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COURT OF APPEALS

STATE OF NEW YORK

HUDSON VIEW PARK CO.,

Appellant,

-against-

TOWN OF FISHKILL,

Respondent.

NO. 115

20 Eagle Street
Albany, New York
November 20, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon, everyone.
2 The first case on today's calendar is Hudson View Park
3 versus Town of Fishkill. Counsel.

4 MR. LEFKOWITZ: Good afternoon, Your Honors. Lee
5 Lefkowitz from Zarin and Steinmetz, on behalf of the
6 appellant, may it please the Court. I'd like to reserve
7 three minutes for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MR. LEFKOWITZ: If we are going to do anything
10 about how difficult it is to build housing, statewide
11 policy should promote agreements like the memorandum in
12 this case, which was all about good government and open
13 process to review and entertain a rezoning application and
14 preserving legislative discretion.

15 JUDGE SINGAS: Well, in your complaint, you
16 accepted the axiom that zoning changes are in the absolute
17 discretion of the legislature, right?

18 MR. LEFKOWITZ: They definitely are. And the MOU
19 preserved that discretion - - -

20 JUDGE SINGAS: How, how so?

21 MR. LEFKOWITZ: - - - of the legislature.

22 At the end of the process, the town board could
23 vote however it wished. It could have voted yes - - -

24 JUDGE SINGAS: They couldn't say, no, we don't
25 want to look at this. Right off the bat, that's one of

1 their options.

2 MR. LEFKOWITZ: So right off the bat they chose
3 to entertain the application. They chose to enter into the
4 MOU. So they chose to entertain it. They chose to
5 exercise their discretion to enter into the MOU and
6 entertain this application.

7 What the MOU committed Fishkill to do was to not
8 terminate in the middle of the process before the applicant
9 could get all of its studies and materials.

10 JUDGE RIVERA: But then that curtails their
11 discretion?

12 MR. LEFKOWITZ: It doesn't - - -

13 JUDGE RIVERA: Their ability to act?

14 MR. LEFKOWITZ: It doesn't curtail their
15 substantive legislative discretion.

16 JUDGE RIVERA: But you agree it does curtail some
17 choice?

18 MR. LEFKOWITZ: Yes. It curtails their ability
19 to not do nothing.

20 JUDGE TROUTMAN: And in - - - without the MOU,
21 they normally could do that?

22 MR. LEFKOWITZ: There is - - -

23 JUDGE TROUTMAN: They could end the process,
24 correct?

25 MR. LEFKOWITZ: I'll note that this court has

1 never opined on that. There are some Appellate Division
2 cases, frankly, which are one or two paragraphs which do
3 assert that a town board doesn't have to take up or
4 continue review of a rezoning. This court has never
5 rendered that decision.

6 And I'll note that every other land-use
7 application - - -

8 JUDGE TROUTMAN: But with respect to their own
9 discretion, you're saying they're supposed to follow it
10 because there was an agreement. But without the agreement,
11 they could exercise their discretion, correct?

12 MR. LEFKOWITZ: Under those Appellate Division
13 cases? Yes.

14 JUDGE RIVERA: But you didn't preserve any
15 argument challenging that line of reasoning?

16 MR. LEFKOWITZ: Correct.

17 JUDGE RIVERA: Right?

18 MR. LEFKOWITZ: Our briefs had - - -

19 JUDGE RIVERA: You're working on the assumption
20 that you have locked them into something?

21 MR. LEFKOWITZ: We're working on - - -

22 JUDGE RIVERA: And what you want us to say is,
23 yes, it was lawful for you to lock them into something?

24 MR. LEFKOWITZ: Yes. We - - - we're working
25 under those Appellate Division cases. In fact, those cases

1 are what motivated the MOU in the first place.

2 JUDGE HALLIGAN: How far does that proposition
3 go, in your view? Could, for example, there have been an
4 MOU that would be enforceable, that would bind the actual
5 determination, the outcome?

6 MR. LEFKOWITZ: No. Not under the - - -

7 JUDGE HALLIGAN: Why not? Why is that different?
8 What - - - why is the exercise of power here different from
9 that hypothetical?

10 MR. LEFKOWITZ: Under the cases we were working
11 with at the time, the doctrines of contract zoning and term
12 limits, which are the two doctrines that are at issue in
13 this case, the cases like BT Holdings and Save Harrison,
14 where courts have found those don't violate those
15 doctrines.

16 JUDGE HALLIGAN: But with respect to the term
17 limits doctrine, in particular. What I'm - - - what I'm
18 grappling with is, is how far do you think one legislature
19 can go to bind the next? What kinds of - - - and please,
20 you know, set to the side proprietary functions. Right?
21 What kinds of decisions can be bound?

