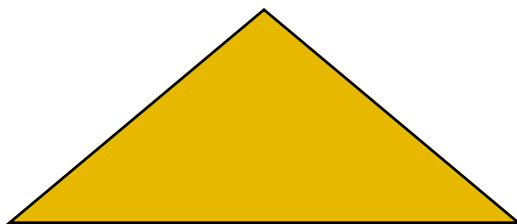


Gaining Ground: Training Book for Land Use Leaders



Starting Ground Series

Land Use Law Center

PACE LAW SCHOOL

Gaining Ground: Training Book for Land Use Leaders

Edited by Kory Salomone

Land Use Leadership Alliance Training Program

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CHAPTER ONE: BACKGROUND

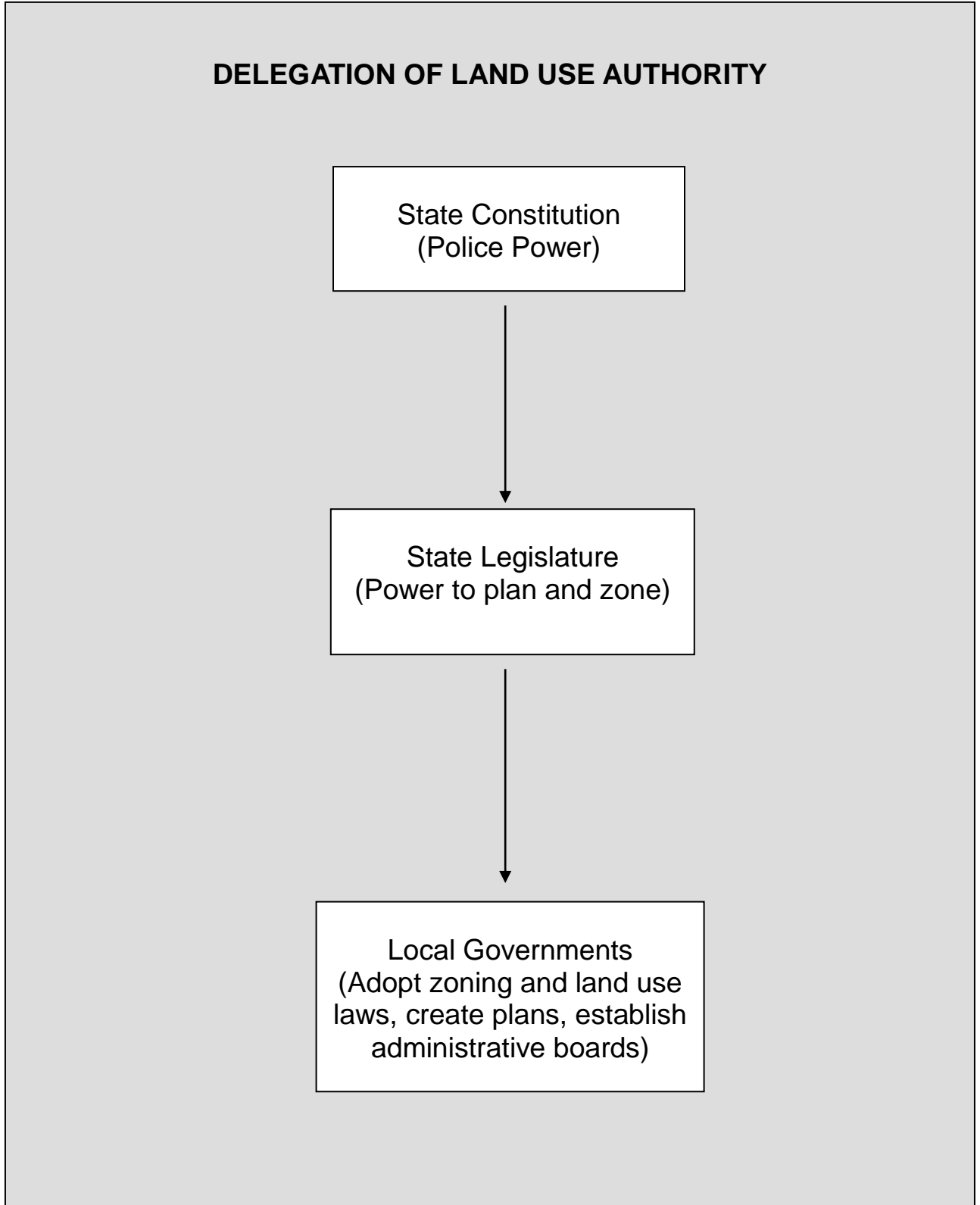
The first comprehensive zoning ordinance was adopted in New York City in 1916. In the early 1920s, Herbert Hoover, who was then Secretary of Commerce, established a commission that developed a model zoning enabling act. State legislatures were encouraged to adopt this enabling act to delegate the authority to adopt zoning regulations to local governments. Most did, and in a relatively short time. In 1926, when the United States Supreme Court ruled that zoning is constitutional in *Euclid v. Ambler Realty Co.*, over 500 municipalities had adopted comprehensive zoning laws similar to New York City's. In just one decade, zoning evolved from an innovative experiment in a single city into a widely accepted method of city planning and land use regulation.

Initially, comprehensive zoning laws were thought to embody a comprehensive plan for the municipality. By the late 1920s, there was considerable support for the idea that a local land use plan should exist separately and that the zoning law should adhere to and carry out the principles and objectives of the comprehensive plan. Another model act was drafted, this one authorizing localities to adopt comprehensive plans. Many states adopted this model act and encouraged local governments to adopt comprehensive plans and use them as the basis for their zoning laws and other land use regulations. Today in New York, state law requires that all land use regulations conform to the locality's comprehensive plan.

As the 20th Century progressed, state legislatures delegated additional techniques for local governments to use to guide and control the use of private land. As localities experimented with their authority to regulate land use, the courts ratified many of their inventions by declaring that their power to act in this way was implied in the authority delegated to them to adopt zoning laws or was inherent in their municipal home rule authority.

By the 1960s, the modern framework for local land use regulation was in place. The state legislature expressly authorized localities to adopt comprehensive plans, zoning laws, subdivision and site plan regulations, and to create planning boards and zoning boards of appeals to hear appeals and review project proposals. The authority of localities to adopt a wide range of land use controls was also affirmed.

In the 1990s, New York's legislature codified and improved state land use law, making better sense out of a full set of land use laws that delegate to local governments the authority to adopt an impressive array of land use strategies.



CHAPTER TWO: THE BASICS OF LAND USE PRACTICE

INTRODUCTION

Delegation of Local Authority

The State Constitution authorizes the state legislature to adopt laws to protect the public health, safety, morals, and general welfare. The authority delegated to governments to adopt zoning regulations is contained in what is loosely called the Zoning Enabling Act (ZEA). Similar provisions of the ZEA are contained in the Town, Village, and General City Laws. These regulations, according to the state legislature, shall be designed to encourage the most “appropriate use of the land throughout the municipality.”

The legislature also delegated authority to control land use and protect the environment under the state’s home rule law. The home rule provisions of Article IX of the New York Constitution and legislation passed pursuant to it give local governments broad home rule powers. The state legislature has implemented Article IX with the enactment of the Municipal Home Rule Law (MHRL). The provisions of the MHRL are to be “liberally construed.” Under the MHRL, localities are given the authority to adopt laws relating to their property, affairs or government, to “the protection and enhancement of their physical and visual environment, and to the matters delegated to them under the statute of local governments. The statute of local governments delegates to municipalities the power to adopt, amend, and repeal zoning regulations and to perform comprehensive or other planning work relating to its jurisdiction.

In New York, local legislatures are not required to adopt zoning ordinances or comprehensive plans or to regulate land subdivision or site development. They are instead authorized to do so if they wish. Once the local legislature adopts a zoning ordinance, it must create a zoning board of appeals to review the zoning administrator’s decisions and entertain requests for variances. Local legislatures may also create planning boards to serve in an advisory capacity regarding community planning and the adoption of zoning provisions and to review applications for various land use permits. A variety of other boards may be created where local circumstances merit, such as an historic district commission, conservation advisory board, architectural review board, or wetlands agency.

Of these various boards, the three most active typically are the local legislature, the planning board, and the zoning board of appeals. The roles played by these three bodies are varied. The local legislature, known as the city council, village board of trustees, or town board, adopts and amends the zoning law: a legislative

function. It may retain or delegate to the planning or zoning boards the authority to review site plan, subdivision, and special use permit applications: an administrative function. When the zoning board of appeals hears appeals from the zoning administrator or grants variances, it is acting in a quasi-judicial capacity.

There are over 1,600 cities, towns, and villages in New York. All of them have local legislatures. All of the cities, approximately eighty-five percent of the villages, and approximately sixty-five percent of the towns have adopted zoning laws and established zoning boards of appeals. All of the cities and approximately eighty-five percent of the towns and villages in New York have created planning boards.

The procedures that these local bodies must follow are spelled out in state statutes that delegate to local governments the power to grant variances, approve site plans and subdivisions, or award special use permits. These statutes must be consulted to determine whether a public hearing is required, how notice of the hearing is to be given, the time in which a decision must be rendered, how the decision is to be filed, and who may appeal a local decision to the courts. The local legislature may establish additional procedures that must be followed by local boards.

State statutes also contain the standards that a local board must consider when reviewing a landowner's application and specify what types of conditions may be attached to a board's approval of such an application. Land uses that preexist the adoption of a zoning law or amendment usually are allowed to continue as nonconforming uses, but are not allowed to be expanded or enlarged. The accessory uses that customarily accompany the principal use allowed on the land are also permitted by most zoning laws, as long as they are incidental to the principal permitted use. A variety of home occupations, such as professional offices, may be allowed in residential zones, again, if they are incidental to the principal residential use of the property. Some communities have adopted zoning provisions that allow single-family homeowners to establish a second, accessory living unit in their houses, subject to a variety of conditions.

These subjects consume most of the time of local land use bodies and the zoning enforcement officer. They receive applications for variances, site plans, subdivisions, and special use permits. They also determine whether uses are permitted accessory uses or home occupations. Landowners petition them for approvals or favorable rulings and neighbors and other affected parties become involved in the local process to protect their interests.

Local Boards and Practices

Three boards are principally responsible for making land use decisions in most localities. The first of these is the local legislature, such as the village board of trustees, the town board, or the city council. The second is the zoning board of appeals, which must be created when a zoning law is first adopted by the local legislature. The zoning board performs quasi-judicial functions as a local appeals board and can be delegated administrative functions. The third is the planning board, which may be created to perform a variety of advisory and administrative functions related to community planning and land use decision-making.

The New York State legislature has allowed for the creation of these local bodies to provide a framework of local governance regarding the use and conservation of land and the quality of life as affected by land use. This framework includes legislative, judicial, and administrative functions performed by the legislature, zoning board of appeals, and planning board. Observable in the laws governing their operation are a number of familiar legal doctrines including separation of powers, citizen participation, public notice, access to information and board deliberations, the right to be heard, the right to impartial decision-making, and the right to appeal some of these decisions. The goal is to provide for the public health, safety, and welfare.

The essential function of the zoning board of appeals, and the reason its creation is legally required, is to grant variances from the strict application of the zoning regulations in circumstances when they create demonstrable hardships for the owners of properties. One important purpose of the advisory role played by the planning board, which consists of appointed members often with special expertise or training in land use matters, is to provide an impartial and professional perspective on locally controversial decisions based on the long-range needs of the community contained in the comprehensive plan or other local policy documents.

State statutes require that when a local government adopts zoning regulations it must establish a zoning board of appeals consisting of three or five members. In towns and villages, appointments to the board are made by the legislature; in cities, the mayor or city manager may make appointments.

State law also permits the local legislature to establish a planning board consisting of five or seven members. Appointments to the planning board are made by the local legislature in towns, by the mayor in villages, and by the mayor or city manager in cities.

State statutes allow the local legislature to retain the authority to review and approve applications for subdivision, site plan, and special use permits or to delegate this authority either to the planning board or the zoning board of appeals. For example, the legislature may provide in the zoning regulations that certain uses are permitted only upon the issuance of a special use permit and

retain the authority to review and issue those permits instead of delegating that authority either to the planning board or the zoning board of appeals. Normally, however, the legislature will establish these boards and delegate important administrative functions to them, such as the authority to issue special use permits and to review and approve or deny applications for site plan and subdivision approval.

Subdivision review authority can be delegated to the planning board and site plan authority can be delegated to the planning board or other administrative body, such as the zoning board of appeals. State law requires variances and appeals from the determinations of the official charged with zoning enforcement to be heard by the zoning board of appeals.

City charters may contain special provisions for the functions and procedures of these local bodies and all local governments may adopt unique provisions under their authority to supersede the provisions of general state law that are otherwise applicable to land use actions.

The Decision Making Process

Basic Due Process Requirements: The decisions of local land use bodies must be made in an open and fair manner, by impartial board members, and must be based on reliable evidence that is contained in the record of the board's deliberations. These guarantees are secured by the federal and state constitution and by a variety of state statutes. Among other mandated procedures, state and local requirements often specify that land use actions can be taken only after a hearing is held following adequate notice and where the public is invited to be heard in a fair and impartial manner. This applies to the adoption and amendment of zoning provisions and decisions on most applications for development permits.

Basing Decisions on Facts in the Record: In making decisions on site plan and subdivision applications and the issuance of variances and special use permits, local boards must keep a detailed record of their deliberations. These records can be in narrative form rather than verbatim transcript form. The findings of the board and its decision should be based on reliable evidence contained in this record. The record may be the minutes of the board, if prepared in enough detail to satisfy these requirements.

Keeping and filing a detailed record insures that board decisions are not arbitrary, capricious, or an abuse of discretion. They provide the type of information parties need to decide whether to appeal board decisions and they create the type of record that a court or review board will need to determine the validity of decisions made by land use boards.

Requirement to Provide Information to the Public: Local land use agencies are governed by the state Freedom of Information Law, which provides public access to governmental records. The records that are subject to public access include photos, maps, designs, drawings, rules, regulations, codes, manuals, as well as reports, files, and opinions. Boards may establish reasonable rules regarding access, time to respond, copying, mailing, and paying for the information requested.

Requirement to Hold Open Meetings: Local public bodies, including the legislature and planning board, are required by the State's Open Meetings Law to allow the public access to their meetings. Although the Open Meetings Law does not apply to "quasi-judicial proceedings," under the Village, Town, and General City Laws, sessions of the zoning board of appeals and planning board are subject to open meetings requirements.

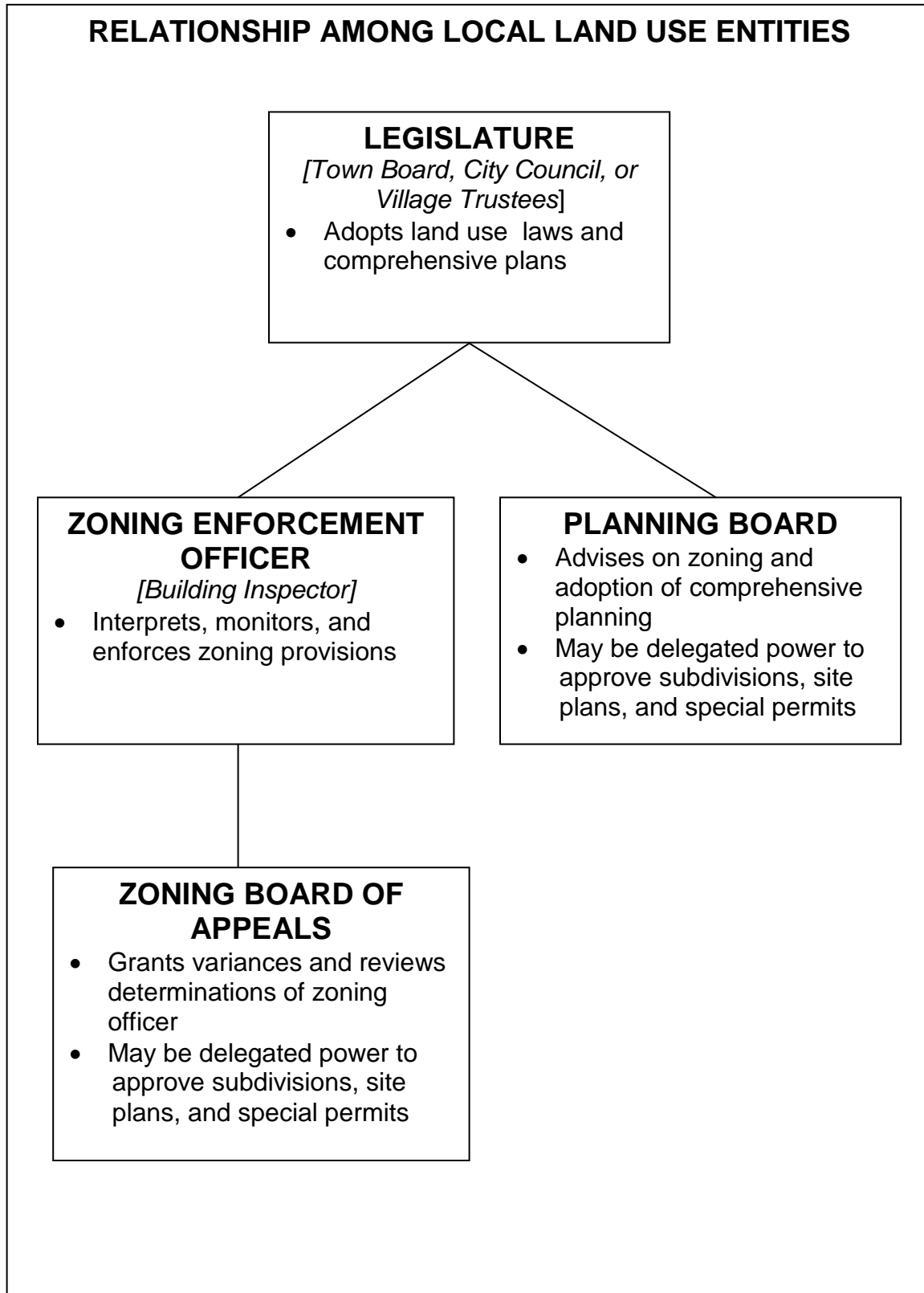
All assemblies of these local bodies must be open to the public, including special meetings with applicants or opponents attended by members of the board and even site visits conducted by the local legislature, planning boards, and zoning boards of appeals. Although closed, executive sessions may be held in certain

circumstances. Courts will scrutinize whether there was a valid reason to hold the meeting in private. Where the deliberations are held in closed session and the public is permitted to know after the fact about decisions that were made in private, both the letter and spirit of the open meetings law are violated.

