of Yonkers*, 285 N.Y. 164, 174, 33 N.E.2d 75, 80 (1941). The provisions of today’s CPLR Article 78 contain similar language explaining the nature of the

While the legislature ultimately codified the former writs available under common law, the codification was not intended to affect any substantive rights previously available by common law: “Although article 78 supersedes [the former] common-law writs, it does so in procedure only. A party’s right to relief still depends upon the substantive law of the former writs.”<sup>22</sup>

Relative to challenging governmental actions or decisions by a body or officer, the legislature intended that any such challenges be brought and determined expeditiously, after the action or decision is final. The legislature’s haste-less intention is evidenced by its codification of the former common law methods for challenging government actions by “specific statutory authorization” as a special proceeding.<sup>23</sup> It has been specifically noted that “[i]t is in the very spirit and purpose of proceedings under article 78 to provide a summary remedy, so summary, indeed, as to dispense with the need or occasion for the application for summary judgment.”<sup>24</sup> That is because the legislature generally intended that “swift adjudication . . . be achieved by way of a special proceeding.”<sup>25</sup>

In accordance with the legislature’s above expeditious intention, the CPLR generally provides a four-month statute of limitations for challenging actions or decisions by a body or officer.<sup>26</sup> Specifically,

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent’s refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty.<sup>27</sup>

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proceeding. See N.Y. C.P.L.R. 7801 (McKinney 2013) (“Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article.”).

<sup>22</sup> See *Harvey*, 174 Misc. 2d at 177, 665 N.Y.S.2d at 1003; see also *Parsons*, 61 Misc. 2d at 840, 306 N.Y.S.2d at 836 (explaining that the purpose and effect of Article 78 is to simplify and unify the procedure associated with the traditional remedies of certiorari to review, mandamus, and prohibition).

<sup>23</sup> See C.P.L.R. 7801 (providing statutory authorization for Article 78 proceedings); see generally *Newbrand*, 285 N.Y. at 174, 33 N.E.2d at 80 (explaining the purpose of the former Civil Practice Act Article 78 codification).

<sup>24</sup> *Rockwell v. Morris*, 12 A.D.2d 272, 275, 211 N.Y.S.2d 25, 29 (App. Div. 1st Dep’t 1961) *aff’d*, 10 N.Y.2d 721, 176 N.E.2d 836, 219 N.Y.S.2d 268 (1961).

<sup>25</sup> See *Lev v. Lader*, 115 A.D.2d 522, 523, 496 N.Y.S.2d 52, 52 (App. Div. 2d Dep’t 1985).

<sup>26</sup> N.Y. C.P.L.R. 217(1) (McKinney 2013).

<sup>27</sup> *Id.*

In discussing the above four-month limitation period, the Court of Appeals has explained that “[t]hose who wish to challenge agency determinations under article 78 may not do so until they have exhausted their administrative remedies, but once this point has been reached, they must act quickly—within four months—or their claims will be time-barred.”<sup>28</sup> That is because “[a] strong public policy underlies the abbreviated statutory time frame: the operation of government agencies should not be unnecessarily clouded by potential litigation.”<sup>29</sup>

Those amongst the bench and bar dealing with local planning and zoning board actions, including related determinations involving the State Environmental Quality Review Act (“SEQRA”), are especially aware of the expeditious nature of an Article 78 proceeding.<sup>30</sup> Such matters typically evoke a severely unforgiving thirty-day limitations period, including challenges relating to site plan, subdivision, or other zoning decisions or actions by local bodies and officials.<sup>31</sup> The thirty-day commencement provisions for challenging zoning and land use actions or determinations are accompanied by the

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<sup>28</sup> *Walton v. N.Y. Dep’t of Corr. Servs.*, 8 N.Y.3d 186, 195, 863 N.E.2d 1001, 1006, 831 N.Y.S.2d 749, 754 (2007).

<sup>29</sup> *Best Payphones, Inc. v. Dep’t of Info. Tech. & Telecomms*, 5 N.Y.3d 30, 34, 832 N.E.2d 38, 40, 799 N.Y.S.2d 182, 184 (2005).

<sup>30</sup> *See generally In re Riverkeeper, Inc. v. Planning Bd.*, 9 N.Y.3d 219, 235, 881 N.E.2d 172, 179, 851 N.Y.S.2d 76, 83 (2007) (discussing the SEQRA mandate requiring quick implementation of regulations with little administrative and procedural delay in order to foster quick review); *see also* 6 N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3(h) (2013) (requiring agencies to expedite all SEQRA proceedings).

<sup>31</sup> *See e.g.*, N.Y. TOWN LAW § 267-c(1) (McKinney 2013) (“Any person or persons, jointly or severally aggrieved by any decision of the board of appeals or any officer, department, board or bureau of the town, may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceeding shall be instituted within thirty days after the filing of a decision of the board in the office of the town clerk.”); *see also* N.Y. TOWN LAW § 274-a(11) (McKinney 2013) (“Any person aggrieved by a decision of the authorized board or any officer, department, board or bureau of the town may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceedings shall be instituted within thirty days after the filing of a decision by such board in the office of the town clerk.”); N.Y. TOWN LAW § 274-b(9) (McKinney 2013) (providing for review of special use permits); N.Y. TOWN LAW § 282 (McKinney 2013) (providing for similar thirty day limitation period); N.Y. VILLAGE LAW § 7-712-c(1) (McKinney 2013) (“Any person or persons, jointly or severally aggrieved by any decision of the board of appeals or any officer, department, board or bureau of the village, may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceeding shall be instituted within thirty days after the filing of a decision of the board in the office of the village clerk.”); N.Y. VILLAGE LAW § 7-725-a(11) (McKinney 2013) (allowing aggrieved persons to file a challenge to an Article 78 determination within thirty days of the filing of a decision); N.Y. VILLAGE LAW § 7-725-b(9) (McKinney 2013) (placing a thirty-day time bar for filing challenges); N.Y. VILLAGE LAW § 7-740 (McKinney 2013) (providing thirty days to challenge certain village planning board determinations under Article 78).