22 MR. LEFKOWITZ: Under that doctrine quite many
23 decisions can be bound. So in fact, many of the federal
24 cases we've cited, like Winstar, these are cases where
25 future legislatures are quote/unquote, bound to pretty

1 substantive policies. In that case, it was tax treatment
2 of savings and loans banks at the time, who were taking on
3 bad loans. Courts have held, yes, you can be bound to
4 really substantive issues like that.

5 JUDGE HALLIGAN: So what's the limit? What's the
6 limit, though, on your view about how far?

7 MR. LEFKOWITZ: The limit is that you cannot
8 prevent a future legislature from legislating. So for
9 example - - -

10 JUDGE HALLIGAN: Okay. But what - - -

11 MR. LEFKOWITZ: - - - if in this case - - -

12 JUDGE HALLIGAN: Yep.

13 MR. LEFKOWITZ: - - - we had said you can - - -
14 you must change zoning even if you're a future legislature,
15 we cannot force a future legislature to do something like
16 that. That's where I draw the line.

17 JUDGE HALLIGAN: Can you require that a future
18 legislature approve, for example, a particular zoning
19 variance?

20 MR. LEFKOWITZ: No. You couldn't do that.

21 JUDGE HALLIGAN: Okay.

22 CHIEF JUDGE WILSON: Could you have required that
23 the - - - sorry. In front of you.

24 Could they - - - you require that they do it
25 before the next elections? That they conduct a - - -

1 MR. LEFKOWITZ: That would - - - that wouldn't
2 violate term limits, but it could violate contract zoning,
3 which is the other doctrine we're dealing with. So you - -
4 - the doctrines that we're dealing with here - - -

5 CHIEF JUDGE WILSON: Uh-huh.

6 MR. LEFKOWITZ: - - - say you cannot predetermine
7 an outcome. You ca - - -

8 CHIEF JUDGE WILSON: No. I'm not asking about
9 the outcome. Just, they finished the process, whatever it
10 is, before it.

11 MR. LEFKOWITZ: Oh, so if it's about finishing
12 the process - - -

13 CHIEF JUDGE WILSON: Finish the process.

14 MR. LEFKOWITZ: Yes, yes, absolutely.

15 CHIEF JUDGE WILSON: You could contract - - -

16 MR. LEFKOWITZ: That's exactly what - - - I'm - -
17 - I'm sorry, Your Honor. I thought you were asking about -
18 - -

19 CHIEF JUDGE WILSON: Yeah. I want to be clear.
20 You think that they could contract to - - - you could have
21 contracted to have them finish the process with whatever
22 result, before the legislature in the state, the town
23 board, or whatever, is turned over?

24 MR. LEFKOWITZ: I think that's a difficult
25 question. So - - -

1 CHIEF JUDGE WILSON: Well, that's why I asked it.

2 MR. LEFKOWITZ: - - - if the - - - if the MOU in
3 that case said you must finish the process on a date
4 certain - - -

5 CHIEF JUDGE WILSON: Yeah.

6 MR. LEFKOWITZ: - - - before the - - - I think
7 that - - -

8 CHIEF JUDGE WILSON: On or before.

9 MR. LEFKOWITZ: - - - a potential potential issue
10 you could have is could you actually get through the
11 statutorily directed process in that time?

12 CHIEF JUDGE WILSON: Suppose you could.

13 MR. LEFKOWITZ: Suppose you could?

14 CHIEF JUDGE WILSON: Suppose you could - - -
15 could.

16 MR. LEFKOWITZ: As long as the process was
17 completed and all statutes were complied with, then yes, I
18 think you could do something like that.

19 JUDGE CANNATARO: Why would that even matter if
20 you got the other side to agree? If you made that
21 agreement and reduced it to a writing, really, who cares if
22 it was a realistic expectation or not? You now have a
23 contractual right, don't you?

24 MR. LEFKOWITZ: We have a contractual right, I
25 think, to - - -



1 JUDGE CANNATARO: No, I'm saying in this
2 hypothetical - - -

3 MR. LEFKOWITZ: Yes. But - - -

4 JUDGE CANNATARO: - - - where you have to finish
5 it by a certain date, probably before the next legislature
6 comes in. If they agreed to that, I would think you'd come
7 here and argue the fact that they're now arguing that
8 that's not feasible is immaterial because you have a - - -
9 you have a contract.

10 MR. LEFKOWITZ: I agree with that. And also I
11 think this goes to Justice Halligan's question. What we're
12 asking for in this case is monetary damages; we're not
13 trying to force a vote. So we're not even seeking to
14 require a future legislature to do anything.

15 In this case, all of our causes of action only
16 seek damages that we incurred in reasonable reliance on our
17 contract, which says we were going to get through the
18 process.

19 JUDGE GARCIA: Counsel, I'd like to ask you
20 something a little bit different. You opened your remarks
21 I think, saying that this - - - how we decide this case
22 will, in your view, have an affect on an ability to build
23 and to increase housing stock. You appealed, as I recall,
24 as of right, claiming this was a constitutional rule. Do
25 you still hold that position?