Requirement to Avoid Conflicts of Interest: State statutes require that every applicant for a variance, zoning amendment, special permit, or site plan or subdivision approval must provide full information regarding any interest of a municipal officer in the matter presented. This disclosure is relevant to the deliberations of land use bodies because state law prohibits municipal officers, including members of any administrative board or other agency, from participating in public matters in which they have a private conflict of interest. Planning and zoning board members have been prevented, under these laws, from deliberating and voting on matters in which they have a private interest in the project or a special connection with the applicant, including a financial investment, a familial relationship, an employment relationship, or any significant contractual relationship.

Limitations on the Actions of the Zoning Board of Appeals: The zoning board of appeals may not hear appeals from the actions of the local legislature if it was acting in its legislative capacity. The denial of a request for the rezoning of a parcel, for example, may not be appealed to the board. The zoning board of appeals also has no power to review the legal validity of the provisions of the zoning law; it may only interpret provisions of the zoning law upon appeal by aggrieved persons from adverse determinations by the responsible administrative official. Zoning boards of appeals may not grant variances that have such an impact as to constitute a rezoning of the land, a function within the province of the legislature. Where the board granted a variance from a two-acre residential development requirement to allow development on lots of one-acre, the court held that its action constituted an invalid rezoning, rather than a variance, where the parcel affected was forty acres in size.

Limitations on the Actions of the Planning Board: A planning board may not consider or issue variances, hear appeals from the official responsible for zoning administration, or issue interpretations of zoning provisions. Planning boards may not act outside of their delegated authority or base their decisions on standards not contained in state or local laws and regulations over which they have jurisdiction.



CHAPTER THREE: BASIC LAND USE TOOLS

INTRODUCTION

A comprehensive plan is a written document formally adopted by the local legislature that contains goals, objectives, and strategies for the future development and conservation of the community. The statutes list fifteen separate components that such plans “may” contain, but requires localities to follow no fixed format in developing their plans for the future. New York statutes require that zoning, and all land use regulations, be in conformance with the comprehensive plan. Although these same statutes greatly encourage local governments to adopt comprehensive plans, they do not require them to do so.

When the courts have to determine whether a challenged land use regulation conforms to a comprehensive plan if one has not been formally adopted, they will look to “all relevant evidence,” including the zoning law itself, all previous studies, policy statements, and land use decisions of the locality to determine the comprehensive planning objectives that have guided the community in the past. Using that evidence, the court will determine whether or not the challenged regulation meets the requirement that it conform to the comprehensive plan.

Adopting land regulations that conform with the comprehensive plan provides significant legal protection for such regulations. When a regulation is challenged, the court will inquire whether it significantly advances a legitimate public interest. When judges find that it was enacted to achieve an objective of the comprehensive plan, they generally resolve that issue in the community’s favor. When a single parcel or small amount of land is rezoned, the complaint is often heard that such an action constitutes illegal “spot zoning.” When it can be shown that the parcel or small area was rezoned to accomplish a specific public objective of the comprehensive plan and not to benefit the private owner, that complaint is put to rest. Aggrieved persons often allege that zoning regulations are arbitrary and capricious. These assertions, too, are thwarted when it can be shown that the regulation conforms to the comprehensive plan.

Land use regulations are not confined to zoning provisions that separate the community into zoning districts and specify the land uses and building dimensions that are permitted in each zone. They may include regulations that protect trees, slopes, historic districts, and viewsheds. They may also include regulations that govern the subdivision of land and development of individual sites. Precisely what aspects of land use local governments decide to regulate and how they organize those regulations is a matter of local discretion. Some have adopted a comprehensive Land Use Chapter of their code or a freestanding Land Use Law. Such a chapter or law can include zoning and all other types of land use controls. Other communities may have several chapters of their

municipal codes or several freestanding laws that regulate land use, only one of which will be the zoning law.

Land use regulations may be adopted under the authority of local governments to enact zoning laws, under the Municipal Home Rule Authority to protect the physical and natural environment, or under other state statutes authorizing localities to accomplish specific objectives. Some localities include their subdivision and site plan regulations in their zoning law, some do not. Additional land use regulations may be found in the zoning law or adopted separately. These include regulations regarding erosion and sedimentation, wetlands protection, historic district and landmarks protection, sign control, or viewshed protection. In fact, all of these provisions regulate land use and constitute the community's land use regulations that are required to conform with the comprehensive plan.

Local governments are encouraged not only to adopt comprehensive plans, but also to do so with extensive and effective citizen participation. The requirement that all land use regulations conform to the comprehensive plan reveals the wisdom of the state legislature in urging villages, towns, and cities to adopt comprehensive plans with citizen input and support. When communities fail to adopt comprehensive plans, to keep them up to date, or to achieve community consensus for them, the adoption of particular land use regulations or decisions regarding specific proposals can be frustrating, time-consuming, and unsatisfying to proponents and opponents alike.

Zoning typically allows landowners to place incidental and subordinate, or accessory, uses on their land. When property is purchased for single-family use, the owner expects to be able to build a garage or tennis court and the neighbors find no reason to object. Certain home occupations that can be carried on in single-family residences without external evidence of their existence are frequently allowed as permitted home occupations, much like an accessory use. When zoning laws are first adopted or changed by amendment, existing uses that violate their provisions are allowed to continue as nonconforming uses. This honors the investment expectations of the affected landowner and effects no change to which nearby residents can object.

Most municipalities in New York have supplemented their zoning laws with subdivision and site plan regulations. These regulations are more specific than the requirements of the zoning law. They allow the locality to regulate the details of the development of residential, commercial, and industrial projects. Subdivision and site plan regulations give the local reviewing board the authority to review the location and other details of on-site roads, sidewalks, lighting, landscaping, and other project features. They are integral to a locality's ability to plan and implement its future development.

Certain land uses are allowed in zoning districts but only if a special use permit is obtained. A special use is one that is compatible with the uses allowed as-of-right in the zoning district but may have adverse impacts on the immediate neighbors. Often a church or synagogue is allowed in a single-family neighborhood by special use permit. The local administrative body that reviews an application for a special use permit is allowed to impose conditions on its approval to reduce or eliminate any potential adverse impacts on adjacent and nearby properties.

COMPREHENSIVE PLAN

The New York State Court of Appeals noted in *Udell v. Haas* that “the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use.” Indeed, the statutes require that all land use regulations must be made “in accordance with a comprehensive plan.” Therefore, planning should precede any adoption or amendment of a land use regulation.

New York statutes define a comprehensive plan as the “materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports, and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices, and instruments for the immediate and long-range protection, enhancement, growth, and development of the [locality].” These statutes require that all land use regulations, including zoning regulations, be made in accordance with a comprehensive plan. Although these same statutes greatly encourage local governments to adopt comprehensive plans, they do not require them to do so.

While there are no required components of a comprehensive plan, the statutes suggest 15 elements for inclusion:

- A general statement of goals, objectives, and standards upon which proposals for the immediate and long-range growth and development of the municipality are based.
- Consideration of the regional needs and official plans of other government units within the region.
- Existing and proposed location and intensity of land uses.
- Consideration of agricultural uses, historic, and cultural resources, coastal and natural resources and sensitive environmental areas.
- Consideration of population, demographics and socio-economic trends, and future projections.
- The location and types of transportation facilities.
- Existing and proposed location of public and private utilities and infrastructure.
- Existing housing and future housing needs, including affordable housing.
- Present and future location of historic sites, educational, cultural, health, and emergency services.
- Existing and proposed recreational facilities and parkland.
- Present and future locations of commercial and industrial facilities.
- Specific policies and strategies for improving the local economy in coordination with other plan topics.
- Proposed measures, programs, devices, and instruments to implement the goals of the comprehensive plan.
- All or part of the plan of another public agency.

- Any and all other items which are consistent with the orderly growth and development of the municipality.

The comprehensive plan creates a blueprint for the future development and preservation of a community. Often referred to as the “master plan,” it is the policy foundation upon which communities are built. A good comprehensive plan not only guides the physical and economic development of the municipality but also accommodates social, environmental, and regional concerns.

There are several important advantages achieved by communities that engage in comprehensive planning. First, although adoption of a comprehensive plan is not mandatory, the statutes require that “all land use regulations must be in accordance with a comprehensive plan.” Land use regulations are defined to include “zoning, subdivision, special use permit or site plan regulation or other regulation that prescribes the appropriate use of property or the scale, location, and intensity of development.” If the validity of a local land use regulation is challenged, a written, up-to-date comprehensive plan provides the court with the necessary information upon which to base its decision. The court will inquire whether the regulation advances a legitimate public interest. When judges find that a regulation was enacted to achieve an objective of the comprehensive plan, they will generally resolve that issue in the community’s favor. When a single parcel or small amount of land is rezoned, the complaint may be raised that the action constitutes illegal “spot zoning.” If the parcel or small area is rezoned to accomplish a specific public objective of the comprehensive plan, and not to benefit the private owner, that complaint is put to rest. Aggrieved persons often allege that zoning regulations are arbitrary and capricious. These assertions, too, are thwarted when it can be shown that the regulation conforms to the comprehensive plan.

Second, after a comprehensive plan is adopted, all other governmental agencies planning capital projects within the municipality must first consider the local plan. Additionally, the comprehensive planning process presents an opportunity for a local government to inventory the needs and assets of the community, to develop a shared vision for the future, and to build consensus and support for actions that will implement the comprehensive plan. Finally, with a comprehensive plan in place, strategic land use regulations can be adopted to implement that vision, protecting the locality’s natural resources and encouraging economic development where desired.

Comprehensive planning may be engaged in at any time, and an adopted plan should be reviewed periodically and amended as necessary. Although many plans contain long-term strategies for community development and conservation, comprehensive plans need to be revisited as change occurs. Planners recommend reviewing the plan every five years and updating it as necessary. The statutes require localities to set forth in the comprehensive plan “the maximum intervals at which the adopted plan shall be reviewed.”

If the mechanics of creating and revising the plan are seen as a process that involves citizens and community leaders in developing a collaborative strategy for achieving a municipality's objectives, then frequent attention to the plan will have a positive impact on day-to-day decision-making and the practical progress of the community toward its long-range goals.

The local legislature is authorized by statute to prepare or amend the comprehensive plan. Alternatively, through resolution, the legislature can direct the planning board or a special board to prepare or amend the plan. A special board is defined as "a board consisting of one or more members of the planning board and such other members as are appointed" by the local legislature. If the plan is prepared by a board other than the local legislature, that board must forward the plan to the local legislature along with its adopted resolution recommending the plan.

Good comprehensive planning begins with information gathering. Physical data should be compiled and considered, regarding, for example, roads and transportation, wetlands, water, sewer, utilities, soils, and drainage. Additionally, the community should inventory its assets – natural, historic, cultural, and geographic – and consider to what extent these features should be enhanced or protected. The municipality must also consider its needs. It should ask, for example, whether there are adequate housing resources, parks, economic development, capital infrastructure, and open space in the community. Are there areas that are particularly appropriate for growth and others in need of conservation? The plans of neighboring municipalities should also be examined, as well as regional economic, environmental, and social needs.

Based on this information, the locality can state its objectives in the comprehensive plan. This statement may address both the intermediate and the long-range goals of the municipality. Further, the comprehensive plan may include specific land use techniques by which the municipality can achieve each of its objectives. These include overlay, cluster, incentive, and agricultural zoning, designating critical environmental areas and floating zones, and the transfer of development rights and planned unit developments, among other strategies. Non-regulatory techniques such as land acquisition, tax incentives, infrastructure investment, and streamlined permit review, as well as grant or loan programs, may also be considered.

Local citizens should participate to the greatest extent possible in forming and implementing the comprehensive plan. Surveys and polls, town meetings, charettes, and focused workshops are some of the many techniques available to draw citizens into this process. A plan that not only addresses the needs of the community but is developed with citizen participation and through consensus will be more effective in creating a viable work plan for the future.

To assure that the public is given ample opportunity to comment on the components of the plan, the statutes require that one or more public hearings be held during the plan's preparation. If the plan is prepared by the planning board or a special board, the local legislature must hold a public hearing within 90 days after receiving the proposed plan. Notice of all required public hearings must be published in a newspaper of general circulation at least 10 calendar days before the hearing. During that time, a copy of the proposed plan or amendment must be made available, at the clerk's office, for the public to review.

If the proposed plan is prepared by the special board or the legislature, the planning board can be given an opportunity to review it and make recommendations prior to action by the local legislature. The proposal must, however, be referred to the county for its review and recommendations. Additionally, prior to adoption, a comprehensive plan is subject to the provisions of the State Environmental Quality Review Act, and the impacts of the plan must be considered and, if necessary, mitigated.

Case Study

The town of Clinton used its comprehensive plan to promote natural resource conservation. Despite its location near an urbanizing Poughkeepsie, Clinton retains large areas of agricultural and undeveloped land. The plan identifies a wide variety of natural resources of exceptional quality: lakes, extensive wetlands, large wooded tracts, rural settings, and several creek basins. These and other natural features not only attract development but also place environmental constraints on it. To protect its natural resources, Clinton, in its comprehensive plan, determined that:

- The town should discourage the development and encourage protection of 100-year floodplains, wetlands, surface waters, slopes over 15%, and ridgelines to insure minimal disruption of their environmental function or scenic qualities.
- Important wildlife habitats and other significant environmental areas should be identified and protected.
- Measures to control erosion and sedimentation should be required during the development review process.
- A defined open space system should be part of every site plan proposal and, where possible, be linked to form continuous greenspace corridors. Natural corridors should be particularly encouraged along streambeds and wetlands to provide open space, wildlife habitat, and groundwater protection.
- The town should encourage high quality design and construction, with the retention of existing trees whenever possible and the extensive use of landscape elements that integrate new development with the surrounding area.

- The planning board should have the authority to mandate clustering as an effective means to reduce housing costs, limit access points, and provide additional recreation and open space.

There are many benefits and values to good comprehensive planning. It does, however, take time, cost money, and require effort. Additionally, many good plans are adopted and then lie dormant on a shelf in the clerk's office. This need not be the case. The comprehensive plan can serve as an opportunity for the community to create a shared vision for the future and a strategy to accomplish that vision. It may lead to updating the local zoning law and other land use regulations and incorporating new ideas and techniques to achieve the community's objectives. Since in New York there are few requirements that a comprehensive plan must meet, however, local leaders may devote just the time and resources needed to address their particular planning issues.

Land use regulations are often challenged as being "not in accordance with a comprehensive plan." When there is a written, up-to-date plan, the court is best able to discern whether the regulation is a permissible exercise of local authority. These plans are given great weight, and courts are hesitant to invalidate a regulation adopted to implement such a plan. There is little doubt that a regulation that accomplishes an express objective of the comprehensive plan "substantially advances a legitimate public objective" – the judicial standard by which challenged regulations are measured.

Difficulty can arise when a locality has no comprehensive plan or the plan is out-of-date. In these cases, the court looks for comprehensiveness of planning by "examining all relevant evidence," which can include the municipality's previous land use decisions as well as the zoning law. Based on the information presented, the court will decide whether the challenged action was adopted in conformance with the community's "total planning strategy" or reflects "special interest, irrational ad hocery." Obviously, this approach allows the court great discretion. In the absence of a comprehensive plan, a regulation can appear to be arbitrary or capricious – simply a response to the complaints or concerns of neighbors. Insuring that land use regulations advance the objectives of the comprehensive plan has been mentioned in numerous scholarly articles as the community's best insurance against claims that its regulations violate substantive due process guarantees or constitute a taking of property without just compensation.

THE ZONING LAW AND ITS AMENDMENT

The local zoning law divides a community into land use districts and establishes building restrictions limiting the height, lot area coverage, and other dimensions of structures that are permitted to be built within each district. At the time that the local legislature adopts a zoning law, it approves a zoning map. The zoning map, implemented through the text of the law, constitutes a blueprint for the development of the community over time. It is a design for the community's development that is to be created with citizen input and that, as it is built out, has far reaching consequences for the quality and cost of life of those citizens. On this map, the zoning district lines are overlaid on a street map of the community. By referring to this map, it is possible to identify the use district within which any parcel of land is located. Then, by referring to the text of the zoning law, it is possible to discover the uses that are permitted within that district and the dimensional restrictions that apply to building on that land.

There is no required format for a zoning law in New York. As a result, local zoning laws are organized in a variety of ways and range from relatively simple to extremely complex in their provisions. Most zoning laws contain several articles covering such basic topics as: the purpose of the zoning law, various definitions, the establishment of zoning districts, the uses allowed within those districts, the building and parking restrictions that apply within each district, how preexisting, nonconforming uses are to be treated, uses that are allowed as accessory uses or by special permits within certain districts, the formation and operation of the zoning board of appeals, how amendments can be adopted, and how the law is to be enforced.

A host of additional topics can also be included in the zoning law such as standards that must be considered before an owner's application for a subdivision or site plan can be approved. Zoning laws can contain provisions that protect landmarks, historic districts, wetlands, floodplains, or environmentally constrained land or that regulate the placement of mobile homes or use of commercial and political signs.

Zoning provisions, once adopted, can be amended by the local legislature. The courts have held that in amending the zoning law, local legislatures have a great deal of flexibility in creating mechanisms to accomplish the statutory purposes of zoning. Under their implied authority to adopt appropriate mechanisms, for example, local laws have been upheld that created floating zones that apply to individual parcels of land, that allowed mixed uses on parcels in single use zones, and that rezoned individual properties subject to restrictive conditions that insure the appropriate use of the land as rezoned.

In delegating to local governments the authority to enact zoning regulations, the state legislature is exercising its police power: the authority to adopt legislation "to promote the public health, safety, morals, and general welfare." It is with

these words that the grant of authority to regulate land use begins and it is for these purposes that such authority is conveyed to local governments. When originally conceived, zoning was designed to protect private investment in land development in cities from unpredictable nearby land uses and urban populations from the perils of fire, unsanitary conditions, unsafe buildings, and uncontrolled traffic. With migrating urban populations, suburbanization, and exurban development, came additional challenges for zoning to confront such as revitalizing cities, managing suburban growth, protecting threatened natural resources, and preventing visual blight in the countryside.