legislature's direction that such proceedings receive "preferences" from the courts.<sup>32</sup> Statutes providing for those challenges each generally require that such a "proceeding . . . shall have preference over all civil actions and proceedings."<sup>33</sup>

While the legislature intended that challenges to governmental decision-making be brought and adjudicated quickly, in many instances it may take several years for the administrative process to unfold before culminating in any final action.<sup>34</sup> This can be especially true in the administrative review process for land use and zoning matters generally, including the SEQRA process related to those matters.<sup>35</sup> As noted in the cases of *Riverkeeper, Inc. v. Planning Board*, *Fleming v. New York City Department of Environmental Protection*, and *Kent Acres Development Co., v. City of New York*, the administrative review process can result in changes to the underlying project or application being reviewed by a body or officer, or invoke other agency reviews or approvals for the underlying project or application.<sup>36</sup> As a result of the events occurring, or matters raised during proceedings before a body or officer, issues can develop that have significant implications in any subsequent challenge to the final administrative action under CPLR Article 78.<sup>37</sup> The summary nature of an Article 78 proceeding, while important to quickly address the governmental action, especially after the typical lengthy administrative process, has significant impacts on appeals of such issues when raised during an Article 78 proceeding.<sup>38</sup>

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<sup>32</sup> TOWN LAW § 267-c(3); VILLAGE LAW § 7-712-c(3).

<sup>33</sup> See e.g., VILLAGE LAW § 7-725-b(11) and VILLAGE LAW § 7-725-a(13) (both providing similar language); TOWN LAW § 282 and TOWN LAW § 267-c(3) (both providing similar language).

<sup>34</sup> See *Riverkeeper*, 9 N.Y.3d at 228–29, 881 N.E.2d at 174–75, 851 N.Y.S.2d at 78–79 (putting to rest an issue outstanding for nearly twenty years).

<sup>35</sup> See *id.* at 228–29, 881 N.E.2d at 174–75, 851 N.Y.S.2d at 78–79 (noting administrative review spanned from the years 1988 to 2002); *In re Highview Estates of Orange Cnty., Inc. v. Town Bd.*, 101 A.D.3d 716, 717–18, 955 N.Y.S.2d 175, 177–78 (App. Div. 2d Dep't 2012) (recounting two-year review period by agency); *Fleming v. N.Y.C. Dep't of Env'tl. Prot.*, 66 A.D.3d 777, 778, 887 N.Y.S.2d 206, 207 (App. Div. 2d Dep't 2009) (noting subsequent approval needed from New York City, after initial local Town of Kent approvals were obtained due to change in laws over a period of review spanning from the 1980s to the 2000s).

<sup>36</sup> See *Riverkeeper*, 9 N.Y.3d at 230, 233, 881 N.E.2d at 175–76, 178, 851 N.Y.S.2d at 79–80, 82 (noting changes to proposed sewage treatment system plans occurring during review process and other changes); see also *supra* text and accompanying note 35.

<sup>37</sup> See *supra* notes 34–35 and accompanying text.

<sup>38</sup> See *infra* Part III.

### III. OBJECTIONS IN POINT OF LAW AND APPEALS OF SUCH ISSUES IN ARTICLE 78 PROCEEDINGS

The provisions of Article 78 allow a respondent to “raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition.”<sup>39</sup> As succinctly explained by Vincent Alexander in his practice commentaries on CPLR section 7804(f):

The first sentence of CPLR 7804(f) is identical to that of CPLR 404(a). Both provisions, including the quaint phrase “objections in point of law,” have their origin in § 1293 of the Civil Practice Act. Objections in point of law are the same types of defenses that can be asserted in a pre-answer motion to dismiss as provided in CPLR 3211(a). Among the defenses that courts have explicitly denominated objections in point of law are failure to state a cause of action, lack of standing, lack of finality, failure to exhaust administrative remedies, statute of limitations, failure to join a necessary party and lack of jurisdiction. Such defenses can produce a summary disposition of the proceeding.<sup>40</sup>

As a result of events that may occur during any matter before a body or officer or issue raised, or even because of the status of a person or entity, various “objections in point of law” may be implicated in a subsequent challenge to the body or officer’s final action or determination.<sup>41</sup> Those objections in point of law, if asserted by a motion upfront in an Article 78 proceeding, can serve to dispose of any challenge to a final determination or action by a body or officer, without addressing the merits of the underlying determination or action.<sup>42</sup> An objection in point of law raised as a

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<sup>39</sup> N.Y. C.P.L.R. 7804(f) (McKinney 2013); *see also* Joseph F. Castiglione, *The Implications of Responding to Pleadings if a Motion to Dismiss Is Denied*, N.Y. ST. B. ASS’N J. 46, 48–50 (2011) (providing an in-depth treatment of the procedures for asserting objections in point of law in an Article 78 proceeding).

<sup>40</sup> Vincent C. Alexander, *Practice Commentaries*, C7804:7, in N.Y. C.P.L.R. 7804 (McKinney 2013) (citations omitted); *see also* Doherty v. Cuomo, 99 Misc. 2d 183, 184, 415 N.Y.S.2d 760, 762 (Sup. Ct. Monroe County 1979) (“[An] ‘objection in point of law’ [constitutes any] ‘threshold objections of the kind listed in CPLR 3211(a), which are capable of disposing of the case without reaching the merits.’”) (quoting DAVID D. SIEGEL, *NEW YORK PRACTICE* § 568, at 796–97 (1st ed. 1978)).

<sup>41</sup> *See* cases cited *infra* note 47.