1 MR. LEFKOWITZ: Absolutely, yes.

2 JUDGE GARCIA: So if we decide against you, and
3 this is a constitutional rule, the legislature couldn't fix
4 this then, right?

5 MR. LEFKOWITZ: It depend - - -

6 JUDGE GARCIA: Without a constitutional
7 amendment, right?

8 MR. LEFKOWITZ: Well, I don't think that's true.
9 So - - -

10 JUDGE GARCIA: The legislature could fix a - - -
11 a constitutional decision from this court?

12 MR. LEFKOWITZ: If you agree that - - - if you
13 said it's not constitutional - - -

14 JUDGE GARCIA: No. But if we agree with you and
15 say yes, it's a constitutional rule and you lose? That's a
16 constitutional rule.

17 MR. LEFKOWITZ: Your interpretation of the
18 Constitution, yes, would bind the legislature and would - -
19 -

20 JUDGE GARCIA: So there's no legislative fix if
21 you are right, in getting here that this is a
22 constitutional rule?

23 MR. LEFKOWITZ: Yes, that's correct. Yeah.

24 JUDGE HALLIGAN: Does your assertion that it's
25 constitutional turn at all on the fact that it's a local

1 government? Or would you say the same thing would be true
2 for the state legislature?

3 MR. LEFKOWITZ: The same thing would be true for
4 the state legislature. And in fact, the cases that we've
5 cited in particular note that all of this derives from
6 constitutional premises of state sovereignty.

7 JUDGE HALLIGAN: So it doesn't turn at all on,
8 you know, powers conferred or not conferred by the
9 Municipal Home Rule Law provisions in the Constitution or
10 statute?

11 MR. LEFKOWITZ: No. It derives - - - it
12 ultimately traces to doctrines of state sovereignty going
13 back to the founding - - - going back to the Federalist
14 Papers, to the Fletcher case, the Winstar case. There are
15 cases where courts have found that that same federally
16 constitutional issue - - -

17 JUDGE TROUTMAN: So is it a common law that
18 you're relying upon that it's constitutional?

19 MR. LEFKOWITZ: No.

20 JUDGE TROUTMAN: Or is it a provision within the
21 Constitution itself?

22 MR. LEFKOWITZ: Well, what I'll say is there's no
23 - - - there's certainly no provision of the Constitution
24 that we're pointing to. These are implied constitutional
25 doctrines that courts have recognized as being part and

1 parcel of the Constitution dating back to the late 18th
2 century. They - - - yes, they derive from common law of
3 Great Britain and how state sovereignty was being
4 interpreted when - - - at the founding.

5 JUDGE SINGAS: Are any of those constitutional
6 issues that you're talking about now, were they raised
7 below by you?

8 MR. LEFKOWITZ: We didn't raise them. They are
9 the only ways in which either court decided this case.
10 Based - - - they were raised as defenses by my adversary in
11 both the - - - in both supreme court and the Appellate
12 Division. These two doctrines - - - contract zoning and
13 term limits - - - which trace to the same federal
14 constitutional premises of state sovereignty, called the
15 unmistakability doctrine, the reserved powers doctrine.
16 These doctrines are what Fishkill raised in defense of our
17 case.

18 They are the only things we've ever argued again
19 - - - about - - - the two of us in supreme court and in the
20 Appellate Division. They're the only two reasons that the
21 Appellate Division found against us, so they are directly
22 involved here.

23 And we've got half a dozen cases dating back to
24 the 1800s that recognize that these doctrines dealing with
25 when can a legislature contract away its legislative

1 authority and when it can't. These are - - - these
2 doctrines, term limits and contract zoning, are modern
3 names for those same federal principles.

4 I want to turn to the question that I opened
5 with, which was this is all about how difficult it is to
6 build here in New York, and the demanding land-use process
7 that we deal with here in New York, and contracts like
8 this, which make the baseline commitment by a municipality
9 to at least review an application. Every other land-use
10 application: a variance; a use variance which is not so
11 different from a rezoning; a site plan application; an
12 environmental review, all of these are entitled to a vote.
13 If you put in an application, you get an answer from your
14 government.

15 JUDGE HALLIGAN: Entitled by virtue of what?

16 MR. LEFKOWITZ: Town laws or Town Law 267(a) - -
17 -

18 JUDGE HALLIGAN: Okay. So by virtue of the
19 statute?

20 MR. LEFKOWITZ: - - - for example, requires a
21 vote on a rezoning. So a - - -

22 JUDGE HALLIGAN: But I thought your - - -

23 MR. LEFKOWITZ: - - - I'm sorry. A variance. So
24 each of these other applications - - -

25 JUDGE HALLIGAN: But if they're entitled to a



1 vote by statute, why do you need an MOU to secure that
2 right?