Zoning responded to these challenges as courts approved the use of innovative provisions to protect visual qualities, conserve environmentally constrained lands, and maintain cultural and historic assets. The statutes make it clear that one of the principal purposes of zoning is to encourage “the most appropriate use of land.” The courts have supported municipal invention and creativity in adopting zoning provisions designed to accomplish that objective in diverse municipal settings. The hallmark of zoning in New York is its adaptability to local circumstance and its ability to accomplish legitimate public objectives defined by local citizens and their elected leaders.

The original court decisions that considered claims that zoning constituted an unwarranted infringement of property rights singled out two purposes of zoning as particularly appropriate reasons to uphold it. *First*, zoning prevents landowners from using their properties in ways that are injurious to the community. *Second*, zoning is an appropriate method of creating a balanced and efficient pattern of land development and avoiding the multiple perils of haphazard growth.

Local governments are authorized, not required, to adopt zoning provisions. Deciding when and why to adopt a zoning law is purely a matter of local discretion. According to a 1995 survey by the New York State Legislative Council on Rural Resources, seventy-five percent of the over 1,600 villages, towns, and cities in the state have adopted zoning regulations. Although no survey has been conducted regarding the reasons for adopting zoning, municipalities seem to have done so in areas of the state where there are significant development pressures, serious environmental challenges, or difficult economic circumstances. This suggests that localities adopt zoning to control or manage growth, to promote economic stability and development, to conserve the environment, and enhance the quality of life of their communities.

Nearly all communities in the lower ten counties of the state, where considerable development pressures exist, have adopted zoning. In addition, all cities in the state have adopted zoning laws. The twenty-five percent of localities that have not adopted zoning tend to be located in rural counties in the southern tier and the north country. There are, however, notable exceptions to this generalization.

For example, there are several counties in the state where only one or two communities have yet to adopt zoning for reasons that are not well researched.

The power to adopt and amend zoning regulations is legislative, one exercised by the village board of trustees, town board, or city council. When zoning provisions are first adopted in villages or towns, a zoning commission must be established to recommend zoning district boundaries, use requirements, and dimensional requirements. The commission must hold one or more public hearings, after public notice, on its recommendations before submitting them to the local legislature. Cities do not have to appoint zoning commissions before considering and adopting the initial zoning provisions.

Before the initial zoning regulations are adopted, the legislative body must hold a public hearing, after public notice, on the proposed regulations. The initial adoption of zoning regulations is listed as a Type I action under the State Environmental Quality Review Act, therefore its adoption may have to be accompanied by the preparation of a full environmental impact statement.

Amendments to zoning provisions can be adopted only after public notice and hearing on each amendment. Changes in zoning provisions are discretionary legislative acts. The legislature can amend the zoning law on its own initiative, in its discretion. When a property owner makes an application for a change in the zoning provisions applicable to his property, the legislative body may simply refuse to consider it, unless the effect of the current zoning provision on the parcel in question denies the owner a reasonable return. This differs significantly from other local land use applications, such as subdivisions, site plans, variances, and special use permits, which must be considered following procedures and applying standards established in state and local laws. Only in cities, and only upon the petition of a requisite number of property owners, must the legislature actively consider an application for rezoning.

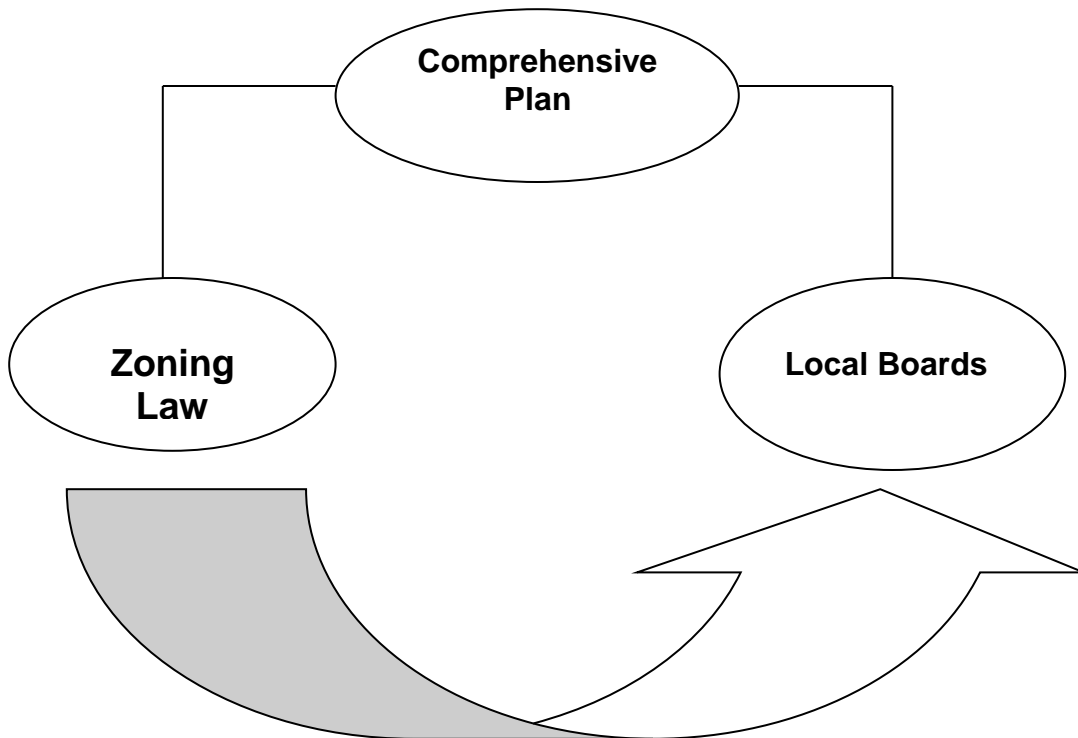
Zoning amendments that change the allowable use of twenty-five or more acres or that have other impacts spelled out in state regulations are Type I actions under the State Environmental Quality Review Act and may require the preparation of a full environmental impact statement. Normally, zoning amendments may be adopted by a vote of a majority of the local legislature. Where a petition is submitted by the owners of a certain percentage of the land affected by a zoning change, or where a county or regional agency has review authority and disapproves of the changes, more than a simple majority vote is required.

Zoning provisions and their amendments must be adopted in conformance with the comprehensive plan of the locality or exhibit comprehensiveness of planning, or they may be found to be beyond the municipality's power to adopt land use regulations. Amendments of use provisions of the law that apply to particular parcels must be accompanied by amendments of the zoning map as well. Local

laws may require additional procedures to be followed when zoning amendments are considered, for example: referral to the local planning board for an advisory report, the mailing to, or service of, notice of public hearing on nearby owners, and the posting of signs on the land subject to the proposed rezoning.

Landowners who wish to develop their parcels in conformance with applicable zoning provisions must apply to the local building inspector or zoning administrator for a building permit. Part of the inspector or administrator's function is to review whether the proposed project and its construction conform to the use and dimensional requirements of zoning. Where they do not, the permit must be denied. Determinations of this sort by the appropriate local official are reviewable by the local zoning board of appeals.

The comprehensive plan, the zoning laws, and the local boards that implement laws and ordinances are closely related. The comprehensive plan outlines the future blueprint for a particular community that is then contained in the adopted zoning district map. The zoning laws set forth the regulations and the standards to achieve the objectives in the comprehensive plan. Then, the local boards are responsible for implementing the zoning law. The boards' decisions should be consistent with policies contained in the comprehensive plan and based on standards in the zoning laws.



Local governments in New York have no inherent authority to regulate land uses and building construction. The power to adopt zoning provisions is delegated to towns, villages, and cities by statutes patterned after a model national act known as the Standard State Zoning Enabling Act, which was promulgated by the United States Department of Commerce in 1922. These provisions empower, but do not require, localities to adopt zoning laws. Specific provisions of the Town, Village, and General City Law grant authority to local governments in New York to divide the community into use districts and to regulate building construction within those districts for purposes set forth in the enabling legislation.

The state authorizing statutes make it clear that zoning regulations are to be enacted in accordance with a comprehensive plan and to accomplish a number of specific purposes, including conserving the value of buildings, encouraging the appropriate use of land, maintaining the character of zoning districts, facilitating the provision of transportation, water systems, sewage treatment, schools, and parks, lessening traffic congestion, preventing overcrowding, providing adequate light and air, and containing damage from fires, floods, and other dangers.

To accomplish these purposes, the local legislative body is authorized to divide the community into zoning districts within which it is empowered to regulate the erection, alteration, and use of land and buildings. Within districts, such regulations are to be uniform for each class of building. Regulations can restrict the height and size of buildings, the percentage of building lots that can be occupied, the provision of open space, the density of population, and the location and use of buildings for trade, industry, residence, or other purposes.

Case Study

The second largest wetland area in New York state is known as the Great Swamp. It contains over 3,000 acres of wetlands and is governed by the land use regulations of five adjacent municipalities in the Putnam and Dutchess County region of the northern New York metropolitan area. The zoning laws of these five communities have all been updated within the last 10 years and all recognize the importance of protecting the Great Swamp, but in a variety of different ways.

In the five communities, land included in the Great Swamp is designated for standard uses: residential, commercial, and industrial. In two of the communities, part of the wetland area is designated a flood hazard zone by the zoning itself. In one community, most of the wetlands is included in this flood hazard zone. In another community, the wetland area is divided among six different use districts, including industrial and highway business. Several of the communities include Great Swamp lands in three or more zoning districts.

Despite this disparate treatment of a critical watershed area in the zoning district provisions, the communities have adopted a number of other provisions to protect the Great Swamp. Three of the communities have adopted wetlands regulations, and one of these has placed the provisions in the zoning law itself. Three of the communities require developers to show watercourses or natural features in their site plan submissions; two of them require that natural resource areas be noted on and protected in subdivision applications. The subdivision and site plan regulations were adopted in most of these communities as separate laws, rather than as a part of the zoning law. Two of the five communities have flood hazard districts in their zoning law, two have separate flood hazard laws, and one has no provisions dealing with flood areas.

The zoning ordinance of the town of Putnam Valley, New York, illustrates how natural resource preservation principles can be incorporated into zoning regulations. The ordinance divides the municipality into 10 zoning districts. Several preservation and conservation districts are specifically designed to protect natural resources within the community. The ordinance establishes a Preservation District and a Conservation District with minimum lot sizes of 10 acres and five acres respectively. The Conservation District is intended to protect open space, natural resources, and environmental features. The Preservation District's purpose is to create a comprehensive network of permanent, multifunctional open space. The four residential districts are designed to minimize harmful impacts on critical resources. The ordinance also has three overlay district designations, as follows: the wetlands and watercourse district, the hillside management district, and the ground and surface water district. The zoning regulations within each of these districts include supplemental regulations that are intended to protect these resources. Among these is a density calculation formula that deducts wetlands, watercourses, and steep slopes from the area that can be developed. In addition, the ordinance has detailed dimensional and excavation regulations that help to preserve critical environmental resources.

The requirement in New York State that zoning provisions conform to the comprehensive plan has led to much confusion at the local level and in the courts. This results from the voluntary nature of the local power to adopt zoning provisions and comprehensive plans. Some states require localities to adopt both a zoning law and comprehensive plan and to update them at specified intervals. New York's approach is to empower and enable localities to do what they wish in adopting and updating zoning laws and comprehensive plans.

Where localities have recently adopted a comprehensive plan and conform their land use regulations, including zoning, to that plan, the regulations are greatly insulated from attack. It is very difficult to show that such a regulation fails to substantially advance a legitimate public objective – the judicial standard applied to challenged regulations. For this reason, in adopting land use regulations and zoning amendments, it is critical that the public interest in the regulation and the

comprehensive planning objective it achieves be spelled out in the findings of the legislature when enacting the regulation or amendment.

Vague zoning provisions cause particular problems. The local building inspector or zoning administrator needs specificity and clarity to interpret and apply zoning provisions to particular parcels. The work of the zoning board of appeals is compounded when statutory language is vague. Specific dimensions, standards, and terminology make zoning provisions easier to implement. Although zoning enactments are presumed by the courts to be constitutionally valid, their provisions are interpreted restrictively because they are deemed to be in derogation of the landowner's common-law property rights. When courts apply this standard of restrictive interpretation to unclear or general zoning language, they often find in the landowner's favor.

Landowners sometimes claim that a zoning amendment violates their vested rights. This happens when an owner has received a permit under zoning provisions that are changed before construction has been completed. The courts have not established a bright line to determine when, in this process, the owner has vested rights. The judicial rule is that an owner is allowed to continue development under a duly issued permit only where he has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment.

SUBDIVISION REGULATION

Local governments are authorized by state statutes in New York and most states to adopt and implement subdivision regulations. The subdivision of land involves the legal division of a parcel into a number of lots for the purpose of development and sale. By adopting and applying subdivision regulations, a municipality insures that a new development is cost-effective, is properly designed, and has a favorable impact on the community and the environment. The New York statutes permit, but do not require, local legislative bodies to adopt regulations and procedures for the review and approval of subdivisions. The local legislature may authorize the planning board to review and approve subdivision applications. Subdivision regulations can contain detailed standards to insure that land development will not adversely affect natural resources, aesthetics, historic sites, or other critical resources. The standards to be applied and the procedures to be followed by the planning board are contained in state law and in subdivision regulations that are adopted by the local legislature.

The subdivision of land provides for the future growth and development of a municipality by regulating the division of large tracts of land into smaller lots that are more easily developed or sold. The New York statutes define subdivision as “the division of any parcel of land into a number of lots, blocks or sites, as specified by local ordinance, law, rule or regulation . . . for the purpose of sale, transfer of ownership or development.” N.Y. Town Law § 276-278; N.Y. Village Law §§ 7-728 – 7-730; N.Y. General City Law §§ 32-34. State law sets forth requirements for the creation, submission, and review of subdivision plats in order to insure that land is developed and used to benefit individual landowners, as well as the community at large.

Subdivision regulations provide for the future growth and development of the community by affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health, and welfare of its population. Landowners are required to obtain approval before subdividing and developing land to insure that considerations such as drainage, erosion, traffic safety, and wastewater disposal are properly addressed. Subdivision regulation carries out the comprehensive plan of a municipality and supplements zoning provisions.

The local legislature may retain the authority to review and approve subdivision applications. Normally, however, it delegates that authority to the local planning board. The planning board may be authorized to impose conditions on subdivision approval, waive requirements where they are not needed to protect the public, require the reservation of parkland on a developed site or require the payment of a sum of money in lieu thereof, or require the posting of a performance bond to secure the development of improvements on the site.

State statutes give local legislatures considerable latitude to determine how to regulate subdivisions. For example, local legislatures can exempt small subdivisions from the approval process, specify whether minor or major subdivisions (as defined locally) are to be treated differently, state whether lot line alterations are controlled by the subdivision regulations, and indicate whether subdivision applicants must go through a preliminary and final approval process or a final approval process only. The locality can specify how detailed subdivision applications must be and how many elements or factors the subdivision plat or drawing must contain.

Local subdivision regulations may authorize the planning board to review the effect of the proposed development on natural resources. The regulations may require the board to consider the condition of soils, the slope of the land, and the existence of vegetation, among other matters, and to impose conditions to insure the integrity of the site and surrounding properties. In order to determine whether proposed construction will have a negative impact on environmental resources, subdivision regulations can require applicants to include detailed information about on-site and nearby environmental conditions in their applications.

The subdivision and development of individual parcels must conform to the provisions of local zoning which contain use and dimensional requirements for land development. Zoning, however, does not contain specifications regulating many of the details of development that determine, for example, the precise location and specifications for streets, drainage facilities, sanitary sewers, storm drains, and water mains. Subdivision standards go beyond zoning regulations and protect neighborhoods from flooding and erosion, traffic congestion and accidents, unsightly design, noise pollution, and the erosion of neighborhood character.

Under a typical set of subdivision regulations, the landowner must submit a plat of the proposed subdivision that shows the layout and approximate dimensions of lots and roads, the topography and drainage, and all proposed facilities at an appropriate scale. A plat is a map, drawing, or rendering of the subdivision which can contain narrative elements.

Local regulations require that the subdivision plat show all streets at sufficient width and suitable grade, sanitary sewers and storm drains, water mains and systems, landscaping, sidewalks, curbs and gutters, fire alarm signal devices, street lighting, signs, and trees. Additional features may be required such as the location of floodplains, wetlands, building footprints, large trees, archeological sites, and utility easements and lines. Further, the statutes authorize the planning board, under certain circumstances, to require the applicant to reserve land for a park, playground or other recreational purposes, or to require the payment of a sum of money in lieu of such a reservation.

Where a subdivision application meets the standards contained in the regulations, it must be approved. Where it does not, the planning board may impose conditions on the standards to insure that it meets the specifications. Where the subdivision cannot meet the standards, it can be rejected.

By adopting and applying subdivision regulations, the community seeks to insure that new development is cost-effective, properly designed, and has a favorable, rather than negative, impact on the neighborhood.

The regulation of land subdivision is a key element of community planning. When used by communities that have not adopted zoning provisions, subdivision control is the principal method by which the locality ensures that land is developed in a beneficial way. When used in conjunction with zoning, the community has an excellent method of insuring that land is developed in accordance with the provisions of the zoning law and goes further to facilitate the proper layout, design, and development of the community.

Normally, communities adopt subdivision regulations to carry out their comprehensive plans and supplement their zoning provisions; localities that have not adopted comprehensive plans and zoning provisions may adopt subdivision regulations to regulate the process by which land is subdivided, developed and sold in the community. Subdivision regulations are typically adopted when communities feel the pressures and experience the impacts, of land development.

According to a recent survey conducted by the New York State Legislative Commission on Rural Resources, about seventy percent of the municipalities in the state have adopted subdivision regulations: ninety percent of cities, sixty-nine percent of towns, and sixty-five percent of villages. Although subdivision regulations have been used in New York for most of the century, most communities did not adopt their subdivision regulations until the 1960s and 1970s.

Legislative Role: The local legislature has the authority to adopt subdivision regulations, to decide what standards to include, to determine what types of private land subdivisions are subject to approval, and to appoint the planning board as the local reviewing body.

Filing Certificate: Once the planning board has been authorized to approve subdivisions in the municipality, the municipal clerk shall file a certificate of that fact with the county clerk or register of deeds.