<sup>42</sup> *See* Stop-The-Barge v. Cahill, 1 N.Y.3d 218, 224, 803 N.E.2d 361, 363–64, 771 N.Y.S.2d 40, 42–43 (2003) (dismissing proceeding for statute of limitations); *see also* N.Y. C.P.L.R. 1003 (McKinney 2013) (providing for dismissal of any action or proceeding under certain circumstances if a necessary party was not joined in the proceeding); *In re Colella v. Bd. of Assessors*, 95 N.Y.2d 401, 407–08, 741 N.E.2d 113, 114–15, 718 N.Y.S.2d 268, 269–70 (2000)

threshold to any Article 78 proceeding continuing beyond the initial petition can further obviate the significant costs otherwise typically associated with preparing the record of the proceedings before the body or officer, a duty that is statutorily imposed upon the body or officer.<sup>43</sup>

As a practical matter, while the CPLR states that a motion to dismiss in an Article 78 proceeding must be noticed for the return date of the petition which commenced the proceeding,<sup>44</sup> practitioners are aware that parties generally agree to a litigation schedule dealing with the motion and awaiting judicial resolution of the motion first, before addressing the merits of the proceeding.<sup>45</sup> Therefore, generally, a motion based upon an objection in point of law can serve to obviate expending the time and effort to address the merits of such a proceeding.<sup>46</sup>

After a motion to dismiss an Article 78 proceeding based upon an objection in point of law is submitted to a court, the court generally has three options to move forward: (1) the court can grant the motion and dismiss the proceeding based upon the objection in point of law; (2) if “it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer,” the court may accept the submissions on the motion alone to decide the merit of the entire proceeding;<sup>47</sup> or (3) the court can deny the motion

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(dismissing Article 78 proceeding against the Nassau County Board of Assessors challenging the Board’s grant and renewal of a real property tax exemption for religious purposes due to lack of standing); *Soc’y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 778, 573 N.E.2d 1034, 1044, 570 N.Y.S.2d 778, 788 (1991) (“We conclude that this plaintiff—having failed to allege any threat of cognizable injury it would suffer, different in kind or degree from the public at large—lacks standing to maintain this SEQRA challenge.”).

<sup>43</sup> See C.P.L.R. 7804(e). Practically speaking, as known among practitioners working in land use planning or local agency approval matters, local bodies and officers tend to seek to have the applicants shoulder a portion, if not all, of those costs. As such, these potential significant costs can be a bane to both public and private parties in an Article 78 proceeding.

<sup>44</sup> The general procedures for asserting motions based upon objections in point of law in an Article 78 proceeding are governed by both CPLR section 7804(f) (governing Article 78 proceedings specifically) and CPLR section 404(a) (governing special proceedings generally). C.P.L.R. 7804(f); N.Y. C.P.L.R. 404(a) (McKinney 2013).

<sup>45</sup> See *Advisory Committee’s Notes, in N.Y. C.P.L.R. 3211* (McKinney 2013).

<sup>46</sup> *Id.*

<sup>47</sup> *In re Nassau BOCES Cent. Council of Teachers v. Bd. of Coop. Educ. Servs.*, 63 N.Y.2d 100, 102, 469 N.E.2d 511, 511, 480 N.Y.S.2d 190, 190 (1984) (“The mandate of CPLR 7804 (subd [f]) . . . proscribes dismissal on the merits following [a motion to dismiss], unless the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.”). See also *In re 230 Tenants Corp. v. Bd. of Standards & Appeals*, 101 A.D.2d 53, 56, 474 N.Y.S.2d 498, 500 (App. Div. 1st Dep’t 1984) (“Notwithstanding the clear meaning and intent of the relevant language in CPLR 7804 (subd [f]), some authority has developed to the effect that a court need not permit a respondent to answer upon denial of its CPLR 7804 (subd [f]) motion.”).



and “shall permit the respondent to answer, upon such terms as may be just.”<sup>48</sup>

The CPLR generally affords litigants with a liberal right to appeal decisions made during the course of litigation in the New York State Supreme Court, to the Appellate Division.<sup>49</sup> The breadth of what can typically be unilaterally appealed in civil litigation is recounted in CPLR section 5701(a); however, the same is not true for an Article 78 proceeding.<sup>50</sup> In an Article 78 proceeding, if a court denies a motion to dismiss based upon an objection in point of law, the losing party has no right to an immediate appeal of that adverse determination.<sup>51</sup> Specifically, the CPLR states that “[a]n order is not appealable to the appellate division as of right where it . . . is made in a proceeding against a body or officer pursuant to article 78.”<sup>52</sup> That prohibition is consistent with the legislature’s intention that challenges to actions by a body or officer must be presented and adjudicated expeditiously.<sup>53</sup> The courts, in turn, are stringent about adhering to the proscription against appeals of intermediate orders and generally require a final judgment under CPLR 7806 before entertaining an appeal.<sup>54</sup> The general proscription against appeals of intermediate orders in these matters has the practical impact of burdening parties to litigate otherwise possibly defective challenges and further expend significant time and costs on the merits of a challenge, even though the lower court may have erred in deciding any objection in point of law or other issue raised by a pre-answer motion. However, as we all learned in law school, there are exceptions for everything and various ways to circumvent that general prohibition based upon the circumstances of the given case.

Initially, a party seeking to appeal an interlocutory order must first look to the substance of the order. “An article 78 proceeding

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<sup>48</sup> See C.P.L.R. 7804(f); see also Castiglione, *supra* note 39, at 48–50 (discussing the implications of a motion to dismiss in an Article 78 proceeding).

<sup>49</sup> N.Y. C.P.L.R. 5701(a) (McKinney 2013).

<sup>50</sup> C.P.L.R. 5701(b).

<sup>51</sup> C.P.L.R. 5701(b)(1).

<sup>52</sup> C.P.L.R. 5701(b).

<sup>53</sup> See *supra* notes 23–25 and accompanying text.