3 MR. LEFKOWITZ: Because this was a rezoning.
4 Rezoning is the only one of all these application - - -
5 types of applications that doesn't have something like
6 that.

7 JUDGE HALLIGAN: So it's only relevant - - - an
8 MOU like this would only be relevant to a rezoning, not to
9 a range of other land-use determinations? Where it sounds
10 like you're telling me that there is a right to an answer
11 pursuant to statute, and presumably one could go to court
12 to enforce that right?

13 MR. LEFKOWITZ: Correct.

14 JUDGE HALLIGAN: Okay.

15 MR. LEFKOWITZ: You see those cases all the time.
16 Those are mandamus cases where you bring a case to supreme
17 court, requiring a municipality to give you an answer on
18 your application.

19 JUDGE CANNATARO: As it relates to building, are
20 you saying that these cases that we see all the time, are
21 only related to zoning questions?

22 MR. LEFKOWITZ: With respect to mandamus or
23 requiring a municipality to act?

24 JUDGE CANNATARO: Whatever the dispute may be.

25 MR. LEFKOWITZ: In my world of land-use

1 applications, yes. These are applications where, for
2 example, if you apply for a variance and the municipality
3 won't act, you could bring a mandamus claim requiring them
4 to vote.

5 Rezoning are the only type of petition - - -

6 JUDGE CANNATARO: That then doesn't have an
7 inevitable adjudication or hearing attached to it?

8 MR. LEFKOWITZ: Exactly. Right.

9 JUDGE HALLIGAN: So presumably you could,
10 notwithstanding the two, you know, arguments made by your
11 adversary, you could enter into an MOU that would not run
12 past the term of a legislature without running afoul of
13 those doctrines. Yes? Wouldn't implicate it because there
14 - - - there wouldn't be the same - - -

15 MR. LEFKOWITZ: You could.

16 JUDGE HALLIGAN: - - - question. And so how long
17 does this process generally take? How often would there be
18 a concern that you would have an agreement, and then a new
19 legislature would come in?

20 MR. LEFKOWITZ: Every time.

21 JUDGE HALLIGAN: Well, that - - - every time?

22 MR. LEFKOWITZ: Yes. Because the land-use
23 process, particularly rezonings, take years. And they
24 don't even have to take years for this to come up every
25 time. One town board member could resign, or it could

1 change over in November - - - these are two-year terms. So
2 the answer is yes, every single one of these applications
3 takes many years, especially big projects, and especially
4 rezonings which are the most involved of these.

5 If there are going to continue to be public-
6 private partnerships to make big things happen in New York:
7 urban renewal; economic revitalization; brownfields
8 cleanups. If any of this is still going to happen, it's
9 going to require municipalities to be able to contract with
10 private parties to make things happen in this state. All
11 of them take more than - - -

12 JUDGE TROUTMAN: Are you suggesting that for the
13 projects that have gone forward, that the only reason they
14 were able to is because they've had these MOUs?

15 MR. LEFKOWITZ: If you were to look at the last
16 six or so biggest public-private partnerships in New York,
17 at the center of every one of them there's going to be a
18 contract just like this that sets forth at least the
19 baseline obligations of each side - - - procedural
20 obligations.

21 JUDGE HALLIGAN: But wouldn't a lot of that be
22 covered by proprietary function? I mean, this perhaps is
23 distinct - - - I see your lights on - - - but distinct,
24 because there's an argument that it is more of a governance
25 function.

1 MR. LEFKOWITZ: The doctrine that we're now
2 talking about, term limits - - -

3 JUDGE HALLIGAN: Yeah.

4 MR. LEFKOWITZ: - - - it shouldn't be looked at
5 that way. That - - - there's two or three cases total on
6 term limits. One of them, yes, mention this proprietary
7 versus governmental distinction.

8 JUDGE HALLIGAN: I'm just asking - - -

9 MR. LEFKOWITZ: But Monroe - - - Monroe talked
10 about how that doesn't even work. It's a difficult
11 question in the land-use context. It should be subject to
12 a balancing test. When it's just a vote - - - just a
13 procedural vote, it should fall on the side of the
14 balancing test that it should be allowed to - - - to go
15 into the next legislature - - - legislative term.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. LEFKOWITZ: Thank you.

18 MR. NUGENT: Good afternoon, Your Honors. May it
19 please the court. Brian Nugent, on behalf of the Town of
20 Fishkill, respondents, the law firm of Feerick Nugent
21 MacCartney.

22 Your Honors, I think to start with. Out of these
23 two doctrines we're discussing today, the term limits
24 doctrine is undoubtedly violated here under this court's
25 determination in Karedes which specifically stated that

1 elected officials must be free to exercise their discretion
2 in these governmental matters, and that they cannot bind
3 future boards in that discretion.