Reviewing Body: The local legislature may retain the authority to review and approve subdivision applications or delegate that authority to the local planning board. Once the planning board is delegated this authority it may draft and recommend subdivision control regulations to the legislature for its adoption.

Applicability: The local legislature, in adopting subdivision regulations, can exempt small subdivisions from the approval process, specify whether minor and major subdivisions, as defined locally, are to be treated differently, state whether lot line alterations are controlled by the subdivision regulations, and indicate whether subdivision applicants must go through a preliminary and final approval process or only a final approval process. The locality can specify how detailed subdivision applications must be and how many elements or factors the submitted subdivision map must contain.

Preliminary Submission and Public Hearing: One typical procedure adopted locally is to require the developer of a major subdivision of land to submit both a preliminary plat of the proposed subdivision and then a final plat, both of which are subject to review and approval. When this procedure is required, the planning board must hold a hearing within sixty-two days of the submission of the preliminary plat, subject to public notice at least five days prior to the hearing. The planning board's decision on the preliminary plat must be made within sixty-two days after the close of the public hearing. The statutes require that public hearings be closed within 120 days of the date they are opened.

Decision on Preliminary Submission: Where the decision is to approve the preliminary plat, that decision must be filed with the planning board and municipal clerk within five days of the decision. Where the decision is to approve but modify the preliminary submission, the grounds for modification must be stated upon the record and the board must state in writing any modifications it deems necessary for the final submission.

Submission of Final Subdivision Map/Final Decision: Within six months after an approval of a preliminary subdivision plat, the applicant must submit his final map for review. If he fails to do so, the preliminary approval may be revoked. Where the final plat is in substantial agreement with the approved preliminary plat, the planning board must approve or deny the final plat within sixty-two days of its submission to the planning board clerk. Within five business days of the adoption of the resolution granting approval of the final plat, the plat must be certified by the planning board clerk and filed in that clerk's office, as well as in the office of the municipal clerk.

Default Approval/Expiration of Approval: The failure of the planning board to take action within the established time periods is deemed an approval by default. The approval of the planning board expires sixty-two days after the date of approval, or the date certified, if not filed by the property owner in the office of the county clerk or register.

Variations: Local authorities may decide not to require a preliminary plat submission and approval process for some or all subdivisions. In such a case, a public hearing, subject to notice, must be held regarding the submission of the final plat. A public hearing, upon notice, is also required when the submitted final plat is not in substantial agreement with the approved preliminary plat. In these

instances, the final plat submission is subject to the environmental review process as well. Under its power to supersede state law, a local legislature may otherwise vary this process to achieve local objectives.

Environmental Review: Regulations adopted under the State Environmental Quality Review Act (SEQRA) make it clear that a subdivision approval is a discretionary action affecting the environment that is subject to environmental review. The statutes governing subdivision approval attempt to coordinate the procedures required for the review of the subdivision with those required by SEQRA.

The law states that a subdivision plat submission is not deemed complete until the planning board has determined that the subdivision will not have a negative impact on the environment or, if it may have such an impact, until the planning board has completed its review of a draft environmental impact statement. The time periods contained in the subdivision statutes do not begin to run until one of these two events has occurred. Further changes in the subdivision process may be required to comply with SEQRA depending on how the environmental review process is handled and whether the planning board is the lead agency responsible for that process.

The subdivision statutes require a planning board, as lead agency for SEQRA purposes, to hold a single public hearing on the subdivision application in compliance with the hearing provisions under both SEQRA and subdivision regulations. Where the public hearing is held to comply with SEQRA's requirements, fourteen days advance notice of the public hearing is required. SEQRA hearings are optional, not mandatory.

County or Regional Review: The application may also be subject to review by the county or regional planning agency under § 239-m of the General Municipal Law. Failure to submit the application to the county in the required circumstance creates a jurisdictional defect in the subsequent local action on the application. In addition, state public health law requires that a landowner who is subdividing a parcel into five or more lots for residential use must obtain a permit from the county or state department of health, which has further legal authority to determine the adequacy of the proposed sewer and water facilities. Metropolitan counties often have more inclusive review provisions, requiring in some cases all subdivision applications to be referred for review.

Parkland Dedication: The state statutes authorize planning boards to ensure that the recreational needs of the occupants of residential subdivisions be met by requiring land to be set aside, where a municipal study shows that there is now or will be an unmet need for recreational facilities in the municipality. The planning board may only require a financial contribution in lieu of a land reservation where it specifically determines that, in a particular case, the

subdivision is not of a sufficient size or adequate character to create a suitable recreational area for the subdivision's occupants.

Provision of Improvements: Site improvements required on approved plats are to be provided directly by the subdivider. Alternatively, their installation can be secured by a performance bond or other security posted by the subdivider. The municipality may elect to provide one or more platted improvements directly or through the creation of an improvement district.

Waiver of Provisions: A planning board may waive certain subdivision requirements where they are unnecessary as applied to the application under review. The statutes provide for such waivers when the planning board finds that the requirements are not "requisite in the interest of the public health, safety, and general welfare."

Area Variance: Where a proposed subdivision contains one or more lots that do not conform to the zoning requirements, an area variance can be requested from the zoning board of appeals without first obtaining a determination of the need for a variance from the official charged with the enforcement of the zoning regulations. The request must be accompanied by a written recommendation of the planning board regarding the proposed variance.

Clustering of Density: The local legislature may authorize the planning board to modify the dimensional provisions of the zoning law to cluster the development of the subdivided parcels. Such modifications allow the subdivision plat to include alternative methods of laying out the lots, buildings, and other improvements in lieu of the layout dictated by the height, setback, parking, landscaping, or other provision of the zoning law. They do not allow the planning board to increase the density of development permitted under all other applicable laws and regulations.

The purpose of authorizing such modifications is to provide flexibility of design in order to preserve the natural and scenic qualities of open lands subjected to subdivision. By clustering the permitted development on the site, the planning board can preserve open space and natural resources much more effectively. The planning board may establish various conditions on the ownership, use, and maintenance of such open lands as necessary to assure the preservation of the natural and scenic quality of the preserved open lands. The local legislature can require that any such conditions imposed for this purpose be approved by it.

In its discretion, the legislature may authorize the planning board to *require* subdividers to cluster the permitted development to preserve open space and natural resources. Typically, however, planning boards are authorized to permit cluster development, rather than to require it. This authority can include the power to cluster residential dwellings in any configuration that best accomplishes the purpose of cluster development, including permitting the use of detached, semi-detached, attached, or multi-story structures in any residential zoning

district so long as the density permitted under all other provisions of law is not exceeded.

Decision of the Board: The grounds for modification or disapproval of a subdivision plat must be stated in the record of the planning board. A copy of the resolution of the planning board approving a final plat must be sent to the applicant and filed in the office of the municipal clerk within five days of its adoption.

Recording of Plats: The law prohibits the sale of lots in a subdivision until the plat of the subdivision has been filed with the county clerk or register of deeds. In a community where the planning board has been authorized to approve subdivisions, a developer may not file a subdivision plat in the land records office of the county clerk or register of deeds unless the plat has the approval of the planning board endorsed on it.

Judicial Review: Within thirty days of the filing of the decision of the planning board with the municipal clerk, any person aggrieved by that decision may apply to the supreme court for review under Article 78 of the Civil Practice Law and Rules. The supreme court will review the record of the local reviewing board, and, if necessary, take additional evidence, directly or through a referee. Even if the local board is reversed by the court, no legal costs may be assessed against it unless it acted in bad faith, with malice, or with gross negligence in making the decision being appealed.

Villages, towns, and cities in New York are authorized by state statutes to adopt and implement subdivision regulations. The adoption of subdivision regulations is permitted – not required – by state law. These statutes authorize localities to impose conditions on subdivision approval; to waive requirements where they are not needed to protect the public; to require the reservation of parkland on the site (if it is to be developed residentially) or to require the payment of a sum of money in lieu thereof; to require the posting of a performance bond or other security to secure the development of improvements on the site; to approve the clustering of permitted density on portions of the parcel to preserve open space; and to require compliance with environmental review provisions when approving subdivision applications.

Parkland Reservation: The statutes that allow for the reservation of parkland or money in lieu thereof were adopted to meet the need for recreational facilities of the residents of the subdivision and their guests, not to provide recreational facilities for the public at large. This was clarified by the Court of Appeals when it set aside a local requirement that the reserved recreational area be dedicated to the town for park purposes.

The courts and the legislature have made it clear that the authority to require land reservation for recreation or the payment of money in lieu thereof, must be

exercised on a case-by-case basis and may not be administered under fixed formulas applicable to all development. In each case, a two step process must be followed. First, the planning board must make a determination that the subdivision under review will add to the recreational needs of the community. This finding must be based on an evaluation of the present and anticipated future recreational needs of the municipality as determined by estimates of the projected population growth to which the particular subdivision will contribute. Second, based on a review of the particular plat before it, the planning board must determine whether it contains adequate and suitable space for recreational facilities. Only if the board finds that such space does not exist may it require the subdivider to make a cash contribution. All such contributions must be deposited into a trust fund to be used by the municipality exclusively for recreational purposes.

Basing Decisions on Standards in the Regulations and Facts in the Record: Decisions of the reviewing board must be based on the standards contained in the subdivision law and regulations. To be entitled to an approval, the applicant must demonstrate that it has responded to all required elements and met all stipulated standards contained in the regulations. Generalized complaints by local residents are insufficient to justify the denial of a preliminary plat application. Similarly, subdivision approval cannot be withheld based solely on conclusory allegations that the subdivision is not in keeping with the character of the neighborhood, where the plat meets all the applicable requirements of local law.

When the planning board approves a subdivision application, state statutes do not require that the record contain, and that the planning board's decision be based on, evidence supporting its approval. The statutes do require that decisions to modify or disapprove applications be based on evidence found in the record. Keeping a detailed record containing such evidence in all cases, however, insures that board decisions are not arbitrary, capricious, or an abuse of discretion. Such records provide the type of information parties need when deciding whether to appeal board decisions, and create the type of record that is necessary for a court to determine the validity of the board's decisions to approve subdivisions.

Conditions Imposed: State statutes authorize the reviewing board to impose reasonable conditions and restrictions on its approval of subdivision applications when such conditions are directly related and incidental to the proposed plan. The applicant must show that these conditions have been met before the local building inspector can issue a building permit or certificate of occupancy. A planning board, however, is without authority to impose conditions that are unrelated to the legitimate purposes of the laws governing subdivision review and approval. Conditions imposed on subdivision approvals must bear a reasonable relationship to the impact on the community of the subdivision itself.

Case Study

The subdivision ordinance of the town of North Salem, New York, described in part at the end of this section, requires applicants to submit considerable data relevant to environmental protection. These regulations illustrate the role that subdivision regulation can play in the protection of natural resources. North Salem's subdivision regulations require applicants to submit the following information regarding site conditions:

- i. existing contours;
- ii. ledge outcrops;
- iii. existing watercourses and water bodies, including intermittent and continuous flow streams;
- iv. location and limits of all wetlands, floodplains, and other land subject to potential flooding;
- v. location and approximate limits of each soil type on the tract based on U.S.D.A. soil surveys as certified by a qualified soil scientist;
- vi. principal wooded areas and the approximate location of any large trees;
- vii. the approximate location of any wells on the tract and on land within 200 feet of the tract; and
- viii. location of any drainage discharge points onto the tract from any street or other property.

The North Salem regulations also require applicants to submit the following information regarding the proposed development:

- i. location of storm drains, catch basins, manholes, headwalls, detention basins and ditches, and elevations at key points on the proposed drainage system;
- ii. any relocation of or improvements to channels or watercourses;
- iii. The proposed floor elevation of the lowest floor of a dwelling or other principal building on each lot near watercourses, water bodies, wetlands, and areas subject to potential flooding;
- iv. the boundaries of any area proposed for re-grading by major excavation, filling, or blasting; and
- v. the boundaries of any areas proposed to be reserved and protected from excavation.

In addition, a subdivision plat, in proper cases and where required by the planning board, shall show a park or parks, suitably located for playground or other recreational purposes. Payment in lieu of land for recreation is authorized when it is found that a park or recreational area cannot be located within the proposed subdivision.

The town of North Salem's subdivision regulations include a variety of standards calculated to protect natural resources from the adverse effects of development. Construction cannot commence until plans have been submitted and approved

pursuant to established construction standards. The developer must submit a construction program designed to limit adverse environmental impacts. The "Natural Features" provision of the law establishes guidelines requiring a developer to prevent soil erosion, excessive tree and vegetation removal, encroachment upon water resources and wooded areas, and to protect other resources of local significance.

SITE PLAN REGULATION

A “site plan” is defined by state law as a drawing, prepared in accordance with local specifications, that shows the “arrangement, layout, and design of the proposed use of a single parcel of land.” Site plan regulations are adopted by the local legislature as part of the zoning law or as a separate set of regulations and contain the specifications that the site plan drawing must include and the standards it must meet.

Local site plan regulations require the developer of an individual parcel of land to file a drawing of that parcel’s planned development for review and approval by a local board. Often, site plan regulations apply only to larger-scale commercial developments such as shopping malls, industrial and office parks, or residential developments such as condominium or town house projects. Some communities, however, subject smaller parcels to site plan review.

Parcels subject to site plan review are normally owned by a single individual or entity such as a condominium association, homeowners’ association, corporation, or partnership. Since such parcels are not to be subdivided, their development would escape local review if it were not for the locality’s site plan regulations. When such regulations have been adopted, individual parcels subject to their terms may not be developed until a site plan has been submitted, reviewed, and approved.

Site plan regulations require that certain elements be shown on the drawing, including:

- Access
- Parking
- Landscaping and buffering
- Drainage
- Utilities
- Roads
- Curbs
- Lighting
- The location and dimensions of the principal and accessory buildings and any other intended improvements

Some communities require site plans, particularly those of larger projects, to show adjacent land uses and to provide a narrative statement of how the site’s development will avoid or mitigate adverse impacts on them.

The purpose of site plan regulations is to ensure that the development of individual parcels of land do not have an adverse impact on adjacent properties or the surrounding neighborhood. Such regulations also ensure that the parcel’s

development fits properly into the community and conforms to its planning objectives.

The development of individual parcels must conform to the provisions of local zoning, which contain use and dimensional requirements for site development. Zoning, however, does not contain specifications regulating the details of a site's development that protect, for example, the design of vehicular access to the site, the provision of needed landscape features, the location of parking areas, and the architectural features of buildings. Site plan specifications go beyond those of zoning and protect adjacent areas and the community's residents from flooding and erosion, traffic congestion and accidents, unsightly design, noise pollution, and the erosion of neighborhood character. This is their distinct purpose.

Normally, communities adopt site plan regulations to carry out their comprehensive plans and supplement their zoning provisions and subdivision regulations. Localities that have not adopted comprehensive plans and zoning provisions may adopt site plan regulations to govern the development of individual sites when development pressures mount.

According to a recent survey by the New York State Legislative Commission on Rural Resources, about sixty percent of municipalities in the state have adopted site plan regulations: seventy-seven percent of cities, sixty percent of towns, and fifty-five percent of villages. Although municipalities have enacted site plan regulations since the 1920s under their implied land use authority, relatively few localities adopted them until 1976, when the state legislature specifically delegated site plan authority to them.

Legislative Role: The local legislature has the authority to adopt site plan regulations, to decide what standards and site plan elements must be included, to determine what sites are subject to approval, and to appoint a local site plan review body.

Reviewing Board: The local legislature may retain the authority to review and approve applications or delegate that authority to the local planning board or other administrative agency, such as the zoning board of appeals.

Applicability: Local site plan regulations may be limited in their application to the development of single parcels of land in specifically designated areas such flood hazard zones, historic districts, coastal zones, or along commercial corridors. Some communities limit the application of site plan regulations to particular zoning districts. Another approach is to require all single parcel development to comply with site plan regulations subject to certain exceptions, such as one and two-family residential projects, accessory buildings, or specified low impact uses.

Procedures: The local legislature may provide different procedures for various types of site plan applications. Proposed site development projects may be divided between those considered minor and those where the impacts are major,

as defined by type, location, or size. Some communities require major site plan applications to go through two review phases: preliminary and final. Others may allow the reviewing agency to waive certain elements of the site plan regulations for minor or other appropriate projects.

Public Hearings: Under state law, the local legislature may require the board with site plan authority to hold public hearings on site plan applications before taking final action on them. Where a public hearing is not required, the board can conduct a public hearing on particular site plan submissions, in its discretion. Where public hearings are held, they must be conducted within sixty-two days from the date of application, public notice must be published at least five days before the hearing, and the applicant must be mailed notice of the hearing ten days in advance. The agency's final decision on the application must be made within sixty-two days of the close of the public hearing, but this deadline can be extended by mutual consent.

Environmental Review: Site plan approval time periods must be coordinated with those required by the State Environmental Quality Review Act regarding the environmental review of projects which may have a significant adverse impact on the environment. When a site plan applicant is required to submit a draft environmental impact statement, the extensive process and extended timetable contained in the regulations of the Commissioner of the Department of Environmental Conservation must be followed. An application for site plan approval is not deemed to be final until the environmental review process is completed. Any public hearing held during the environmental review process can be used to satisfy any public hearing requirement for the site plan itself.

County/Regional Review: In certain instances, site plan applications must be submitted by the reviewing board to a county or regional planning agency. This must be done where the land subject to approval is within 500 feet of a municipal boundary, an existing or proposed county or state highway or park, an existing or proposed stream channel owned by the county, or county or state land on which a public building is situated. Where such referral is required, it must be submitted ten days prior to a public hearing held on the matter or if no public hearing is held, before the agency's final action on the application. The time period for the local board's review and decision does not begin until the county or regional planning board has been heard from or thirty days have elapsed from the date of referral.

Park Land Reservation: Where the residential development of a site will contribute to the need for future recreational facilities and parks in the community, the reviewing board can require the development to contain a park, suitably located on the site. Where one cannot be accommodated, the board can require the applicant to pay a sum of money into a trust fund administered exclusively for recreational purposes.

Area Variances: Where a proposed site plan contains building features that do not conform to the zoning requirements, an area variance can be requested from the zoning board of appeals without first obtaining a determination of the need for a variance from the official charged with the enforcement of the zoning regulations.

Decision of the Board: The planning board or other reviewing board may either approve the site plan application, deny it, or approve it subject to conditions or modifications. If denied, the applicant can resubmit a new application with a different site plan for the parcel. Any decision of the reviewing board must be based on evidence found in the record of its proceedings. That decision must be filed in the office of the municipal clerk within five business days of the decision and a copy mailed to the applicant.