<sup>54</sup> See *In re Defreestville Area Neighborhood Ass’n, Inc. v. Planning Bd.*, 16 A.D.3d 715, 719 n.3, 790 N.Y.S.2d 737, 741 n.3 (App. Div. 3d Dep’t 2005); see also *Cohen v. State*, 2 A.D.3d 522, 523, 770 N.Y.S.2d 361, 362 (App. Div. 2d Dep’t 2003) (holding that an appeal cannot be made “as of right from a nonfinal order” in an Article 78 proceeding); *Luebbe v. Brookhaven Zoning Bd. of Appeals*, 120 A.D.2d 731, 731, 502 N.Y.S.2d 516, 517 (App. Div. 2d Dep’t 1986) (dismissing an appeal from an intermediate order in an Article 78 proceeding); *Driscoll v. Dep’t. of Fire*, 112 A.D.2d 751, 751, 492 N.Y.S.2d 249, 249 (App. Div. 4th Dep’t 1985) (dismissing an appeal made from a “nonfinal intermediate order” in an Article 78 proceeding).

terminates in a judgment, rather than in a final order.”<sup>55</sup> In some instances, a court may inaccurately identify its final determination adjudicating the merits of a proceeding as an “order,” not as a “judgment.”<sup>56</sup> A court’s “denomination of the result of [the] proceeding as a ‘final order’ rather than a ‘judgment’ [is] merely an inconsequential and nonprejudicial error which should be disregarded,” and not stand to obstruct an appeal.<sup>57</sup>

A determination of the objection in point of law concerning a party’s standing could also be considered a final judgment. For example, in *Troy Ambulance Service, Inc. v. New York State Department of Health*,<sup>58</sup> several petitioners commenced an Article 78 proceeding to challenge certain determinations by the New York State Department of Health.<sup>59</sup> The Appellate Division, Third Department, explained in that case that the “[s]upreme [c]ourt dismissed the proceeding as to [certain] petitioners . . . on the ground that they lacked standing to challenge the Department of Health’s administrative action, and this appeal ensued.”<sup>60</sup> In reviewing the appeal of the lower court’s decision dismissing the petition as to certain petitioners for lack of standing, the Third Department held as follows:

As a preliminary matter, we reject [the opposing party]’s argument that the judgment dismissing the petition as to these petitioners is not appealable because it did not terminate the proceedings and therefore is not a final judgment. A judgment or order is final if it “disposes of all of the causes of action between the parties in the . . . proceeding and leaves nothing for further judicial action apart from mere ministerial matters.”<sup>61</sup>

The Third Department’s holding in *Troy Ambulance Service* raises an interesting question about finality as to the underlying matter.

In many Article 78 proceedings the petitioners are comprised of individuals and entities, with the entities typically having the

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<sup>55</sup> *De Paula v. Memory Gardens, Inc.*, 90 A.D.2d 886, 886, 456 N.Y.S.2d 522, 523 (App. Div. 3d Dep’t 1982).

<sup>56</sup> *See id.* at 886, 456 N.Y.S.2d at 523–24.

<sup>57</sup> *Id.* at 886, 456 N.Y.S.2d at 524.

<sup>58</sup> *Troy Ambulance Serv., Inc. v. N.Y. State Dep’t of Health*, 260 A.D.2d 715, 687 N.Y.S.2d 943 (App. Div. 3d Dep’t 1999).

<sup>59</sup> *Id.* at 715–16, 687 N.Y.S.2d at 494.

<sup>60</sup> *Id.* at 716, 687 N.Y.S.2d at 494.

<sup>61</sup> *Id.* (quoting *Burke v. Crosson*, 85 N.Y.2d 10, 15, 647 N.E.2d 736, 739, 623 N.Y.S.2d 524, 527 (1995)).

individuals as members of those entities.<sup>62</sup> Those petitioners are usually represented by the same legal counsel in the litigation. The *Troy Ambulance Service* case raises the question of whether, if certain petitioners are dismissed but the same underlying arguments from a petition are allowed to continue due to the legal standing of other petitioners, the proceeding is properly considered “final” to justify characterizing the intermediate order as a “final judgment” for the purposes of an appeal.<sup>63</sup> In other words, if the same arguments are allowed to continue by the same legal counsel and other parties generally similarly situated, is there actually a final determination for the purposes of triggering an appeal? The *Troy Ambulance* case currently supports that position.

Further, as noted in the *Troy Ambulance* decision, an intermediate order may be considered final if the intermediate order otherwise “leaves nothing for further judicial action apart from mere ministerial matters.”<sup>64</sup> There are two issues raised by that statement: first, whether an intermediate order has decided all issues in dispute and is therefore deemed “final”; and, second, if the court has remanded a matter to a body or officer for further proceedings or actions.<sup>65</sup> Each issue plays a role in determining if an intermediate order is appealable in an Article 78 proceeding.

Relative to determining whether an intermediate order has decided all issues between the parties and therefore is properly deemed “final,” the Court of Appeals explained the issue of “finality” in *Burke v. Crosson* as follows:

The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing. Nonetheless, a fair working definition of the concept can be stated as follows: a “final” order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters. Under this definition, an order or judgment that disposes of some but not all of the substantive and monetary disputes between the same parties is, in most cases, nonfinal. Thus, a nonfinal order or judgment results when a court decides one or more but not all causes of action in the complaint against a particular defendant or where the court disposes of a

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<sup>62</sup> See, e.g., *Troy Ambulance Serv.*, 260 A.D.2d at 715–16, 687 N.Y.S.2d at 494.

<sup>63</sup> See *id.* at 716, 687 N.Y.S.2d at 494.

<sup>64</sup> *Id.* (quoting *Burke*, 85 N.Y.2d at 15, 647 N.E.2d at 739, 623 N.Y.S.2d at 527).