4 And in this case, it's clear - - -

5 JUDGE TROUTMAN: What do you say about the
6 argument that the ultimate decision that they're free to
7 vote whatever way they will?

8 MR. NUGENT: So Your Honor, I think that if we
9 take away the discretion - - - and which the appellants
10 acknowledge is absolute discretion when it comes to zoning
11 amendments - - - and now we sign an MOU, and the next board
12 cannot terminate that review, we're clearly taking away
13 from what we're describing, and all conceding, is absolute
14 discretion.

15 JUDGE CANNATARO: How do - - -

16 JUDGE TROUTMAN: So any part of the process
17 that's impacted violates the term limits?

18 MR. NUGENT: I think anything that's a
19 governmental power, such as zoning where there's an
20 absolute power to consider/not consider. And I'll say it's
21 rare in the governmental context that we have. As my
22 colleague mentioned, there's applications for site plan and
23 variances that have a process, and a municipality cannot
24 just say we're not listening to you.

25 JUDGE CANNATARO: And how do you justify or



1 explain that distinction that in almost every other land-
2 use process there is a set - - - you know, an inevitability
3 of a consideration and a vote, except for zoning, you know.
4 Why should it be that way?

5 MR. NUGENT: So I think the very reason for that
6 is that - - - you know, typically municipalities adopt
7 zoning in a comprehensive plan. And when you're coming to
8 a municipality, you're asking to say I want you to change
9 this from what you've already determined is the appropriate
10 uses and zoning and setbacks in that particular district,
11 and it's a request. And I think that's why there is
12 absolute discretion, because - - -

13 JUDGE CANNATARO: Isn't everything a request? A
14 request for a permit or a variance or - - -

15 MR. NUGENT: Yeah. But the difference is if you
16 - - - you have land, and you have a zoning code that says
17 you can develop it, you've been given that right to file
18 that application and obtain a determination from the
19 government. Which is not the case if you're saying I want
20 you to change that zoning law and make it more suitable to
21 me.

22 Secondly, I think if we ended up with a process
23 by which all developers were able to lock municipalities
24 into having to review zoning amendments, then we'd be
25 dealing with so many of those requests, and we would have

1 to - - -

2 JUDGE HALLIGAN: Can I ask you - - -

3 JUDGE SINGAS: Are these MOUs unusual or are - -
4 - is it part of common practice?

5 MR. NUGENT: This MOU, in my view, is unusual.
6 There are many MOUs in development, but more times when you
7 see those MOUs, they're setting forth an understanding of -
8 - - which is why they're usually called "memorandums of
9 understanding", because zoning codes don't necessarily
10 address every particular step in the process or how we're
11 going to handle it.

12 So there would be an MOU to say, okay, you have a
13 site plan, a special permit, a zoning variance, how are we
14 going to move forward on those, and so everybody's on the
15 same page essentially. But they don't bind the government
16 as this one does with that paragraph that basically tells
17 us, number one, you can't terminate your review of the
18 zoning amendment.

19 But on top of that, it imposes these conditions
20 that it must be based upon empirical data.

21 JUDGE HALLIGAN: And - - -

22 MR. NUGENT: When it comes time to make that
23 final determination - - -

24 JUDGE HALLIGAN: On - - -

25 MR. NUGENT: - - - you must base it on empirical



1 data and other factual basis.

2 I'm sorry, Judge Halligan.

3 JUDGE HALLIGAN: Not at all.

4 On the question of whether there's a
5 constitutional issue before us. If the term limits
6 doctrine isn't constitutional, you argue, I think, that - -
7 - that instead it's an issue of an absence of delegated
8 power. I'm not sure I follow that. And I guess, I think,
9 if it's not constitutional, I'm not sure what it is. Can
10 you address that?

11 MR. NUGENT: Yeah. So I think that when we refer
12 to the absence of the statutory authority, that, of course,
13 is the exception. And I would suggest that if the term
14 limits rule was really something that was entrenched in the
15 Constitution, then we wouldn't have statutes that actually
16 authorize term limits violations, so to speak. In some
17 cases, such as urban development, we have statutes that
18 specifically say a municipality can enter a long-term
19 development - - -

20 JUDGE HALLIGAN: Yeah. But a lot of that is a
21 proprietary function, right? I mean, I am not sure where
22 the source of that kind of constraint would come if it
23 wasn't constitutional in nature and wasn't really a
24 constitutive part of what it means to have a legislature
25 where you elect a new group every X years.

1 MR. NUGENT: Yeah. I think the court's decisions
2 have described it as public policy. Now, I'm not saying
3 that we can't - - - and I think this is what the appellant
4 argues and does. The question for this court when it comes
5 to jurisdiction is not is there - - - can we trace this
6 somehow? Can we go back to constitutional decisions and
7 find some discussion about not binding future boards?