Judicial Review: Within thirty days of the filing of the decision of the reviewing board, any aggrieved person may apply to the supreme court for review under Article 78 of the Civil Practice Law and Rules. The supreme court will consider the record of the reviewing board, and, if necessary, take additional evidence, directly or through a referee, for the proper resolution of the matter. Even if the local board is reversed by the court, no legal costs may be assessed against it unless it acted in bad faith, with malice, or with gross negligence in making the decision being appealed.

Since 1976, villages, towns, and cities in New York have been expressly authorized by state statute to adopt and implement site plan regulations. The adoption of site plan regulations is permitted – not required – by state law. These statutes authorize localities to impose conditions on site plan approval; to waive requirements where they are not needed to protect the public; to require the reservation of park land on the site, if it is to be developed residentially, or require the payment of a sum of money in lieu thereof; to require the posting of a performance bond or other security to secure the development of improvements on the site; and to require compliance with environmental review provisions when approving site plans.

Standards and Elements: Site plan regulations must contain standards to guide the determinations of the reviewing board and must specify the elements that are to be included on the drawing submitted by the applicant. The delegation of site plan authority to the planning board or other administrative agency is the delegation of legislative authority; the reviewing board must be guided by some specific standards so that its decisions are not wholly discretionary.

Site plan regulations typically contain a series of “elements” that must be included on the drawing and explained in a narrative submission by the applicant. The state statutes contain a number of site plan elements that may be required by the local legislature, including those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of

buildings, adjacent land uses, and physical features. Additional elements may be included in the site plan regulations if desired by the local legislature.

Site plan review elements generally contain both qualitative and quantitative measures. For example, they may authorize the responsible agency to preserve certain natural features “insofar as is possible,” or to review the adequacy of the arrangement of trees, shrubs, and other landscaping – qualitative standards. They may require that no septic tank be located within 50 feet of any shoreline – a quantitative specification that supplements the requirements of the zoning ordinance. These standards and elements provide guidance to both the reviewing agency and the applicant.

Basing Decisions on Standards in the Regulations and Facts in the Record: Decisions of the reviewing board must be based on the elements contained in the site plan law and regulations. To be entitled to an approval, the applicant must demonstrate that it has responded to all required elements and met all stipulated standards contained in the regulations.

In making decisions on site plan applications, the reviewing board must keep a detailed record of its deliberations. These records can be in narrative form rather than verbatim transcripts. The findings of the board and its decision must be based on reliable evidence contained in this record. The record may be the minutes of the board, if prepared in enough detail to satisfy these requirements.

Keeping a detailed record of this nature insures that board decisions are not arbitrary, capricious, or an abuse of discretion. Such a record provides the type of information parties need when deciding whether to appeal board decisions, and creates the type of record that is necessary for a court to determine the validity of the board’s decisions.

Conditions Imposed: State statutes authorize the reviewing board to impose reasonable conditions and restrictions on its approval of site plan applications when such conditions are directly incidental to the proposed plan. The applicant must show that these conditions have been met before the local building inspector can issue a building permit or certificate of occupancy. A reviewing board, however, is without authority to impose conditions that are unrelated to the legitimate purposes of the laws governing site plan review and approval.

Acting Beyond the Authority of the Reviewing Board: The board may not base its denial of a site plan on matters that are beyond its authority. For example, a denial based on the failure of the proposed land use to comply with the zoning ordinance is beyond the reviewing board’s authority; that determination must be made by the local building inspector and the zoning board of appeals. If the authority to issue special permits has been granted to a different body, the board cannot refuse to approve a site plan application where it finds that a special permit was erroneously granted.

VARIANCES

A variance allows property to be used in a manner that does not comply with the literal requirements of the zoning ordinance. There are two types of variances: area and use.

A use variance permits “a use of the land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.” For example, if a piece of land is zoned for single-family residential use and the owner wishes to operate a retail business, the owner could apply to the zoning board of appeals for a use variance.

An area variance, on the other hand, allows for a “use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulation.” An area variance is needed when a building application does not comply with the setback, height, or area requirements of the zoning ordinance. If an owner wants to build a deck on his house which encroaches slightly into a side yard setback area, he could apply to the zoning board of appeals for an area variance.

Variances provide flexibility in the application of the zoning law and afford the landowner an opportunity to apply for administrative relief from certain provisions of the law. A property owner may seek a use or area variance when an application for a building permit is denied on the grounds that the proposal violates the use or dimensional requirements of the zoning ordinance. Alternatively, the property owner could request the local legislative board to rezone the property so that the requested use is allowed as-of-right.

The zoning board of appeals has been delegated the statutory authority to issue use and area variances. The jurisdiction of the zoning board of appeals is appellate only. It is limited to reviewing or hearing appeals from the decisions of an administrative official charged with enforcing the zoning law. In other words, a landowner may not go directly to the zoning board of appeals for an interpretation of the zoning law or for a variance. The zoning enforcement officer must rule on the matter first and that decision must be filed in the enforcement officials' office within five days of the decision. That ruling may be appealed to the board. In order to grant a use or area variance, a concurring vote of a majority of the board is necessary. The board is limited to granting the minimum variance necessary which addresses the need for the variance while preserving the character, health, safety, and welfare of the community.

When an application for permission to build is made to the local building inspector or department which does not comply with the literal requirements of the zoning law, the proposal must be denied. If the reason for the denial is that

the application violates the use or area provisions of the law, the applicant may apply to the zoning board of appeals for a use or area variance.

New York law provides statutory standards for the issuance of use and area variances. The statutes impose upon an applicant a heavy burden of demonstrating that a use variance should be granted, since the applicant is asking that the zoning board of appeals alter the local legislature's determination that a specific use is not appropriate in the zoning district. The legal burden is less stringent when applying for an area variance, since the potential impact on the surrounding area is significantly less.

Statutory Standard for Use Variance: To obtain a use variance, the applicant must demonstrate that the applicable zoning regulations cause an unnecessary hardship. To prove unnecessary hardship, the applicant must establish that the requested variance meets the following four statutory conditions:

1. The owner cannot realize a reasonable return on the property as zoned. The lack of return must be substantial and proved with competent financial evidence. It is insufficient for the applicant to show only that the desired use would be more profitable than the use permitted under the zoning. For example, in *Everhart v. Johnston*, 30 A.D.2d 608, 290 N.Y.S.2d 348, (3d Dep't 1968), the owner of residentially zoned property sought a use variance to construct offices for an insurance agency and a real estate business. The owner testified in support of the application that it would not be economical to renovate the property for residential purposes and that a greater rent could be charged to a commercial lessee. The court held that a showing that "the permitted use may not be the most profitable use is immaterial." What must be established is that "the return from the property would not be reasonable for each and every permitted use under the ordinance."

2. The hardship must be unique to the owner's property and not applicable to a substantial part of the zoning district. If the hardship is common to the whole neighborhood, the remedy is to seek a change in the zoning, not to apply for a use variance. In *Collins v. Carusone*, the court held that the applicant had failed to establish that the hardship – being located near a city landfill – was unique to his property. Rather, it was held that the hardship was common to all properties in the area. Thus, the property owner should apply to the local legislature for rezoning.

In *Douglaston Civic Association v. Klein*, 51 NY2d 963, 416 N.E.2d 1040, 435 N.Y.S.2d 705 (1980) the court noted that "uniqueness does not require that only the parcel of land in question and none other be affected by the condition that creates the hardship. What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed."

3. Granting the variance must not alter the essential character of the neighborhood. In making this determination, the court often considers the intensity of the proposed development as compared to the existing and permitted uses in the neighborhood. For example, a use variance to permit construction of an office building in a single-family neighborhood where several tall commercial structures already exist would not alter the essential character of the neighborhood. Conversely, the court in *Holy Sepulchre Cemetery v. Board of Appeals of the Town of Greece*, 271 A.D. 33, 60 N.Y.S.2d 750 (4th Dep't 1946), held that a cemetery would alter the essential character of a district zoned for residential development, despite the fact that the land in the district was undeveloped at the time of the application.

4. The hardship must not be self-created. In *Clark v. Board of Zoning Appeals of Town of Hempstead*, 301 NY681, 95 N.E.2d 44 (1950), the Court of Appeals held that "one who . . . knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of special hardship." For example, a developer may not acquire land zoned residential at the time of acquisition and successfully petition for a variance to construct office buildings. Whether the purchaser actually knew about the use restriction is not relevant; he is charged with a duty to discover such restrictions.

In issuing a use variance, the board may impose "such reasonable conditions and restrictions as are directly necessary to and incidental to the proposed use of the property. Such conditions shall be . . . imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community."

Statutory Standard for Area Variances: For a zoning board of appeals to grant a variance from the dimensional and area requirements of a zoning ordinance, it must find that the benefits to the applicant of the requested variance outweigh the detriment it will cause to the health, safety, and welfare of the neighborhood. The board must weigh the benefits of the requested variance to the applicant against the five factors set forth in the statute:

1. Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of an area variance?
2. Can the benefit sought by the applicant be achieved by some method that is feasible for the applicant to pursue other than an area variance?
3. Is the requested area variance substantial?
4. Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?

5. Is the alleged difficulty self-created? This consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

In *Sasso v. Osgood*, 86 NY2d 374, 657 N.E.2d 254, 663 N.Y.S.2d 259 (1995), the Court of Appeals interpreted the statutory balancing test for area variances. The case involved an application for an area variance to allow the property owner to build a boathouse on a lot that was smaller than the required minimum lot size. The zoning board of appeals granted the area variance, and several neighbors challenged that decision. In upholding the determination of the zoning board of appeals, the court found that the board had carefully considered the five statutory criteria and made a rational decision. The zoning board had found that construction of the boathouse would not cause a change in the character of the neighborhood since adjacent properties had similar structures. No alternatives other than an area variance existed because the subject parcel was smaller than required and there was no available adjacent land to be purchased so as to meet the minimum requirements. The fact that the hardship was determined to be self-created was not fatal to the granting of the variance. Even though the owner had knowledge that the lot was substandard when purchased, the statute specifically provides that this is just one factor to be considered and “shall not preclude the granting of an area variance.” The court found that the zoning board properly weighed the benefit of the variance against the detriment to the community and that the board’s findings were amply supported by the record.

Limitations and Concerns

Use variances involve an inherent contradiction. It is the prerogative of the legislative body to separate one land use from another. This is the essential purpose of dividing the community into zoning districts. The power of a quasi-judicial body, such as the zoning board of appeals, to vary the uses allowed in a district must be limited in order to prevent that body from usurping this essential legislative function. At the same time, the legislature does not want property owners to be denied a reasonable return on their property because of use restrictions where some relief from these restrictions can be afforded without altering the underlying purpose of the zoning district. For this reason, zoning boards have been authorized to grant use variances subject to the requirements of the statute. The statute imposes on the petitioner a burden of proving specific factors. Area variances involve similar tensions, but to a lesser degree. There the zoning board of appeals is charged with the task of balancing the benefit of the variance to the petitioner against its impact on the area.

When making a decision to grant or deny an application for a variance, the zoning board of appeals must rigorously follow the statutory requirements, carefully review the evidence presented, and make a finding based on the record. Particularly in the case of area variances, where the legislature has

specified factors that must be considered but has given no guidance as to how to weigh those factors, the record should reveal that all five factors were considered and state the findings of the board with respect to each. Additionally, the board is limited to granting only the minimum variance necessary under the circumstances.

CHAPTER FOUR: SMART GROWTH AND AREA IDENTIFICATION

INTRODUCTION

“Smart Growth” is a term that provides a popular label for a growth strategy that addresses current concerns about traffic congestion, disappearing open space, nonpoint source pollution, the high cost of housing, increasing local property taxes, longer commutes, and the diminishing quality of community life. To accomplish smart growth, government must take two related actions. The first is the designation of areas for recreation, conservation, and environmental protection. The second is the designation of discrete geographical areas into which private market growth pressures are directed. This reduces a complicated subject to its two most essential features and leaves much for further discussion. This focus also helps to explain why local strategies to protect critical environmental areas need to be paired with efforts to encourage growth and development in appropriate areas.

One approach to identifying growth or development areas is to begin with a scientific inventory of existing open lands and to put those lands in priority order for protection. Critical and fragile environmental areas enjoy the highest priority for regulation and acquisition. Appropriate regulation of environmentally sensitive lands should occur before localities and land trusts expend their limited funds to acquire open lands or their development rights.

By identifying critical environmental areas and protecting them by regulations and acquisition programs, communities can better define where to locate the development needed to accommodate population increases. The sustainable development movement taught that development and conservation are mutually supportive. Proper land conservation increases the quality of life, protects needed natural resources, stabilizes property values, and provides recreational and tourism benefits. Proper development, for its part, takes development pressures away from critical environmental areas, provides tax resources for municipal services, and can provide financial resources for land conservation.

Two examples illustrate this point. First, under a transfer of development rights program, development rights on critical environmental lands can be transferred to a receiving area where the community can support higher density development. Because development at higher densities is allowed by law in the receiving area, landowners there are willing to pay for the development rights on the constrained land. Second, localities in some states have been given the authority to adopt incentive zoning: that is to give density bonuses to land developers in defined areas in exchange for public benefits, including cash, provided by those developers. This cash can be deposited into a land acquisition trust fund and

used to purchase the title or development rights to environmentally valuable properties. Both these strategies create private sources for financing the acquisition of development rights on environmentally sensitive land. They demonstrate the reinforcing quality that supporting both development and conservation in appropriate areas can have.

What is accomplished by directing development to growth areas? Michael Pawlukiewicz, who is the Urban Land Institute's Director of Environmental Land Use Policy, endorses the notion of "compact development," by which he means growth that is focused on existing commercial centers, new town centers, and existing or planned transportation facilities. This, he argues, is necessary to create a sense of community, promote economically viable development, insure the ease of movement and safety of residents, and preserve open space, natural resources, and sustainable habitats.

Concentrating development in designated growth areas, bounded in some specific way, is a necessary factor in the smart growth equation. Bounded growth, however, is not a novel concept. Local governments have traditionally drawn blueprints for growth in the design of their zoning codes. Zoning's primary characteristic is the creation of hard-edged districts that separate land uses into residential, commercial, and industrial zones. Traditional zoning districts separate land uses to advance a number of public purposes. The architects of zoning thought that this approach to community planning protected children in residential districts from commercial and industrial traffic, for example, and protected residential property values by placing noxious and inconsistent uses in distant locations.

Perhaps we are moving into an era of "smarter growth," where public policy encourages more compact and integrated land uses to accomplish a number of contemporary public interests, such as the reduction of car travel and air pollution and the rate of consumption of farmland, natural resources, and environmentally sensitive areas. Smart growth advocates see the designation of areas for more compact, mixed-use development as a present imperative, a necessary change in the zoning blueprint needed to address the concerns expressed by Pawlukiewicz and addressed by the Oregon and Maryland growth management initiatives.

**States That Have Adopted
Growth Management Laws
That Restrict or
Guide Local Land Use Authority:**

- Florida
- Georgia
- Hawaii
- Maine
- Maryland
- New Jersey
- Oregon
- Rhode Island
- Vermont
- Washington

AUTHORITY TO DESIGNATE GROWTH AREAS

If local governments are to design the basic blueprint for smart growth, how should they proceed? State law provides numerous planning tools for municipalities to use in designating growth and conservation areas. The principal among these, of course, is the comprehensive plan, without which, the Court of Appeals has said, there can be no rational allocation of land use. (*Udell v. Haas*, 21 NY2d 463). State statutes suggest that local comprehensive plans include a statement of goals and objectives regarding the community's physical development and describe the specific actions to be taken to provide for the long-range growth and development of the locality. (See Town Law § 272-a, Village Law § 7-722, and General City Law § 28-a).

Comprehensive plans can, in fact, be quite detailed, incorporating maps, graphs, and studies that can precisely locate designated growth areas and spell out the techniques to be used to encourage development in those areas. This authority is highly elastic, and can be stretched to fit all development contexts, from urban and suburban to rural, where communities wish to control growth. Growth control measures, including goals, objectives, and techniques contained in the comprehensive plan, were validated nearly 30 years ago by the Court of Appeals in *Golden v. Ramapo*, 30 NY2d 359.

State law permits local governments to divide the community into zoning districts and to regulate the density of population, the use of land, and the size, shape, and location of buildings within each district. (Town Law § 261, Village Law § 7-700, and General City Law § 20(24).) Although this authority has been used in some communities to impose a grid type of development pattern on the land, with residences separated from retail and commercial areas, zoning itself may be used to designate a variety of growth districts to carry out a local smart growth agenda. Municipalities have designated large parcels of land for mixed-use zones, planned unit development districts, planned residential development areas, floating zones, and conservation areas.

DIRECTING GROWTH TO DESIGNATE GROWTH AREAS

Once a growth area has been designated, local governments have a long shopping list of techniques they may choose from to direct development into such areas. One of these is to lower the density of development and to otherwise restrict development permitted outside the growth area. Facilitating development within the area can be accomplished by using the following devices:

Higher Density Districts: In a designated growth zoning district, the density of development can be increased as a matter of right. Municipalities can use their traditional zoning authority to create a mixed-use neighborhood with bulk, area, and use provisions that create the type of compact development pattern

envisioned by the smart growth concept. In taking this approach, smart growth advocates argue, the locality needs to create a sufficient density of development to support the transportation and transit services needed to increase pedestrian traffic and reduce car travel.

Bulk and Area Requirements: A designated growth zoning district can contain bulk, area, and parking provisions that encourage types of development that support smart growth principles. By establishing setback lines that require buildings to be brought up to the sidewalk and by requiring parking and garages in the rear, pedestrian use of streets can be encouraged and an attractive neighborhood design created. Access to residential units and offices can be provided through alleys on which garages or parking spaces are located. The number of parking spaces required can be fewer if real prospects of transit services exist. Lot sizes can be reduced and zero lot line requirements can be introduced to create higher residential and mixed-use densities. Design amenities such as front porches and traditional architectural styles can be included in the zoning provisions. Attention to the quality of the design of buildings abutting streets can encourage pedestrian use, which is important in encouraging the use of transit facilities. In some parts of these designed zoning districts, narrower streets can be specified to discourage traffic and ease pedestrian use.