<sup>65</sup> See *Troy Ambulance Serv.*, 260 A.D.2d at 716, 687 N.Y.S.2d at 494.

counterclaim or affirmative defense but leaves other causes of action between the same parties for resolution in further judicial proceedings.<sup>66</sup>

Applying the above reasoning from *Burke* to an interlocutory order in an Article 78 proceeding, an interlocutory order in an Article 78 proceeding may properly be deemed final if it “disposes of all of the causes of action between the parties in the . . . proceeding” and does not leave “other causes of action between the same parties for resolution in further judicial proceedings.”<sup>67</sup> However, as noted above and reiterated in *Burke*, a would-be appellant must also look to the substance of purported “mere ministerial matters” that may be left open or otherwise directed by a court order in an Article 78 proceeding.<sup>68</sup> A court may identify certain issues as “mere ministerial matters” in its intermediate order, but the impact of those matters may actually be more substantive, resulting in the intermediate order being “non-final” and therefore non-appealable.<sup>69</sup>

The case in *Mid-Island Hospital v. Wyman*<sup>70</sup> serves as an example of what constitutes “ministerial matters.”<sup>71</sup> In *Mid-Island Hospital*, the Court of Appeals reviewed an appeal of a lower court determination in an Article 78 proceeding challenging a determination by the Commissioner of Social Welfare of the State of New York.<sup>72</sup> The court explained the facts before it as follows:

Pursuant to the court order the matter was resubmitted to the Commissioner who on March 2, 1964 made a new determination including some new findings. The Commissioner made findings as to the relations between the sublessor and the hospital partnership, pointed out that under section 35-b of the Social Welfare Law licensed physicians only may operate proprietary hospitals, and held that by reason of certain facts this hospital was actually being operated by the sublessor corporation and that, accordingly, the operation of the hospital was in violation of section 35-b and held that there was, therefore, no right of

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<sup>66</sup> *Burke*, 85 N.Y.2d at 15–16, 647 N.E.2d at 739, 623 N.Y.S.2d at 527 (footnote omitted) (citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 15–16, 18, 647 N.E.2d at 739, 741, 623 N.Y.S.2d at 527, 529 (quoting N.Y. C.P.L.R. 5501(a)(1) (McKinney 2013)).

<sup>70</sup> *In re Mid-Island Hosp. v. Wyman*, 15 N.Y.2d 374, 207 N.E.2d 187, 259 N.Y.S.2d 138 (1965).

<sup>71</sup> *Id.* at 379, 207 N.E.2d at 190, 259 N.Y.S.2d at 141.

<sup>72</sup> *Id.* at 377–78, 207 N.E.2d at 189, 259 N.Y.S.2d at 140.

Mid-Island to any determination as to the adequacy of the reimbursement rate. A new article 78 proceeding (the present one) was then begun. The petition alleged, among other things, that the Commissioner's second determination, made on the same facts that were before him the first time, is arbitrary and illegal because it ignored the Special Term decision and order of November, 1963. By another proceeding begun at the same time petitioner sought from the court an adjudication that the Commissioner was guilty of contempt for willfully disobeying the Special Term order. These two proceedings came on at Special Term before the same Justice who had made the earlier decision and he again reversed the determination of the Commissioner and again remanded the matter for the making of specific findings by the Commissioner, but withheld the decision in the contempt proceeding pending the Commissioner's determination on the remand. The Commissioner appealed to Appellate Division, Second Department. The Appellate Division dismissed the appeal on the ground that the Commissioner's determination was not appealable as of right. In other words, the Appellate Division took the position that the Commissioner's order made on Special Term's second remand was the kind of intermediate order described in CPLR 5701 ([b], 1) and so required leave to appeal from the court, which leave had not been obtained. We granted the petitioner leave to appeal to this court from that dismissal.<sup>73</sup>

Based upon the above facts, the Court of Appeals posed whether the lower court's order being appealed was an intermediate order, and therefore not appealable as of right:

The question to be answered here is: was the Special Term order which petitioner attempted to appeal to the Appellate Division a "final judgment" of the kind described in CPLR 5701 ([a], 1) and 7806 and accordingly appealable as of right to the Appellate Division, or was it a CPLR 5701 ([b], 1) intermediate order in an article 78 proceeding?<sup>74</sup>

The court in *Mid-Island Hospital* ultimately determined that the order was a final order and appealable, due to the ministerial nature of the activities to be performed by the agency on remand

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<sup>73</sup> *Id.* at 378–79, 207 N.E.2d at 189, 259 N.Y.S.2d at 140–41.

<sup>74</sup> *Id.* at 379, 207 N.E.2d at 189, 259 N.Y.S.2d at 141 (quoting N.Y. C.P.L.R. 5701(a)(1) (McKinney 2013)).

that were specifically identified and ordered by the lower court.<sup>75</sup> The Court of Appeals explained:

The Special Term order of September 28, 1964 read with the court's opinion embodied therein can be nothing other than or less than a final judgment. It annuls the Commissioner's second determination. While in form it directs the making by the Commissioner of new findings, it insists that such findings "be rendered in accordance and not inconsistent with the findings contained in the decisions and memorandum and opinion" of the court handed down in 1963 and 1964. This says and means these things: that the Commissioner must adopt Special Term's finding that the \$350,000 annual rent is to be included as a reimbursable expense, that the exclusion of that amount by the Commissioner results in an inadequate reimbursement rate to Mid-Island, and that the Commissioner's asserted reason for his determination was erroneous since, as Special Term found, there was no substantial affiliation between the hospital operators and the owners of the premises and the hospital was in fact operated by duly licensed physicians only. The Special Term order, therefore, unmistakably commanded the Commissioner to make specified findings, the making of which could result in nothing other than a determination by the Commissioner that the \$350,000 rent must be included in the reimbursement rate base. While a remand to the Commissioner was ordered, any action of his pursuant thereto would have had to conform in all respects with Special Term's directions. Thus his action and function would be "purely ministerial."<sup>76</sup>

The *Mid-Island Hospital* case involved a lower court order remanding the matter back to the administrative agency, where the agency's "function would be 'purely ministerial.'"<sup>77</sup> The order was therefore deemed "final" for appeal by the Court of Appeals.<sup>78</sup> However, under certain circumstances an order remanding an administrative proceeding back to the administrative agency may be non-ministerial, and therefore non-final. For example, as noted by the Third Department in *Schreck v. Wyman*,<sup>79</sup> "[w]here a matter

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<sup>75</sup> *Id.* at 379–80, 207 N.E.2d at 189–90, 259 N.Y.S.2d at 141–42.