8 The jurisdiction of this court is for substantial
9 constitutional questions that are directly involved. And
10 that's what we're arguing is not present here. And I think
11 the appellants had difficulty presenting that
12 constitutional argument because they don't identify any
13 provision of the Constitution that is a vote.

14 CHIEF JUDGE WILSON: Well, if - - - to follow
15 your point there. If the question of whether this is a
16 substantial constitutional question is itself substantial,
17 does that give us jurisdiction?

18 MR. NUGENT: If it's not substantial?

19 CHIEF JUDGE WILSON: No, no. You're arguing back
20 and forth, I think, about whether this is or is not rooted
21 in the Constitution. Could that itself be a substantial
22 constitutional question?

23 MR. NUGENT: That's a good question, Your Honor.
24 I guess, if - - - you know, it's not obviously an
25 interpretation, but a question of is there a term limits

1 found in the Constitution? But I would tend to believe,
2 and we're maybe not collectively as bright as this panel,
3 but somebody would have found that. We would have found
4 the source in all of this briefing, or it would have been
5 argued in the lower court if it was a substantial
6 constitutional question. There would have been some
7 mention of the Constitution somewhere in this case, and
8 there's not because it's generally viewed as a public
9 policy - - -

10 CHIEF JUDGE WILSON: I guess what I'm asking is -
11 - - I guess what I'm asking is, does our jurisdiction
12 depend on whether you are right about the constitutional
13 question, or simply about whether the constitutional
14 question is a substantial one for our decision?

15 MR. NUGENT: I think it's whether the court
16 determines there's a substantial constitutional question,
17 and whether that means if it's in there or not. I - - - I
18 don't honestly know, you know, if - - - if the question is
19 do we have one?

20 But I think that it's at least well-established
21 in New York State, the term limits rule, and it's reflected
22 in your decisions. And it doesn't speak of only outcome;
23 it speaks of binding legislative discretion.

24 And I think in fairness, the appellants - - - if
25 you read the briefs and the complaint - - - have also

1 backed off that position about the offending language in
2 this MOU, because on appeal they tell you we're not trying
3 to enforce as part of our breach of contract action, this
4 empirical data language. But then, when you look at
5 paragraph 112 of their complaint, and the record at page
6 60, it very specifically says the town breached the MOU.
7 And point number two in that paragraph is the exact
8 language that they're now telling you they're not trying to
9 enforce.

10 And I think - - - I'm not pointing that out for
11 the inconsistency, but for the fact that the appellants
12 themselves realize that the language of this MOU is
13 problematic in the sense that it binds the 2020 Town of
14 Fishkill Town Board when they came into office. And I
15 don't think there's any question in this case that there is
16 a term limits rule violation.

17 As to contract zoning then, as my colleague
18 pointed out, there's no term limits violation if we don't
19 get to the next board as we did in this case. But when it
20 comes to contract zoning, that becomes void or illegal at
21 the point when the contract is entered into by the 2017 - -
22 -

23 JUDGE HALLIGAN: But what is your response to the
24 public policy argument that the other side is making about
25 how difficult it will be to do development projects if you

1 can't, you know, hold the legislature to a deal?

2 MR. NUGENT: Your Honor, first, I would point out
3 that I know they - - - it's not a factual part of the
4 record, but this difficulty in building in New York State.
5 I've lived in New York State all my life, I certainly see
6 no difficulty with building.

7 JUDGE HALLIGAN: Okay. But why shouldn't - - -
8 why wouldn't it inject significant uncertainty into the
9 development process?

10 MR. NUGENT: In respect if we're talking housing
11 or just the uncertainty that we won't be able to build
12 without these agreements? That - - -

13 JUDGE HALLIGAN: Well, I think your adversary is
14 arguing that if, one, legislature cannot enter into an MOU
15 which runs past the end of the term of that legislature,
16 that it will make it more difficult to do large-scale
17 projects. And I assume that's because the uncertainty that
18 that will engender as to whether the next legislature will
19 stick with the deal will be problematic. So I'm wondering
20 what your response is to that.

21 MR. NUGENT: Yes. Absolutely fair question. So
22 in this case I think it's important to note that the town
23 board in 2020 did not terminate this project, did not
24 terminate - - -

25 JUDGE HALLIGAN: I know. But it's a - - -

1 MR. NUGENT: Right.

2 JUDGE HALLIGAN: - - - it's a broader - - - we're
3 - - - we're trying to think about a rule.

4 MR. NUGENT: But it highlights the point that the
5 problem is that in this case, they rolled the zoning
6 amendment into the process. MOUs occur all the time.
7 Developments happen all the time. They don't always
8 require zoning amendments, number one, so they're building
9 as of right. And as I touched on before, they're sometimes
10 just reflecting the process, mostly so that both sides are
11 on the same page as to how they're going to move forward.