Incentive Zoning: Significant waivers of zoning requirements can be offered to developers, including increasing the density of development allowed, as a method of directing larger-scale development into designated growth areas. (Town Law § 261-b, Village Law §7-703, and General City Law § 81-d). Land developers can be required to provide public amenities such as transportation, parks, affordable housing, social service centers, or other infrastructure in exchange for the waivers. In this way, some of the services needed in designated growth areas can be provided by private developers in exchange for the increased density desired in the area.

Special Permits: Larger-scale developments providing for mixed uses may be approved by special permits issued by the planning board or other administrative body. This practice has been followed for decades by municipalities as a method of combining land uses in designated “planned unit” or “planned residential” zoning districts.

Floating Zones: Large-scale developments can be permitted by amending the zoning code to provide for a special use zone, such as a mixed-use development district, that can be affixed to a large area upon the application of all or a majority of the landowners. That application, if successful, results in the amendment of the zoning map to redistrict the subject parcels and permit the new use.

Generic Environmental Impact Statements: When any of these techniques is used to create a designated growth area, a generic environmental impact statement can be prepared that identifies negative environmental impacts and provides for their mitigation. When this happens, it is possible that developers of individual projects will not be required to prepare lengthy and costly environmental impact studies. This alone can provide a powerful incentive for developers to concentrate their projects in designated development areas.

Transfer of Development Rights: State law allows New York municipalities to establish transfer of development rights programs that concentrate development in receiving districts and provide for the transfer of development rights from sending districts. In smart growth terms, the receiving district is the designated growth area and the sending area is a conservation or natural resource protection area. (See Town Law § 261-a, Village Law §7-701, and General City Law § 20-f).

Intermunicipal Agreements: In New York, local governments have been given liberal legal authority to cooperate in the planning and zoning field. (Town Law § 284, Village Law §7-741, and General City Law § 20-g). Through intermunicipal agreements, they can designate shared or interlocking growth districts that create real market opportunities and a complementary range of housing types, retail services, office buildings, and needed amenities. This is a particularly important technique to consider when several communities share a transportation corridor.

See Chapter Five, page 86, for more information regarding Development Tools.

TECHNIQUES FOR PROTECTING THE DESIGNATED GROWTH AREA

One of the more practical limitations to the designation of development areas is the likely opposition of residents in and near the area. They will be concerned about the quality of life in their neighborhoods, the impacts of increased density, and the effect of new development on their property values.

To counter these predictable and reasonable fears, residents will need to be involved in the planning process for the designated growth area. During meetings with these residents a variety of methods of protecting their interests can be discussed. These include adopting landmark protection laws, creating historic district protections, insuring the quality of the design of new and expanded buildings, providing new parks and recreational facilities, establishing cheaper and more convenient transportation alternatives, and explaining the benefits of a properly functioning, pedestrian-oriented neighborhood.

THE PRIORITY GROWTH DISTRICT CONCEPT

An innovative land use technique can be used by suburban and rural communities to manage and define future growth in a way that creates more livable places that are environmentally, socially, and fiscally sound. Specifically, a community may designate mixed-use Priority Growth Districts, or PGD's, which direct development to selected locations and also specify a design that is attractive to both the community's current and future residents.

Priority Growth Districts (PGD's) are specially selected areas where, through the comprehensive planning process, a community has determined that growth is desirable, compatible with existing uses, and can be implemented in a manner that will enhance the larger community by providing needed housing alternatives, preserve open space, and add retail, commercial and community uses that support the tax base. PGD's should be served by existing community water and sewer facilities or designated in locations where such facilities can readily be provided. PGD's should incorporate Traditional Neighborhood Design concepts that emphasize creating a sense of place in the form of community or neighborhood centers, provide a variety of housing types in a cohesive, pedestrian friendly environment, include services and employment opportunities within walking distance, and be designed to respect the district's natural features. In sum, PGD's can accommodate a community's future growth in a manner that minimizes sprawl and creates an opportunity to maximize the preservation of open space both within the district and in other areas of the community.

Generally PGD's will be located where adequate transportation infrastructure is available, such as along or proximate to state or county highways or other arterials, or near transit facilities.

PGD's are mixed-use districts that may be located in a variety of settings depending upon a community's needs, such as:

- on the fringe of existing centers that will both serve and benefit from new residential development
- adjacent to existing neighborhoods where community infrastructure has the capacity to be extended to serve the PGD and where by combining existing and future residential development, appropriately scaled, readily accessible, non-residential centers can be introduced and supported by the expanded neighborhood
- as infill in existing underdeveloped or haphazardly developed areas, such as along suburban corridors that can be made more functionally cohesive and less automobile reliant
- in outlying areas in those cases where a community has made a deliberate decision to establish a new hamlet center that can accommodate future growth, such as at existing crossroads

The PGD process begins with the preparation of a comprehensive plan that promotes the implementation of Smart Growth principles, specifically including the creation of PGD's, and identifies the criteria for their establishment, such as proximity to highways, transit facilities, existing development centers, existing neighborhoods, etc. The comprehensive plan should also define the tools and techniques that can be used by the community to define and encourage PGD's. These could include zoning incentives to achieve desired community objectives such as affordable housing, open space preservation and the like, or possibly the transfer of development rights to shift development from outlying areas deemed worthy of preservation into the PGD's. Thereafter, the process focuses on site-specific suitability considerations such as the amount of available developable land, the availability of necessary infrastructure such as central or municipal water and sewer facilities, the environmental characteristics of the site, and market demand at that location.

See [Breaking Ground: Planning and Building Priority Growth Districts](#) for more information on the Priority Growth District Concept.

CONSERVATION BOUNDARIES: PRESERVING OPEN LANDS

The other side of the smart growth equation requires local governments to take actions that conserve some of the open lands and natural resources that are threatened by land development pressures in growth areas of the state.

The preservation of open lands is one of the few land use objectives that is found in the New York State Constitution. It is the policy of New York State to “conserve and protect [the] natural resources and scenic beauty [of the state] and encourage the development and improvement of . . . agricultural lands for the production of food and other agricultural products.” (Article 14, § 4). The state legislature has enacted several statutes that delegate to local governments the authority to protect local natural resources and agricultural lands. Under Village Law § 7-704, Town Law § 263, and General City Law § 20(25), zoning regulations may be adopted with reasonable consideration of the character of the zoning district and with a view to encouraging the most appropriate use of the land. Local comprehensive plans can identify and provide for the preservation of “natural resources and sensitive environmental areas.” Village Law § 7-722(3)(d), Town Law § 272-a(3)(d), and General City Law § 28-a(4)(d). The Municipal Home Rule Law § 10(1)(ii)(a)(11) authorizes each local government to adopt land use laws “for the protection and enhancement of its physical and visual environment.”

Open space serves a variety of purposes, including the conservation of farmland, wetlands, viewsheds, floodplains, coastal areas, habitats, and other natural resources. Open space maintains natural processes of conservation, provides recreational opportunities, promotes aesthetically pleasing landscapes, and maintains community character and the quality of life.

Local governments in New York have extensive authority to limit the development of privately owned land through land use regulations. Using this authority, localities have protected open space through overlay zoning, floating zones, clustering development, environmental review, incentive zoning, transferring development rights, tree preservation, and wetland protection. These techniques enable them to conserve wetlands, habitat, trees, landscape features, soils, floodplains, ridgelines, viewsheds, aquifers, and watersheds.

See Chapter Five, page 57, for more information regarding Conservation Tools.

CONSERVATION ADVISORY COUNCILS TO DEFINE CONSERVATION AREAS

Conservation advisory councils (CAC's) are created by local legislatures to advise on the development, management, and protection of local natural resources. The CAC is to cooperate with other official municipal bodies active in the area of community planning and development approvals.

CAC's are created to study and protect local open areas, including those areas characterized by natural scenic beauty which, if preserved, would enhance the value of surrounding development, establish a desirable pattern of development, achieve objectives of the comprehensive plan, or enhance the conservation of natural or scenic resources. CAC's are directed to keep an inventory and map of all local open areas and obtain information pertinent to their proper use. The inventory should identify open areas and list them in order of priority for acquisition or preservation. The map is to identify open areas designated for preservation, including those having conservation, historic or scenic significance.

Once the local legislative body has received and approved the CAC's open area inventory and map, it may redesignate the CAC as a conservation board. At this juncture, the inventory and map become the official open-space index of the municipality and the conservation board can be assigned additional duties to assist the community with its open-area planning and to assure the preservation of its natural and scenic resources. These duties include:

- the review of applications made to other local bodies that seek approval to use or develop any area on the open-space index; and
- the submission of a report on such requests for approval regarding the impact of the proposal on the listed open area and on the open area objectives of the locality.

Both CAC's and conservation boards are authorized to perform other duties assigned to them by resolution of the local legislative body as long as they are consistent with their general statutory advisory role regarding the development, management, and protection of local natural resources.

The formation of a CAC provides an opportunity for the legislature to appoint local experts in this subject matter to an official advisory body that can assist, guide, and encourage other local bodies in protecting and preserving open areas and natural resources. An effective CAC identifies and collects needed data regarding the community's natural resources, open areas, and historic and scenic assets. Once accepted by the local legislature, a CAC's open-area inventory and map becomes the official index of these assets and expresses the community's commitment to their responsible management and protection.

CAC's and conservation boards may also assist the planning board, special board, or local legislature in preparing or amending the comprehensive plan with respect to open-area information, policy, and protection. CAC's and conservation boards can help prioritize the importance of open areas and advise their legislatures regarding effective strategies for protecting open areas, including acquisition, cluster development, overlay zoning, and critical environmental area designation. They can also assist local lead agencies in assessing and mitigating the adverse environmental impacts of development approvals and other local actions.

Most communities can benefit from the work of an effective CAC. In rural areas where development pressure is less, advance planning can help preserve agricultural lands, maintain scenic beauty, and protect priority natural areas from the impacts of development. In developed communities, the conservation, enhancement, and increase of available open space and natural features can be a significant method of maintaining the quality of life and property values of local residents. The conservation board can also assist with the review and modification of development proposals that might affect priority open areas.

The General Municipal Law contains provisions that authorize local legislatures to form CAC's, redesignate them as conservation boards upon the completion of an open-space inventory and map, and grant them duties related to their statutory role of advising local bodies regarding the development, management, and protection of natural resources.

To establish a conservation advisory council, the local legislature must pass a local law or ordinance. A CAC shall be made up of not less than three nor more than nine members who are appointed by the legislature for a term of not more than two years. Up to two appointees may be between the ages of 16 and 21. The chair of the CAC is also designated by the legislature from among the CAC membership. Members of the CAC may be removed by the legislature for cause and after a public hearing. CAC's must keep records of their meetings and file an annual report with the legislature by the end of each year.

Upon the submission and acceptance of its open-space inventory and map, the CAC can be redesignated by the legislature as a conservation board. This designation gives the conservation board the authority to review development and other land use proposals that affect any of the listed open areas. Upon the receipt of such a referral, the conservation board must submit a written report to the referral body within 45 days. Its report must evaluate the proposed use or development in light of the open-area planning objectives of the municipality and must include an analysis of the effect of the development on open areas listed in the local open-space index.

If the local legislature decides to create the CAC by local law, a public hearing must be held. This presents an opportunity for the local legislature to receive

citizen input, as well as to generate interest in and support for the CAC's activities.

Case Study

The conservation board of the City of White Plains commented on the amendment of the city's comprehensive plan at the outset of the amendment process. It analyzed and stated the importance of the preservation of three large contiguous open properties in the city, taking note of various issues such as steep slopes, woodlands, and site contours, the adequacy of the proposed preservation of a greenprint edge, and the possibility of acquiring some or all of the properties. Similar input was offered regarding the city's proposed amendments to its zoning law, emphasizing the need for regulations that preserve wetlands and other environmentally sensitive features.

The role of the CAC and the conservation board is advisory only. Other local boards create and amend the comprehensive plan, including its open-areas component; review and approve development proposals; and determine the capital spending priorities of the locality. To be effective, a CAC or a conservation board must coordinate carefully with these approval bodies, avoid duplication and confusion of local processes, and focus on its role as the body that is most knowledgeable about the open areas and natural resources of the community.

Fulfilling that important role requires time, energy, and resources. If the identification of open areas and natural resources is to serve as an effective index and aid in decision-making, it must be accompanied by data gathering. When the CAC or conservation board renders advisory opinions – which the attorney general has pointed out are not binding on other local boards – they are persuasive and compelling only to the extent that they are backed by competent information. In communities where resources for data gathering are limited and in the absence of help from outside agencies, the CAC or conservation board will be challenged to gather, evaluate, and order scientific and other hard data needed for its advisory role to be effectively discharged. In this regard, the local CAC or conservation board can be greatly assisted by an effective countywide or regional environmental management council charged with identifying and studying open space in the area.

THE ACQUISITION ALTERNATIVE

An alternative to using land use regulations to achieve the conservation objectives of the smart growth agenda is to use local authority to purchase open lands. Local governments in New York are authorized under the General Municipal Law § 247 to spend public funds to acquire and maintain open spaces and to limit the future use of open spaces. Open space is defined by this section as land characterized by natural scenic beauty, lands whose condition enhances surrounding developed lands, lands containing valuable natural resources, and lands used for agricultural production. Local governments using public funds to acquire such lands may either purchase the lands outright or purchase some or all of their development rights. To purchase a lesser interest of this type, the local government typically purchases a restrictive covenant or “conservation easement” from the landowner which limits the parcel’s development and then pays the landowner the value of the development rights that have been conveyed to the municipality. When public funds are used under § 247 to purchase development rights, the local government must reassess the property’s value for property tax purposes to reflect the reduced use and value of the land as restricted.

Under the New York Environmental Conservation Law (§§ 49-0301 – 49-0311), municipalities and not-for-profit conservation organizations are empowered to purchase conservation easements for the purpose of protecting property containing environmental, historical, or cultural assets or agricultural soils. If conservation easements are acquired by local governments under the Environmental Conservation Law, a land conservation organization, or land trust, can be assigned the responsibility of monitoring and enforcing the development restrictions placed on the land.

Using this authority, local governments have established programs that combine the purchase of full title to open lands, the purchase of all development rights not currently used by the landowner, and the lease or purchase of less than all of the development rights, allowing landowners the option of developing part of the land presently or in the future. A variety of local programs can be created to meet the interest of the locality and the financial needs of particular landowners.

SMART GROWTH PROCESSES

When a landowner submits an application for a development permit to a local land use agency, an extended process of negotiation is initiated. The parties to this negotiation are the owner, the members of the local administrative agency with approval authority, other involved public agencies, and those affected by the proposed project: neighbors, taxpayers, and citizens of the community. Unlike commercial and personal negotiations, this process is not viewed by most of its participants as a negotiation in the traditional sense. Local zoning ordinances give the landowner property rights that must be respected. State and local statutes prescribe standards and procedures that the agency members must follow. Affected neighbors and citizens receive notice of their right to attend and speak at one or more public hearings. This process is not organized, in most localities, as a structured negotiation in which the parties meet face-to-face, follow a self-determined process of decision-making, and arrive at a mutually acceptable agreement based on facts gathered in the process and give-and-take on all sides.

The local development approval process often costs the applicant significant sums of money, involves only indirect contacts among interested parties, and provides little opportunity to develop better and more creative solutions. For most significant development proposals, the process is lengthy, inflexible, and frustrating. The outcomes are unpredictable and relationships among those involved are more often damaged than strengthened. Nonetheless, during the awkward journey of a development proposal through the local approval process, critical interests of many stakeholders in the matter are expressed, heard, considered, and disposed of by a decision rendered by a voluntary board of local citizens. This is, in the classic sense, a negotiation that resolves, if not satisfies, each participant's interests. When it is seen as such, methods of making it more productive, satisfying, and efficient seem obvious.

Recent efforts have been made to improve the structure of negotiations among affected parties during the course of the approval process. The New York Court of Appeals, for example, sanctioned informal multi-party negotiations during the local environmental review process in *Merson v. McNally*, 90 NY 2d 742 (1997). The issue in that case was whether a project that, as originally proposed, involved several potentially large environmental impacts could be mitigated through project changes negotiated in the early environmental review process mandated by the State Environmental Quality Review Act (SEQRA) process.

The agency involved in the Merson case was the planning board in the Town of Philipstown. The owner of a mining site submitted a full environmental assessment form as required by SEQRA along with its application to the board for a special permit to conduct mining operations. In an unusual move, the planning board conducted a series of open meetings with the project sponsor, other involved agencies, and the public. As a direct result of the input received at

these meetings, the applicant revised the project to avoid any significant negative impacts. The planning board then issued a negative declaration, finding that the project, as now configured, would not adversely affect the environment.

The Court of Appeals found that the planning board had conducted an “open and deliberative process” characterized by significant “give and take.” It described the planning board’s actions as “an open process that also involved other interested agencies and the public” rather than “a bilateral negotiation between a developer and lead agency.” It found that the changes made in the proposal were not the result of conditions imposed by the planning board but were, instead, “adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies....” In short, the planning board had created an effective multi-party negotiating process that met due process requirements.

See [Starting Ground, A Local Leader’s Guide to Land Use Mediation](#) for more information regarding negotiations.

OVERLAY ZONING AS A TECHNIQUE FOR AREA IDENTIFICATION

Local governments in New York adopt overlay zoning to limit development in environmentally sensitive areas and encourage development in designated growth districts. An overlay zone is a mapped district superimposed on one or more established zoning districts. Its requirements supplement the underlying zoning standards, so that a parcel within the overlay zone is simultaneously subject to two sets of regulations: the provisions of the traditional, underlying zoning district and the overlay zoning requirements.

The overlay district is most often thought of, and is sometimes defined, as a technique for conserving a fragile natural resource area such as a pine barren, wetland resource area, watershed, or tidal basin. The underlying zoning may permit the subdivision of all land in such an area for residential purposes. If implemented, this might destroy the resource area. To accomplish a more appropriate land use pattern, an overlay district can be adopted that contains special clustering or setback provisions to protect environmentally constrained areas. Additional provisions can be added that are not typically found in zoning ordinances, such as grading, landscape restoration, and limitations on the development of steep slopes.

Overlay districts, however, have broad application to a variety of contexts. They can be used, for example, to accomplish the redevelopment or rehabilitation of deteriorated neighborhoods. Within a designated redevelopment overlay district, developers can be given a variety of incentives to redevelop contaminated or substandard properties, rehabilitate substandard structures, or provide needed community facilities or affordable housing.