<sup>76</sup> *Id.* at 379, 207 N.E.2d at 189–90, 259 N.Y.S.2d at 141.

<sup>77</sup> *Id.* at 379, 207 N.E.2d at 190, 259 N.Y.S.2d at 141.

<sup>78</sup> *Id.* at 379, 207 N.E.2d at 189–90, 259 N.Y.S.2d at 141.

<sup>79</sup> *Schreck v. Wyman*, 39 A.D.2d 809, 332 N.Y.S.2d 482 (App. Div. 3d Dep't 1972).

is remitted to an administrative agency for further action and the agency has the power and duty to exercise discretion or to make an independent record, its function remains quasi-judicial and the order is not final.”<sup>80</sup>

In *Schreck*, the appellate court was reviewing the propriety of an appeal of a lower court order “in a proceeding, pursuant to CPLR article 78, which remanded the matter to the State Commissioner of Social Services for further administrative proceedings, modified a stay, denied a motion to dismiss the petition and denied intervenor’s counterclaim.”<sup>81</sup> The court explained the facts on appeal, as follows:

[The] intervenor-appellant, and her eight children are recipients of public assistance under [a program run by Albany County, and was subsequently informed by the County] that her monthly grant would be reduced by \$100 per month from October 16, 1969 until September 30, 1972. Thereafter, appellant filed a request for a “fair hearing” before an officer of the State Department of Social Services for the purpose of challenging the reduction. The decision of the Commissioner of the New York State Department of Social Services held that the Albany County Commissioner had erred in withholding \$100 monthly from appellant’s grant and ordered that the amount be restored to her future grants.<sup>82</sup>

Albany County subsequently challenged the administrative determination at issue in *Schreck*, by Article 78 proceeding.<sup>83</sup>

In reviewing the appeal of the lower court’s order in the Article 78 matter, the appellate court in *Schreck* noted that the lower court had determined:

[T]hat the record before him was inadequate and remanded the case for further administrative review. Special Term provided that appellant should receive her full grant pending determination of the case and dismissed appellant’s counterclaim against the Albany Commissioner for lost grants back to October, 1969 and also denied a motion to dismiss the petition.<sup>84</sup>

Based upon the foregoing, the court in *Schreck* determined that, “[c]onsequently, it must be concluded that the order in this case is

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<sup>80</sup> *Id.* at 810, 332 N.Y.S.2d at 484.

<sup>81</sup> *Id.* at 809, 332 N.Y.S.2d at 483.

<sup>82</sup> *Id.* at 809–10, 332 N.Y.S.2d at 483 (citation omitted).

<sup>83</sup> *Id.* at 810, 332 N.Y.S.2d at 483.

<sup>84</sup> *Id.* at 810, 332 N.Y.S.2d at 484.

intermediate and not final and the appeal must be dismissed.”<sup>85</sup>

Relatedly, the appellate court in *Cirasole v. Simins*<sup>86</sup> identified “residual discretion” over a matter that was remanded to a board for additional proof as grounds for characterizing the order as non-final.<sup>87</sup> It has also been held that a remand of a matter that “aggrieves” a party is sufficient to allow the order to be appealed.<sup>88</sup>

The foregoing therefore serves to show that there can be different implications on the appealability of an intermediate order involving a remand to the administrative agency.

Additionally, in some circumstances, a trial can be had in an Article 78 proceeding.<sup>89</sup> Article 78 provides, in part, as follows:

If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith. Where the proceeding was transferred to the appellate division, the issue of fact shall be tried by a referee or by a justice of the supreme court and the verdict, report or decision rendered after the trial shall be returned to, and the order thereon made by, the appellate division.<sup>90</sup>

As known among the bench and bar, trials can invoke any number of trial-related motions, including motions in limine objecting to the introduction of certain evidence at trial.<sup>91</sup> Consistent with the prohibition against appealing intermediate orders in an Article 78 proceeding, courts have generally acknowledged that, relative to trial-related orders, “[i]t is correct to

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<sup>85</sup> *Id.*; see also *Nodelman v. Codd*, 61 A.D.2d 771, 771, 402 N.Y.S.2d 21, 21 (App. Div. 1st Dep’t 1978) (“Such further action, as recommended by Special Term, is not purely ministerial in character, but requires the exercise of quasi-judicial responsibility with respect to the issues, and hence the order is intermediate, and not final, and is not appealable as of right but only upon obtaining permission to appeal.”); *Coor Dev. Corp. v. Weber*, 41 A.D.2d 689, 689, 342 N.Y.S.2d 635, 636 (App. Div. 4th Dep’t 1973) (“Under the order appealed from petitioner’s application to the Town Board is remanded to the board to take proof at a new hearing and to make a determination on the proof presented. Such further action as directed requires the exercise of quasi-judicial responsibility with respect to the issues and, therefore, it is not ministerial in character. The order being intermediate and not final, is not appealable as of right but only upon obtaining leave to appeal.”) (citation omitted).

<sup>86</sup> *Cirasole v. Simins*, 48 A.D.2d 795, 369 N.Y.S.2d 423 (App. Div. 1st Dep’t 1975)

<sup>87</sup> *Id.* at 795, 369 N.Y.S.2d at 424 (“The order appealed from is non-final, the Supreme Court having remanded the matter to the respondent for further proceedings which necessitated the taking of additional proofs as well as respondent’s exercise of ‘residual discretion.’”) (quoting *N. Am. Holding Corp. v. Murdock*, 6 A.D.2d 596, 599, 180 N.Y.S.2d 436, 439 (App. Div. 1st Dep’t 1958), *aff’d*, 6 N.Y.2d 902, 160 N.E.2d 926, 190 N.Y.S.2d 708 (1959)).