12 But that's something different, right? When you
13 roll the zoning amendment and it becomes - - - and it's
14 critical to your development. Some developers pursue their
15 zoning amendments upfront for this very reason because
16 they're concerned with that discretion, and it being
17 denied, so they pursue the zoning amendment. Once they
18 have it, now they're just proceeding as of right. So
19 anything in an MOU is just reflecting what the statutes,
20 the local law - - -

21 JUDGE CANNATARO: So get the zoning change first,
22 and then start developing your project? Is - - -

23 MR. NUGENT: That's how some developers proceed -
24 - -

25 JUDGE CANNATARO: - - - that the concern?



1 MR. NUGENT: - - - because they have the very
2 concern that arose here, that a new board could come in and
3 say we don't like this zoning change and reject it. So
4 they go for the zoning amendment, and then they're
5 proceeding as of right. There might still be an MOU, but
6 it's not binding anyone. It's basically setting forth a
7 process and saying this is the steps and the order in which
8 we're going to do things.

9 CHIEF JUDGE WILSON: I take it you don't think
10 that a state statute that required municipalities to see a
11 zoning application through to a decision would violate the
12 term limits rule or the contract zoning rule?

13 MR. NUGENT: If a statute required that?

14 CHIEF JUDGE WILSON: A state statute.

15 MR. NUGENT: Well, I think that that would be a
16 legislative matter. And if the legislature eventually said
17 you are going to process - - -

18 CHIEF JUDGE WILSON: Get an application, you got
19 to process it through to conclusion?

20 MR. NUGENT: Yeah. I think if it was a statute
21 other than, obviously, a challenge to the statute, which I
22 would bring, it would be - - -

23 CHIEF JUDGE WILSON: Well, on what ground?

24 MR. NUGENT: - - - you have to follow the
25 statute.

1 CHIEF JUDGE WILSON: On what ground?

2 MR. NUGENT: Well, I think that again - - -

3 CHIEF JUDGE WILSON: That's what I'm asking.

4 Would you bring it on a - - -

5 MR. NUGENT: - - - because of the - - - the
6 nature of a statute like that tells the next board in the
7 case. But you're right, it would specifically authorize it
8 which is exactly what I have to say Karedes said. If we
9 had a statute and it specifically said you can do this, we
10 probably would not be here, on this case at least.

11 So I - - - if there's any other questions,
12 otherwise, I rest on our briefs.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. NUGENT: Thank you, Your Honors.

15 MR. LEFKOWITZ: Counsel indicated that rezonings
16 are different because it's a developer coming in and saying
17 I want you to change this. That's not true, and it's not
18 even what happened here.

19 Fishkill needed more housing. It was in their
20 comprehensive plan that they wanted more housing. Then
21 Fishkill supervisor came to my client and approached us
22 about doing - - -

23 JUDGE SINGAS: Yeah. But you know what? Like
24 you mentioned public policy. And those people ran on
25 stopping this development, and the people voted for them.

1 So it doesn't matter if they came to you or - - - you know,
2 the circumstances that brought you there. The fact of the
3 matter is the public said we don't want this. In fact,
4 they came out and said, good news, this development is now
5 stopping. That's sort of democracy, no?

6 MR. LEFKOWITZ: Their recourse under the MOU was
7 to vote no on it then. Not to disallow us from getting all
8 the studies and data in front of them and making our case
9 in the public. That was what we contracted for, was the
10 ability to compile all the studies, submit all the
11 environmental analyses - - -

12 JUDGE RIVERA: So if they could just reject that
13 outright, you agree to that, right? That if - - -

14 MR. LEFKOWITZ: They could vote no, yes.

15 JUDGE RIVERA: - - - they actually looked at it,
16 they could decide we don't want to proceed.

17 MR. LEFKOWITZ: Correct.

18 JUDGE RIVERA: Correct?

19 MR. LEFKOWITZ: They could vote no, they couldn't
20 - - -

21 JUDGE RIVERA: Could vote no?

22 MR. LEFKOWITZ: Yeah.

23 JUDGE RIVERA: Okay. All right. So what's the
24 benefit you get - - -

25 MR. LEFKOWITZ: We get to make - - -



1 JUDGE RIVERA: - - - if they're - - - if you know
2 that they can always vote no?

3 MR. LEFKOWITZ: We get to make our case in the
4 public. This process requires us to compile all the
5 studies and data. We're incurring all the costs. If
6 Fishkill wanted to rezone on its own, it would have to pay
7 all the planners and all the engineers and all the
8 consultants, but they came to us and said why don't you
9 bring a rezoning petition? Now we're paying our own
10 planners and engineers, as well as Fishkill's cost.

11 JUDGE CANNATARO: Is that answer exactly
12 accurate? I mean, they could vote no, but they have to
13 vote no according to a set of standards that were laid out
14 in the MOU, don't they?