The term “overlay district” refers to the superimposition of the new district’s lines on the zoning map’s district designations. An overlay district can be drawn to include whole zoning districts or contain only parts of one or more such districts.

Overlay districts can, at the same time, be used to further the development and conservation objectives of the community. For example, the locality can adopt a conservation area overlay district in one or more environmentally constrained areas and a development area overlay district along a transportation corridor to provide for greater and more cost-effective development patterns. Adopting both overlay districts simultaneously provides needed tax revenue, housing, jobs and commercial activity while protecting the quality of life and the environment through the conservation of threatened natural resource areas. A variety of techniques can be employed to accomplish the objectives of both overlay districts. A developer, for example, can be given zoning incentives in the

development district in exchange for purchasing a conservation easement on land in the conservation district.

When development and conservation areas overlap municipal borders, communities can enter into intermunicipal agreements to adopt and enforce compatible overlay zones. In this way, the efforts of one community to achieve appropriate land uses along a shared transportation corridor or in an intermunicipal natural resource area can be enhanced greatly.

A local government's authority to create an overlay district is implied in the delegation of the power to enact zoning restrictions and create zoning districts. One purpose of zoning is to insure that its provisions consider the character of areas and their suitability for particular uses with a view toward conserving the value of buildings and encouraging the most appropriate use of the land throughout the municipality. New York's highest court has made it clear that "how various properties shall be classified or reclassified rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary."

Zoning ordinances traditionally divide the community into districts that permit certain land uses and types of buildings. Where more specific provisions are needed to protect important natural resources or to limit or encourage development, one option available to the local legislature is to create an overlay zone. The new zone is intended to achieve its conservation objectives without unduly disturbing the expectations created by the existing zoning ordinance. The legislature superimposes the new district on the existing zoning map, and adopts special provisions regulating development within the district. The boundaries of the overlay zone often follow the topography of the protected resource and may cover more than one established district. Its provisions apply in addition to the provisions of the underlying zoning ordinance.

Overlay zoning is one method of achieving the most appropriate use of the land. Municipal authority to adopt overlay zones is implied in the delegated power to adopt zoning districts and to regulate the bulk and location of development of the land. New York's Municipal Home Rule Law further provides, in part, that "every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of the constitution [for the] protection and enhancement of its physical and visual environment."

CHAPTER FIVE: USE OF ADVANCED LAND USE TOOLS

To accomplish smart growth, or rational land use patterns, communities should designate areas for conservation and areas for development. This chapter demonstrates a number of land use tools and strategies that municipalities may adopt to accomplish conservation and development objectives. In the material below numerous techniques of conserving natural resources and protecting the environment are presented. Following these, several land use techniques aimed at encouraging appropriate development are discussed.

CONSERVATION TOOLS

Aquifer Protection

An aquifer is a geological formation capable of yielding a significant amount of water to a well or spring. Aquifers act as underground reservoirs, storing water for periods of time ranging up to thousands of years. Aquifers also act as conduits or pathways for the movement of water to recharge surface waters—rivers, lakes, streams, ponds, and wetlands. Much of our nation's domestic water supply is held in aquifers as groundwater. Both the quantity and the quality of groundwater can be adversely affected by land development activities. In New York, municipalities may enact aquifer protection ordinances through the land use enabling statutes. [See N.Y. Town Law § 263; N.Y. Village Law § 7-704]. Additionally, aquifers may be protected under the Municipal Home Rule Law. [See N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11)]. Site plan and subdivision approval may be conditioned on locating structures so as to minimize their impact on aquifers.

Aquifer protection involves regulating uses and activities within the entire groundwater resource area. Aquifers vary greatly both in size and in geological composition. The nation's largest aquifer—the Ogallala or High Plains Aquifer—extends from South Dakota to Texas, underlying parts of eight states. In New York, the Department of Environmental Conservation (DEC) estimates that the Long Island aquifers underlie some 3% of the state's total area and supply water to more than three million people, while upstate aquifers underlie another 4% of the state and serve 800,000 people. The DEC has recognized that groundwater supplies more than 50% of the drinking water in some areas of the state and more than 90% in other areas.

New York State has recognized the importance of aquifer protection in its Environmental Conservation Law. In 1993, the state legislature passed the Pine Barrens Protection Act, "to allow the state and local governments to protect, preserve and properly manage the unique natural resources" of Long Island's

pine barrens. The Act's main goals are to protect the pine barrens' unique ecosystem and to protect the Source Aquifer—the largest natural drinking water source in the state. A federal court rejected a constitutional challenge by an owner of property within the pine barrens and upheld local and state regulation of development under the Act as furthering legitimate state interests.

Major threats to groundwater include contamination; reduction through overdraft, or over-pumping; interruption of recharge; and saltwater intrusion. All these threats have different initial impacts, but their ultimate effect is the same—the reduction in quantity and quality of available water resources. Contamination—whether by industrial chemicals or agricultural effluents, by auto emissions and runoff from roadways, or by homeowners' use of lawn fertilizers or pesticides—makes water unsuitable for consumption or use. Overdraft and interruption of recharge, in addition to reducing the amount of available groundwater, may reduce the amount of surface waters available in streams or lakes, and may also cause land subsidence and changes in vegetation and aquatic habitat. Saltwater intrusion, which may occur even in inland areas as a result of overdraft, affects both the quantity and the quality of potable water.

There are four main ways that contamination can occur: infiltration, direct migration, interaquifer exchange, and recharge from surface water. The actual infiltration of contaminants may result from leachates from landfills and dumps, disposal of industrial wastes, drainage of water from mines, and/or pumping of water near contaminated land. The primary cause of water quality problems, however, is nonpoint source water pollution. Nonpoint source pollution results from diffuse sources such as oil runoff from roadways and parking lots, salting roadways, dumping snow, fertilizing agricultural lands, or spraying home yards with pesticides.

Aquifer protection is generally a preferred approach to preserving groundwater, because it takes into account hydrology—the water cycle as a whole—as well as potential water supplies. Wellhead protection, however, may initially be more feasible in terms of local goals, time, and monetary resources. The 1986 Amendments to the federal Safe Drinking Water Act define a wellhead protection area as “the surface and subsurface area surrounding a water well or wellfield, supplying a public water system, through which contaminants are reasonably likely to move toward or reach such water well or wellfield.” In New York, the state's Wellhead Protection Program is administered by the Department of Health.

The town of Victor, New York, adopted a Wellhead Protection Environmental Overlay District to minimize “the potential for contamination for the publicly owned well/springs” that are in current use or may be used in the future. This plan requires site plan approval for developments that became nonconforming by this law. There are also many prohibited uses, including golf courses, excavations intersecting the seasonal high water table, open storage of manure,

and impervious surfaces covering more than 12,000 square feet or more than 60% of a lot.

The aquifer overlay districts created by the town of Bedford and the town of Dover demonstrate two different approaches to aquifer protection. Bedford's zoning ordinance delineates an aquifer protection zone in which certain uses and activities are regulated or prohibited. The regulations function in a manner nearly identical to any other zoning district. A unique aspect of this particular ordinance is the Table of Uses and their Wastewater Equivalents, which can aid in community development and planning. The boundaries of the protected zone are identified on an official map, which was prepared by professional hydrogeologists.

Instead of identifying permitted and prohibited uses, the aquifer overlay district of the town of Dover regulates development by means of performance standards. These standards control wastewater treatment systems, sediment generation, and the use of fertilizers, pesticides, and other chemicals that could adversely affect aquifers.

State practice in local aquifer protection differs because aquifers vary in their geological composition, because the need for groundwater varies greatly from region to region, and because the number, size, and competence of local governments is quite diverse. Some municipalities have adopted aquifer protection ordinances that focus on present and future public groundwater drinking supplies. Others consider the surface waters that are fed by the groundwater. Some aquifer protection ordinances have been adopted as health regulations, focusing on new development in critical aquifers and specifying at what distance away from the resource that development can be located. Still other localities enact regulations to control withdrawals of groundwater and prevent overdraft.

Erosion and Sediment Control

Soil erosion is the removal and loss of soil by the action of water, ice, wind, and gravity. The loss of soil through erosion and the accumulation of eroded soil as sediment degrades water quality, destroys valuable soil nutrients, disrupts ecosystems, harms aquatic life and wildlife, depreciates property values, and is costly to remedy. Although erosion is a natural process, the rate of erosion is significantly increased by land development, including agriculture, forestry, construction, and surface mining. When soil particles are loosened and dislodged by rainwater during construction and transported to adjacent surface waters, the sediment can do significant damage to the environment by altering hydrologic processes, covering delicate land surfaces, and carrying pollution to wetlands and watercourses. Siltation of watercourses and water bodies can increase the need for costly filtration and treatment of water before it is fit for household use. Sediments originating in urban and suburban locations often carry harmful

pollutants or toxins that threaten the plants, wildlife, and ultimately the human beings using the water

The USDA estimates that the nation loses two billion tons of topsoil each year. The rate of erosion is affected by the characteristics of the soil, by topography, including the steepness of slopes, by the soil's exposure to wind, rain, and stormwater runoff, and by the amount of impervious surfaces—paved areas, rooftops, swimming pools, compacted soils—and the adequacy of vegetative cover.

To prevent erosion, the stripping of soil, and other adverse impacts of land disturbance, communities may adopt erosion and sedimentation control ordinances, as well as filling, grading, mining, excavation, and soil removal regulations. These local laws may require the consideration of topography and soil type, the retention of as much natural vegetation as possible, and other measures for soil stabilization. Cuts and fills may be required to follow the land's natural contours. Communities may require development proposals to include basic sediment barriers, vegetative or structural cover for soil exposed during construction, and ponds or basins to retain water and sediment. Vegetated buffers along waterways and sediment basins can aid in removing sediment from runoff. Vegetated buffers can also be required to protect sites adjacent to a proposed development. Development may be allowed only by special permit, and may require mitigation of damages. The phasing of construction projects can also significantly reduce erosion.

In New York, municipalities may adopt erosion and sediment control ordinances under their delegated authority to adopt zoning regulations for the public health, safety, and general welfare. The physical environment may be protected from soil erosion and sedimentation under the Municipal Home Rule Law. [See N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11)]. Additionally, under §96-b of New York's General Municipal Law, local governments are authorized to adopt laws for the protection and conservation of trees and related vegetation. Sections 34-0101 through 34-0113 of the Environmental Conservation Law require certain coastal localities to adopt local erosion and hazard area ordinances to control coastal erosion if they wish to retain authority over such matters.

Methods of limiting land disturbing activities in order to control erosion and sedimentation include:

- Protecting areas exposed in the development process from wind and rain.
- Retaining existing trees and vegetation to the greatest extent possible.
- Shielding adjacent resources from disturbance during the development process.
- Regulating the phasing of construction projects.
- Avoiding development of areas vulnerable to erosion, such as steep slopes.

- Designing development that follows the natural contours of the land.
- Requiring vegetative buffers along waterways and wetland boundaries.
- Requiring the installation of sediment basins or other structures to remove sediment from stormwater runoff.

Other natural resource protection ordinances—floodplain, stormwater, tree harvesting and tree preservation, wetlands, and habitat preservation ordinances—all can help to control erosion and sedimentation. Limiting the amount of land covered by impervious surfaces—roads, parking lots, paved areas, rooftops—and encouraging the use of porous paving blocks, permeable asphalt, grassy swales, and other innovative technologies can also help to reduce erosion. In areas with steep slopes, an environmental protection overlay district could be established to minimize soil erosion, sedimentation, the destruction of vegetation, and the increased runoff rates and slope failure caused by land disturbing activities.

The local legislature can adopt an erosion and sedimentation control ordinance or can incorporate control measures as amendments to existing regulations for zoning, subdivision, and site plan review. The planning board and local advisory bodies such as conservation advisory councils or conservation boards can identify areas in need of protection and can recommend the adoption of erosion control measures. In order to expedite project review and approval, developers can incorporate into their planning process the recommendations of environmental consultants for controlling erosion.

Local ordinances can require landowners to obtain a permit for all land-disturbing activities not exempted. The town of Yorktown's Erosion Control Ordinance requires that each permit application contain information about site conditions, the proposed development activity, and an erosion and sediment control plan that allows the approval board to make an informed decision. General standards are set forth to minimize the potential for erosion and to reduce harmful effects on adjacent resources. The ordinance also includes enumerated standards for activities that are exempted from the permit requirements.

In adopting an environmental overlay protection district, a community defines protected areas within a certain number of feet from the top or toe of slopes of a certain degree of steepness. A development permit is then required for any clearing or construction in these steep slope areas. To secure a permit, an applicant must demonstrate to that the proposed development will meet standards for the maintenance of stable soils and the prevention of erosion and sedimentation, and that there is no reasonable alternative for the proposed regulated activity on a portion of the site not containing steep slopes.

In its site plan review regulations, the town of Southeast has established a number of ecological criteria and standards for which the Planning Board must account:

- To protect watercourses and wetlands from pollution, soil erosion, and sedimentation caused by stormwater runoff, the site plan must include provisions for the management of stormwater.
- Proposed developments must limit the degradation of unique natural features such as streams, wetlands, aquifer recharge areas, steep slopes, and wildlife breeding grounds.
- A parcel's landscape is to be preserved in its natural state, insofar as practicable. This requires the least possible tree and soil removal consistent with allowing site development.
- Special attention must be given to replanting wherever site development necessitates the removal of established trees.
- Proposed development must also consider the relation between structures and their natural surroundings. Structures must be related harmoniously to the terrain and to nearby buildings and roads.
- Any scenic, historic, archaeological, and landmark sites located on, or adjacent to, the proposed development must be preserved and protected.

Under the regulations of the commissioner of the State Department of Environmental Conservation, 6 NYCRR Part 617 (the SEQRA regulations), all local agency approvals of projects that may have a significant adverse impact on the environment must be subjected to a detailed environmental review following the completion of an environmental impact statement. These regulations authorize land use permits to be subject to conditions that mitigate any adverse impact on the physical environment that is identified in the review process.

Floodplain Protection

A floodplain is the area adjacent to a stream, river, or watercourse that is subject to periodic flooding. In the 1968 National Flood Insurance Act, Congress encouraged state and local regulation of floodplains. New York State requires local governments with flood hazard zones to comply with federal floodplain regulations. Local governments have authority to adopt floodplain regulations under the state flood protection statute, the state zoning enabling acts, and the Municipal Home Rule Law. These sources of authority either explicitly or implicitly designate floodplain control and protection as a matter of local concern. Under this authority, local governments not only may protect development from the hazards of flooding but also may protect and conserve the environmental and ecological benefits of floodplains.

Floodplains include wet meadows, bottomland hardwood forests, and riparian shrub wetlands. These areas are most often defined in terms of the likelihood of flooding in a given year. For example, in the 100-year floodplain there is a 1% chance of flooding in any given year. A flood hazard area encompasses floodways and flood fringe areas. Floodways are those areas adjacent to a

stream that are most affected by flooding. Flood fringe areas are outer areas that are still subject to flooding but at lower flood depths and velocity.

Floodplains are valuable for their soils, their protection of water quality, and the number and variety of species of plants and animals that inhabit them. Floodplains provide temporary storage of floodwaters and thereby reduce the velocity of the water and minimize the property damage and the amount of sediment that can accumulate downstream. Floodplains also maintain water quality and protect aquifers and surface waters by filtering nutrients and impurities from storm runoff and by processing wastes. Floodplains offer habitats for many species of plants and animals. Trees and other floodplain vegetation anchor riverbanks, help moderate water temperature, create microhabitats for aquatic and terrestrial organisms, serve as feeding and spawning areas for fish, and provide resting, feeding, and nesting areas for waterfowl.

Floodplains may be damaged or destroyed by urban and suburban development, by heavy recreational use, and by the removal of vegetation and the use of pesticides and insecticides. These activities impede flood storage and increase runoff, which decreases the supply and quality of surface water and groundwater. Pollution and wide fluctuations in water conditions can degrade habitat and reduce the diversity and abundance of aquatic and riparian life. Development may physically alter habitats.

Floodplain regulations are designed to limit the effects of development on land prone to flooding. The National Flood Insurance Act was enacted to help property owners protect themselves from losses caused by flooding. The Act requires the Federal Emergency Management Agency to identify all floodplain areas within the United States and establish flood risk zones. Flood Insurance Rate Maps, which delineate areas of special flood hazard, have been created for most communities. The Act also created the National Flood Insurance Program (NFIP), which makes federal flood insurance available to people living in communities that have adopted local laws in accordance with the NFIP.

New York requires any local government with jurisdiction over any area of special flood hazard to comply with the NFIP requirements. In order to take advantage of the federal insurance program, most communities that have adopted floodplain laws have done so in accordance with federal requirements. These requirements are designed largely to protect development from flood damage rather than to preserve the ecological functions and values of floodplains.

In addition to the federal regulations, local governments in New York may regulate floodplains through the authority granted in the zoning enabling statutes. Under the statutes, local regulations “shall be . . . designed to . . . secure safety from fire, flood, panic, and other dangers.” The enabling statutes allow local governments to create zoning districts and overlay districts that incorporate flood

plain regulations. Density restrictions and conditions attached to site plan and subdivision approval can limit the alteration of flood hazard areas.

In *Dur-Bar Realty Co. v. Utica*, New York's highest court upheld the ability of a municipality to prohibit any as-of-right uses in a floodplain area and to subject all development to special permits that are conditioned on meeting environmental objectives. The court noted that the local regulation was a legitimate exercise of the police power. The Municipal Home Rule Law delegates authority to local governments to legislate with regard to the public health, safety, welfare, and the physical environment. This authority allows local governments to adopt independent floodplain protection regulations that preserve the ecological function of floodplains.

The statutes of other states may either allow or mandate local governments to enact floodplain regulations and may set forth criteria for local regulation. Authority to enact local floodplain regulations may be contained in state zoning acts, implied from a grant of police power, or set forth in specific legislation regulating floodplains. Local regulations may be included in zoning and subdivision ordinances or contained in separate flood prevention statutes. Some local governments have acknowledged the important environmental and ecological benefits of floodplains in their statutes. Expanding the protection afforded to floodplains under the National Flood Insurance Program, these local regulations are enacted to protect rare habitats, preserve water quality, and achieve other ecological goals.