<sup>88</sup> See *Dukuly v. Aponte*, 204 A.D.2d 189, 189, 612 N.Y.S.2d 126, 127 (App. Div. 1st Dep’t 1994).

<sup>89</sup> N.Y. C.P.L.R. 7804(h) (McKinney 2013).

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., *In re City of New York v. Mobil Oil Corp.*, 12 A.D.3d 77, 79–80, 783 N.Y.S.2d 75, 77 (App. Div. 2d Dep’t 2004).



say that an order, made in advance of trial, which merely determines the admissibility of evidence is an unappealable advisory ruling.”<sup>92</sup> However, consistent with the need to determine if an intermediate order is actually properly deemed a “final” determination, parties need to look to the substance of any pretrial order to properly make that decision.<sup>93</sup>

Related to the foregoing, a trial in an Article 78 proceeding could involve a trial and determination of “restitution or damages,” as the terms of Article 78 allow a party to recover such if they are “incidental to the primary relief sought by the petitioner.”<sup>94</sup> Consistent with the above, any court ruling on admission of evidence at trial relating to the requested restitution or damages would seemingly generally constitute a non-final intermediate order not appealable as of right under CPLR section 5701(b)(1);<sup>95</sup> however, if the court ruling affected evidence regarding the amount of restitution or damages sought by a party, that could constitute a final order for purposes of appeal.<sup>96</sup> While not directly on point, the decision in *In re City of New York v. Mobil Oil Corp.* provides insight on this issue.<sup>97</sup>

In *Mobil Oil*, there was a proceeding involving the valuation of lands acquired by the City of New York through condemnation from Mobil Oil Corporation.<sup>98</sup> As explained on appeal by the Second Department in that matter:

Prior to the condemnation valuation trial, Mobil made a motion in limine to preclude “evidence of a claimed reduction in the fair market value of . . . property . . . arising from any set off for contamination cleanup and removal costs.” Mobil argued that this evidence should be excluded in the eminent domain proceeding due to the risk of “double liability” which could result if the City paid a decreased value for the condemned property in the proceeding, and subsequently recovered damages for the cost of remediation pursuant to

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<sup>92</sup> *Id.* at 80, 783 N.Y.S.2d at 77 (quoting *Rondout Electric, Inc. v. Dover Union Free Sch. Dist.*, 304 A.D.2d 808, 810, 758 N.Y.S.2d 394, 397 (App. Div. 2nd Dep’t 2003)).

<sup>93</sup> *See Mobil Oil*, 12 A.D.3d at 81, 783 N.Y.S.2d at 77 (holding that claimant’s utilization of a motion in limine was functionally equivalent to a motion for summary judgment, and was thus appealable).

<sup>94</sup> N.Y. C.P.L.R. 7806 (McKinney 2013).

<sup>95</sup> *See* N.Y. C.P.L.R. 5701(b)(1) (McKinney 2013); *Mobil Oil*, 12 A.D.3d at 80–81, 783 N.Y.S.2d at 77.

<sup>96</sup> *See Mobil Oil*, 12 A.D.3d at 81, 783 N.Y.S.2d at 77.

<sup>97</sup> *See id.* at 80–81, 783 N.Y.S.2d at 77.

<sup>98</sup> *See id.* at 79, 783 N.Y.S.2d at 76.

the Navigation Law action.<sup>99</sup>

This arose out of an action by the City of New York against Mobil under the Navigation Law, seeking judgment stating that Mobil was strictly liable for cleanup costs and damages associated with petroleum released upon the same lands allegedly by Mobil.<sup>100</sup> The lower court ultimately granted Mobil's motion in limine and excluded the evidence.<sup>101</sup> On appeal, the Second Department explained that portion of the City of New York's appeal concerning the motion in limine as follows:

Mobil argues that the City's appeal should be dismissed because a party cannot appeal from an order that decides a motion in limine to exclude evidence. However, while "[i]t is correct to say that an order, made in advance of trial, which merely determines the admissibility of evidence is an unappealable advisory ruling," in fact, Mobil's motion to preclude sought far more than a mere evidentiary ruling. By precluding the evidence regarding diminution in value, Mobil sought to affect the amount of compensation for which the City would be liable in the condemnation proceeding.<sup>102</sup>

In reversing the lower court, the Appellate Division determined the order constituted a final determination on the merits.<sup>103</sup> The Second Department held:

Since compensation is the only issue involved in a condemnation valuation proceeding, Mobil's "in limine" motion was the functional equivalent of a motion for summary judgment. As this Court has recently stated, "[a]n order deciding such a motion clearly involves the merits of the controversy and affects a substantial right and thus is appealable." Therefore, the appeal should not be dismissed.<sup>104</sup>

While not on point for an Article 78 proceeding, an in limine ruling on the admissibility of evidence as to the value of restitution

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<sup>99</sup> *Id.* at 79–80, 783 N.Y.S.2d at 77.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 80, 783 N.Y.S.2d at 77.

<sup>102</sup> *Id.* at 80–81, 783 N.Y.S.2d at 77 (quoting *Rondout Electric, Inc. v. Dover Union Free Sch. Dist.*, 304 A.D.2d 808, 810, 758 N.Y.S.2d 394, 397 (App. Div. 2nd Dep't 2003) (citations omitted)).

<sup>103</sup> *Id.* at 81, 783 N.Y.S.2d at 77.

<sup>104</sup> *Id.* at 81, 783 N.Y.S.2d at 77–78 (quoting *Rondout Electric*, 304 A.D.2d at 808, 758 N.Y.S.2d at 397) (citations omitted).

or damages sought in an Article 78 trial,<sup>105</sup> could be argued as a final determination on the merits concerning the amount of the restitution or damages, consistent with the reasoning in *Mobil Oil*.