15 MR. LEFKOWITZ: No, not a set of standards. They
16 could - - - they had full legislative discretion to vote no
17 for whatever reason - - -

18 JUDGE HALLIGAN: So you're no longer pressing the
19 empirical data point that's in the complaint?

20 MR. LEFKOWITZ: We're not asserting that that was
21 violated.

22 JUDGE RIVERA: Why? Could you, though?

23 MR. LEFKOWITZ: Well, that - - -

24 JUDGE RIVERA: Now that's avoiding the question.
25 It is in the MOU.

1 JUDGE HALLIGAN: Yeah.

2 JUDGE RIVERA: So if they went ahead and just
3 didn't look at anything, or just voted no, would you not be
4 arguing wait a minute, you were supposed to take into
5 consideration the following in the best interests of the
6 town - - -

7 MR. LEFKOWITZ: The point - - -

8 JUDGE RIVERA: - - - and you didn't do that.

9 MR. LEFKOWITZ: We're not arguing that. If we -
10 - -

11 JUDGE RIVERA: Well, I know you're not arguing
12 it. I'm asking you about it.

13 MR. LEFKOWITZ: If we tried to argue that - - -

14 JUDGE RIVERA: Yes.

15 MR. LEFKOWITZ: - - - this court could certainly
16 find that that's contract zoning. But what we're arguing
17 is that they didn't even let us get to the point of getting
18 - - -

19 JUDGE RIVERA: But the point is that it's in the
20 MOU. I mean, the point is it's already in the contract.
21 Right?

22 MR. LEFKOWITZ: If this court has a problem with
23 it, then it should sever that provision. We're not trying
24 to enforce that provision. What we're saying is that if a
25 town comes to us and says you incur all the costs, all the

1 years, all the expenses of studying this rezoning that we
2 want, and all we are getting is the opportunity to persuade
3 - - - even this new board that was elected to say we're
4 going to stop this project - - - we have a right to get all
5 the studies in front of them, and try to persuade them and
6 all the public to - - -

7 JUDGE RIVERA: But didn't you bundle this as a
8 convenience to you all? I may have misunderstood your
9 briefing. I thought that you were making some point in the
10 briefing that you could have proceeded a different way, but
11 you wanted to get all of this before the board.

12 MR. LEFKOWITZ: I think that - - -

13 JUDGE RIVERA: And that's, in part, why you
14 wanted the MOU.

15 MR. LEFKOWITZ: The point I think you're raising
16 is we could have proceeded, for example, by a use variance,
17 but that's - - - that's much less desirable for a lot of
18 reasons in the land-use world. A rezoning is more
19 comprehensive. It allows - - -

20 JUDGE RIVERA: Yes. But that would have assured
21 you that they would address it. No?

22 MR. LEFKOWITZ: Under a very - - - under a very
23 different standard. So under that standard, you need to
24 show dollars-and-cents proof - - -

25 JUDGE RIVERA: So - - - so you're doing - - -



1 MR. LEFKOWITZ: - - - as to that. You can't - -
2 -

3 JUDGE RIVERA: All I'm saying is you're doing
4 more than merely saying, well, I just want a vote. You're
5 actually changing the standard by which they vote?

6 MR. LEFKOWITZ: We - - - no. We could have
7 gotten a use variance. We could have used this property
8 and put in a 300,000-square-foot-big-box store that would
9 have created way more traffic as of right. What we're
10 suggesting is if we're going to go by way of a rezoning,
11 the only assurance we wanted from Fishkill that we wouldn't
12 get to the 11th hour, having spent millions of dollars
13 paying their costs and ours to study this rezoning, only to
14 be told you're not even going to be able to present that to
15 the public - - - the town board, but also the general
16 public who comes out to these meetings.

17 JUDGE RIVERA: So if we disagree with you, you
18 still have other paths? You would have had other paths,
19 you just didn't want to take them, that's my point.

20 MR. LEFKOWITZ: Not - - - no. We could not have
21 gotten a use variance, or any other kind of variance that
22 would have allowed this project. If this is the project
23 that Fishkill told us they wanted, this is the only pathway
24 that it could have been done is through rezoning. And if
25 they were to do it, it would have been very costly to them.

1 They were able to get a developer to bear all those costs
2 and all those years. And the only assurance was - - - we
3 wanted to protect against the fact that suppose there's a
4 change in politics in the town, that we get to make our
5 case in the public. We get to submit all the studies.

6 That's what that language, "empirical data", was
7 all about. Is we just want to get the data in front of the
8 board so that they have it in front of them, and we were -
9 - - have been able to make our case.

10 CHIEF JUDGE WILSON: Thank you.

11 MR. LEFKOWITZ: Thank you.

12 MR. NUGENT: Thank you, Your Honors.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Hudson View Park Co. v. Town of Fishkill, No. 115 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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