#### IV. PERMISSION TO APPEAL AN INTERMEDIATE ORDER

As shown above, a number of significant issues can arise in an Article 78 proceeding that, if determined against the party raising the objection or issue, can have significant repercussions upon that party. An adverse intermediate ruling can expose a party to significant litigation costs and/or potentially jeopardize projects, permits, or related financing, due to the mere prolonging of the underlying Article 78 proceeding.<sup>106</sup> As such, practitioners must endeavor to take all necessary and appropriate actions to ensure that an adverse ruling is quickly challenged by appeal. However, the general prohibition against appeals of intermediate orders is a difficult obstacle to overcome in an Article 78 proceeding.

Determining whether an intermediate order is appealable or not in an Article 78 proceeding won't ultimately change the substance of whether the ruling is actually appealable or not under CPLR section 5701(b)(1).<sup>107</sup> However, there is hope. Apart from the above circumstances that may allow for an interlocutory order to be appealed, the CPLR provides a more ubiquitous option for a hopeful appellant in an Article 78 matter. Specifically, the CPLR states:

An appeal may be taken to the appellate division from any order which is not appealable as of right in an action originating in the supreme court or a county court by permission of the judge who made the order granted before application to a justice of the appellate division; or by permission of a justice of the appellate division in the department to which the appeal could be taken, upon refusal by the judge who made the order or upon direct application.<sup>108</sup>

Therefore, by asking either the lower court or appellate court in the order and manner provided by section 5701(c), a party can endeavor to immediately appeal any adverse ruling in an Article 78

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<sup>105</sup> See *Mobil Oil*, 12 A.D.3d at 81, 783 N.Y.S.2d at 77.

<sup>106</sup> See *supra* notes 28–39 and accompanying text.

<sup>107</sup> N.Y. C.P.L.R. § 5701(b)(1) (McKinney 2013).

<sup>108</sup> C.P.L.R. § 5701(c); see also, e.g., *Leung v. Dep't of Motor Vehicles*, 65 A.D.2d 736, 736, 410 N.Y.S.2d 616, 616 (App. Div. 1st Dep't 1978) (dismissing the appeal because the appeal was from a non-final order in an Article 78 proceeding and no permission to appeal was obtained by the Appellate Division).

proceeding that could otherwise impose significant problems for the party.<sup>109</sup>

As made clear by CPLR section 5701(c), a party can seek permission by formal application to the court, or the appellate court can grant permission *sua sponte*.<sup>110</sup> The courts have identified several grounds for granting permission to appeal *sua sponte*, including based upon the broad “interest of judicial economy” standard.<sup>111</sup> Apart from judicial economy, in *Swartz v. Wallace*,<sup>112</sup> the Third Department noted the significance of the underlying issue in the case as grounds to allow permission to appeal *sua sponte*.<sup>113</sup> Specifically, the appellate court stated:

Petitioners’ proper mode of seeking review was to have sought permission to appeal. However, in view of respondents’ failure to move to dismiss the appeal on this ground, the significant involvement of the order in the merits of this proceeding, and the importance of the issues presented, which apparently involve the validity of a policy of the board reflected in a series of its prior determinations, the case is an appropriate one for us to grant permission to appeal *sua sponte*.<sup>114</sup>

As opposed to grounds to justify granting permission to appeal *sua sponte*, a court refused to allow an appeal *sua sponte* where “the order appealed from [was] akin to an evidentiary or scheduling ruling made in the midst of trial, and does not appear to implicate the merits.”<sup>115</sup>

Litigants should be cautious about seeking to rely upon a court’s *sua sponte* kindness, as courts are consistently clear that in instances when permission to appeal an intermediate order in an Article 78 proceeding has not been made, the “appeal must be dismissed.”<sup>116</sup>

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<sup>109</sup> N.Y. C.P.L.R. § 5701(c).

<sup>110</sup> See *In re Shawangunk Holdings, Ltd. v. Superintendent of Highways*, 101 A.D.2d 905, 907, 475 N.Y.S.2d 602, 604 (App. Div. 3d Dep’t 1984); *Schwartzberg v. Whalen*, 87 A.D.2d 665, 666, 448 N.Y.S.2d 838, 840 (App. Div. 3d Dep’t 1982).

<sup>111</sup> *Shawangunk Holdings*, 101 A.D.2d at 907, 475 N.Y.S.2d at 604; *Schwartzberg*, 87 A.D.2d at 666, 448 N.Y.S.2d at 840.

<sup>112</sup> *Swartz v. Wallace*, 87 A.D.2d 926, 450 N.Y.S.2d 65 (App. Div. 3d Dep’t 1982).

<sup>113</sup> *Id.* at 927, 450 N.Y.S.2d at 65.

<sup>114</sup> *Id.* (citation omitted).

<sup>115</sup> See *In re City of Newark v. Law Dep’t*, 8 A.D.3d 152, 153, 779 N.Y.S.2d 59, 60 (App. Div. 1st Dep’t 2004).

<sup>116</sup> *Driscoll v. Dep’t of Fire*, 112 A.D.2d 751, 751, 492 N.Y.S.2d 249, 249 (App. Div. 4th Dep’t 1985); see also *Luebbe v. Brookhaven Zoning Bd. of Appeals*, 120 A.D.2d 731, 731, 502 N.Y.S.2d 516, 516 (App. Div. 2d Dep’t 1986) (denying an appeal of an intermediate order in an

2013/2014]

Article 78 and Interlocutory Appeals

147

## V. CONCLUSION

An Article 78 proceeding is generally required to be brought soon after the action or decision to be challenged becomes final, and decided quickly. However, an issue raised and decided by an interlocutory order in such a matter can cause big problems for a client. Due to the expeditious nature and purpose of the proceedings, the courts are stringent about not allowing the underlying proceedings to be bogged down by appeals during the pendency of the matter. Contrary to the old adage that it is better to seek forgiveness later than ask for permission first, a practitioner must be cautious in such matters to decide if the issue raised is essential to the case or client's goals; and, if so, practitioners are better advised to seek permission to appeal the interlocutory matter from the court first, rather than seeking forgiveness from an unhappy client later.