Scenic Resource Protection

Scenic resource protection is a means of preserving a community's natural, cultural, and historical heritage. Scenic resources might include open views, country roads, panoramic landscapes, tree-lined streets, and agricultural lands. The protection of these resources enhances a community's quality of life and its property values. At the same time, protecting specific natural scenic resources helps to maintain local ecosystems. For example, minimizing development on slopes and ridgelines to preserve scenic views also helps to reduce erosion and sedimentation in those environmentally sensitive areas.

A majority of states allow municipalities to advance aesthetic goals as the sole or primary purpose of regulation. Other states require the protection of visual resources to be linked to another traditional regulatory goal. In New York, the authority to regulate for the protection of the visual environment is established in the Municipal Home Rule Law § 10(1)(ii)(a)(11). The General Municipal Law § 96-a also grants authority to protect sites that have a "special historical or aesthetic interest or value." New York's highest court has held that regulation for the purpose of aesthetics alone is a legitimate use of the police power. [*Cromwell v. Ferrier*, 19 N.Y.2d 263 (1967)].

Local governments can protect scenic resources through zoning regulations and the comprehensive plan, and through development approvals for site plan, subdivision, special permits, or rezoning applications. These regulations can be designed to address elements such as siting, structural dimensions, and other aesthetic impacts of development. Communities may also regulate the size and placement of signs and billboards, establish architectural review boards to enforce design standards in new construction, and create overlay districts to protect historic areas and identified view corridors. Adopting tree preservation ordinances and other natural resource protection laws and requiring maintenance of vegetative buffers, street trees, and other vegetation is permitted to mitigate the adverse impacts of development on a community's aesthetic resources and to preserve its quality of life.

Because aesthetic judgments may be subjective, it is especially important for communities to justify their regulations through planning and empirical studies. The aesthetic or design standards established by the local legislative body should be as specific as possible, in order to avoid challenges for abuse of discretion or for being overly broad. The community's aesthetic objectives should be clearly stated, along with any additional objectives such as maintaining property values, advancing economic development and tourism, or public safety. Studies that identify the scenic resource and document its importance to the community help prove that the public welfare will be protected by the proposed regulation. In identifying scenic resources, a number of factors should be considered:

- Can the resource be seen from a road corridor, trail, or other public area?
- Does the resource contribute to the community's sense of place?
- Is the resource unique or highly distinctive?
- Do community residents widely recognize and value the resource?
- Is the resource vulnerable to change or in danger of being disturbed?

Local legislatures often adopt regulations to minimize the negative aesthetic impacts of new development and to protect and enhance the positive aesthetic features of the community. In fact, basic zoning provisions such as setback, minimum lot area, and height requirements serve aesthetic purposes, among others. They set a context for future development by defining the neighborhood environment and establishing scenic quality. The same can be said of the separation of land uses into zoning districts, which creates a physical environment that enhances property values and the quality of life. These zoning provisions protect and enhance community appearance as well as advance a variety of public health and safety objectives.

Communities protect local aesthetic and scenic resources in a variety of other ways. They regulate the size and placement of signs, limit the location – or require the removal – of billboards, and establish architectural review boards to enforce design standards in new construction. In addition, they adopt tree preservation ordinances and other natural resource protection laws, protect historic districts and landmarks, and impose conditions on subdivision, site plan, special permit, and rezoning approvals and variances to protect the aesthetic quality of the affected neighborhood or of an identified viewshed or view corridor.

Aesthetic Regulations

States are divided on whether aesthetics may serve as a basis of land use regulations.

1. Aesthetics may be the sole objective of a regulation.
2. Aesthetics may be one, but not the only, objective of a regulation.
3. Aesthetics may not be an objective of land use regulation.
(New York fits into category 1)

Authority for local governments to protect local aesthetic and scenic assets comes from many sources. These include the power to adopt zoning provisions to accomplish the most appropriate use of the land and to adopt a comprehensive plan to provide for the preservation of historic and cultural resources. Under their home rule authority, localities may provide for the “protection and enhancement of its physical and visual environment.” Special state laws provide localities with authority to preserve trees, landmarks, and historic districts. State laws delegating authority to local governments to adopt regulations and procedures for approving site plans, subdivisions, variances, and special use permits recognize that such regulations may be drafted to protect the visual environment. As lead agencies under the State Environmental Quality Review Act, local reviewing bodies must take all practical steps to avoid significant adverse environmental impacts on environmental resources of “historic or aesthetic significance.”

The local legislature can protect and enhance the visual quality of the community by using its power to:

- adopt comprehensive plans and zoning laws,
- enact tree preservation ordinances,
- condition variances and development approvals,
- review the environmental impacts of all official local actions,
- establish design standards and create architectural review boards,
- eliminate public nuisances,
- designate and protect historic districts and residences, and
- protect its physical environment.

Citizens can lobby their local legislatures to adopt protective ordinances, and special advisory bodies—such as a conservation advisory council, architectural review board, or historic district commission—may be established.

Comprehensive Planning: If a community wishes to adopt local laws that regulate aesthetics, it can create a basis for those regulations in its comprehensive plan. In adopting or amending the comprehensive plan, there can be findings that identify the aesthetic problems that the community wishes to eliminate or prevent and the aesthetic resources that it wishes to preserve. Since all land use regulations are to conform to the comprehensive plan, such provisions will help to sustain aesthetic regulations that are challenged by affected property owners.

Zoning: Zoning laws can establish neighborhood character and aesthetic quality through the judicious use of zoning districts within which certain uses are prohibited and certain height, lot area, and setback provisions are required for new developments. These laws, in addition, can contain specific “nuisance prevention” provisions, such as specifications for signs in commercial areas, as well as requirements that eliminate nonconforming uses, such as billboards or junkyards, over a reasonable time.

Identification and Study of Unique Aesthetic Resources: Where aesthetic assets of the community need to be protected, they should be identified and their importance to the community should be documented by studies and community surveys. This can be reflected in the comprehensive plan, the zoning law or other local enactment such as the adoption of an overlay zone, a separate law establishing design standards and creating an architectural review board, or by the adoption of a historic district or landmark law.

Overlay Zones: Unique aesthetic resource areas or sites can be identified and protected through the use of overlay zoning. Overlay zones, in general, do not disturb the underlying zoning requirements; they specify other considerations and requirements to protect and enhance identified areas in need of additional protection. In this way, the adoption of an overlay zone for aesthetic purposes provides an opportunity for the community to recognize and protect an existing viewshed or view corridor or a series of local landmarks or landscapes in need of preservation.

Sign Control Ordinances: Provisions can be added to the zoning law or can be separately enacted to control the location, size, and aesthetics of signs and billboards. In addition to advancing aesthetic purposes, such provisions can protect public safety, stabilize property values, and foster sound economic development. The First Amendment protects the content of signs, which may not be regulated except to achieve a compelling state interest. But this constraint does not affect the authority of local governments to regulate the time, place, and manner by which signs and billboards communicate their messages. Some municipalities in New York have adopted extensive provisions that regulate the

type of construction, size, location, color, illumination, design, texture, and other aspects of signs and that apply different standards in selected zoning districts.

Design Review Laws: Localities can adopt design review laws for the purpose of controlling community appearance. Under such a law, an architectural review board can be created with advisory authority only or with the authority to review, approve, disapprove, or conditionally approve proposed new construction and building improvements before the building inspector is authorized to issue a building permit. The authority of the architectural review board can be limited to a certain type of construction, to particular zoning districts, or to areas of special scenic, architectural, and aesthetic importance, as defined by the law.

The chief concern of the board is whether the exterior design and treatment of the proposed construction conforms with the design review standards contained in the regulation. Generally, two standards of review are included in such laws:

- First, whether the proposed construction is “excessively dissimilar” to an established pattern of design.
- Second, whether the proposed project is “excessively similar” to existing buildings where the objective is to prevent the monotonous visual impact of new development in the area.

Some design laws authorize review boards to eliminate “visual offensiveness” or to conform design in discrete areas to the character of specific landmarks or architecture of distinction.

Tree Preservation Laws: Another means of controlling scenic quality and community appearance is the adoption of a tree preservation law. Such a law allows a community to restrict the removal of trees on private property in order to preserve their environmental and aesthetic importance to designated districts or to the community as a whole. The purpose clause of one extensive local law explains that the provisions were adopted to reduce tree destruction, which gives rise to barren and unsightly conditions, impairs the stability of real property values, and adversely affects the character of the community. Tree ordinances typically limit their applicability to trees of a certain diameter and height. They establish a permit system, which allows tree removal, but only upon a showing of necessity and upon compliance with certain conditions, such as replacement of all or some of the trees to be removed.

Local Development Approvals: Local action on applications for site plan, subdivision, special permit, or rezoning approval and variances can be conditioned to respect aesthetic matters. This can be accomplished in a variety of ways. Site plan and subdivision regulations adopted by the local legislature can require that aesthetic impacts be revealed in maps, plats, and drawings submitted for review. These regulations can authorize the reviewing body to

condition any approval on design and layout changes that are reasonably related to the prevention of aesthetic damage or to the preservation of nearby aesthetic resources. In the same way, the award of special use permits and variances can be granted upon conditions that prevent aesthetic damage or preserve aesthetic assets. When a project may have a substantial adverse impact on aesthetic or historic resources, the local approval agency may condition its approval by requiring the applicant to take steps that mitigate those impacts under the agency's environmental review authority.

Limitations and concerns: Where design and aesthetic standards impose serious burdens on property owners, challengers may claim that the regulations are arbitrary and capricious, and violate constitutional requirements of due process. To withstand such challenges, it is important that communities justify their regulations through advance planning and empirical studies. Studies that define the aesthetic setting, identify the scenic resource, and document its importance to the community help prove that the public welfare will be protected by regulations adopted to protect and preserve aesthetic values.

When regulations to protect aesthetic values achieve additional community objectives, those objectives should be stated to provide a firmer base for the regulations' validity. These might include stabilizing property values, in the case of a design review law; public safety, in the case of sign control laws; and advancing economic development and tourism, in the case of the adoption of an aesthetic overlay district or of viewshed or view corridor regulations.

The means chosen to protect aesthetic values should impose on property use the least burden necessary to achieve the community objectives.

The aesthetic or design standards established by the local legislative body should be as specific as possible to withstand challenges claiming that the administrative agencies charged with implementing them have too much discretion or that they have been delegated authority that is overbroad.

The legislature, additionally, might require the administrative agency to find "clear and convincing evidence" that a proposal fails to meet established standards before denying or conditioning any land use approval on aesthetic grounds.

Steep Slope Protection

Steep slopes are defined as areas that exceed a certain percent slope, or inclination of the land's surface. Often associated with other environmental features such as rock outcrops, shallow soils, bedrock fractures, and groundwater seeps, steep slopes are sensitive landforms that create microclimates for diverse kinds of plants, animals, and other organisms. The natural modification of slopes is extremely slow, and is influenced by many

factors, including climate, geology, hydrology, vegetation, weathering, and transport.

Land development—whether agriculture, road and railway construction, house building, or drainage—can modify the natural slope system very rapidly. Excavations or building construction can promote instability by loading the slope, removing vital support, and increasing pore-water pressures. Grading, cutting, and filling also modify the natural angle of repose—the steepest angle at which a pile of loose material will remain standing on a surface before sliding away. The alteration of steep slopes can cause erosion, sedimentation, landslides, the pollution of aquifers and surface waters, and the destruction of vegetation, wildlife habitats, and scenic resources.

Local governments in New York may protect steep slopes simply by creating a zoning ordinance that applies to all land development and construction activities on all properties containing steep slopes, as identified on municipal maps. The authority to enact zoning laws is established in the state enabling statutes. [N.Y. Gen. City Law §§ 20(24) & (25); N.Y. Town Law §§ 261 & 262; N.Y. Village Law § 7-703]. Under their home rule authority, localities can also provide for the protection and enhancement of their physical and visual environment. [N.Y. Mun. Home Rule § 10(1)(ii)(a)(11)]. Deducting environmentally constrained areas, such as steep slopes, from density calculations can help to minimize the impacts of development on sensitive areas. Where an existing zoning ordinance is inadequate to protect important natural features such as steep slopes from the impacts of development, communities may consider creating an overlay zone.

Stormwater Management

Stormwater is water that runs off the land's surface as a result of rain or melting snow or ice. Naturally occurring surface runoff is a valuable ecosystem function, and over centuries has played a large part in shaping the landscape. Land development, however—particularly impervious surfaces, such as buildings, roads, and parking areas—can prevent stormwater from infiltrating the soil. This increases the volume and velocity of runoff, causing flooding, and interferes with the natural processing of nutrients, sediments, and other contaminants by biological activity in the soil.

Typical contaminants contained in stormwater include oil and grease, pesticides, suspended solids, nutrients such as nitrogen and phosphorus, and bacteria. Instead of being filtered by the soil, these contaminants run into surface water and degrade water quality, wildlife habitats, and the recreational enjoyment of rivers, bays, and beaches. Increased runoff also degrades stream channels, erodes slopes and other land surfaces, and causes landslides, the loss of topsoil, and the buildup of sediment.

Stormwater management has been described as “the process of controlling and cleansing excess runoff so it does not harm natural resources or human health.” [Jim Gibbons et al., *NEMO Project Fact Sheet 7 Reviewing Site Plans for Stormwater Management* (December 1995)]. Stormwater runoff can be controlled by the use of infiltration structures, such as basins and wells or porous pavement. Conveyance structures, such as storm drains, open ditches, and channels or streams, can be used to delay or speed runoff to a receiving stream. Detention or retention structures, such as impoundment basins or ponds, can be used to store water temporarily. Stormwater management reduces flooding, erosion, and sedimentation, and aids in replenishing groundwater.

In New York, authority to enact stormwater management regulations is derived from the enabling statutes. [N.Y. Gen. City Law § 20(24); N.Y. Town Law § 263; N.Y. Village Law § 7-704]. [“Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, and to secure safety from fire, flood, panic and other dangers.”] The inclusion of stormwater management plans as part of the site plan and subdivision review process is within the broad authority granted to municipalities in this area. [N.Y. Gen. City Law §§ 27-a, 32, 33; N.Y. Town Law §§ 274-a, 276, 277; N.Y. Village Law §§ 7-725-a, 7-728, 7-730]. Additionally, the Municipal Home Rule Law may be relied upon to enact stormwater management regulations. [See N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11)].

Timber Harvesting

Forests protect watersheds and flood areas by regulating the effects of surface water runoff, stabilizing soils, and protecting against erosion. Forests also provide wildlife habitat, reduce air and noise pollution, and moderate air temperature. To preserve the environmental benefits of forests, municipalities may restrict the felling, processing, and transporting of trees by adopting subdivision and site plan ordinances, overlay zones, or timber harvesting ordinances. Timber harvesting includes both the removal of trees during commercial timber operations and the removal of individual trees during land development. The long growth period of trees from planting to harvest requires a long-term land use commitment. Local governments can use timber harvesting regulations to maintain the ecological benefits of forests while still meeting present and future demands for lumber, pulp, and wood products.

As timber harvests on federal lands in the Pacific Northwest decrease and the demand for forest products increases, market forces will provide incentives to private landowners to harvest forest products. In consideration of the historic responsibility for land use decisions at the local level, many local governments will eventually face decisions about forest management. It will be increasingly important for public officials to learn more about environmentally sound forest management and for those in the private sector who are concerned with forest

management to understand why local governments choose to regulate private forest practices.

Local harvesting regulations must take into account ecological factors such as the successional role of species in a forest or stand of trees, the growth potential of individual species, the potential for regeneration, the effects of competing vegetation, and the potential for damage from insects, pathogens, or weather. The location of processing centers and access roads is also an important consideration. The damage to roads caused by logging trucks may necessitate restrictions on road use.

Timber harvesting regulations can protect water quality by limiting harvesting near streams and other water bodies, and by controlling erosion and sedimentation. Local governments may restrict stream crossings, the creation and use of roads and skid trails, and the disturbance of forest floor vegetation. Felling, skidding, and other harvesting activities may be restricted in order to reduce adverse impacts on soil, water, and vegetation. Communities may require timber harvesters to obtain permits before engaging in the removal of any trees.

In New York, explicit authority to enact timber harvesting regulations is found in the General Municipal Law. Section 96-b states that a local government may regulate “any activity involving the removal or destruction of trees.”[N.Y. Gen. Mun. Law § 96-b(2).] Local legislative bodies have the authority to require “appropriate conditions” applicable to any activity involving tree removal. Additional authority to protect the visual and physical environment is found in the Municipal Home Rule Law. Timber harvesting regulations can also be implemented through site plan and subdivision regulations, and the zoning authority can be used to segregate timber harvesting from other land uses. Because of the hazardous and destructive nature of timber harvesting, special use permits may be required. [N.Y. Town Law § 274-b; N.Y. Village Law § 7-725-b; N.Y. Gen. City Law § 27-b].

Tree Preservation

A means of controlling scenic quality and community appearance is the adoption of a tree preservation law. Such a law allows a community to restrict the removal of trees on private property in order to preserve their environmental and aesthetic importance to the community. The purpose clause of one extensive local law explains that the provisions were adopted to reduce tree destruction, which gives rise to barren and unsightly conditions, impairs the stability of real property values, and adversely affects the character of the community. Tree ordinances typically limit their applicability to trees of a certain diameter and height. They establish a permit system, allowing tree removal but only upon a showing of necessity and compliance with certain conditions, such as replacement of all or some of the trees to be removed.

By regulating the care and removal of certain kinds or sizes of trees, a community can protect both ecological and aesthetic resources. The urban forest—trees and related natural resources in populated areas—may be protected through regulation of the planting, pruning, and removal of trees. Individual trees may be protected for their beauty, their size or age, or their historical significance. Native species may be given special protection. Tree maintenance requirements and planting restrictions not only limit the spread of inappropriate species that may cause disease or an imbalance in insect populations, but also enhance the beauty of neighborhoods and parks, and preserve property values.

Some communities choose simply to authorize a town arborist to develop a plan for the preservation, planting, maintenance, and removal of trees and shrubs in public parks and along public ways. Another community may require subdivision and site plan applicants to maintain or replace on-site trees. Yet another may stringently restrict tree removal on already developed private property.

The tree preservation law of the town of Mamaroneck, New York, asserts that indiscriminate and excessive tree cutting “causes barren and unsightly conditions, creates increased surface drainage problems, increased municipal costs to control drainage . . . and causes deterioration to the community which adversely affects the health, safety, environment, ecosystems and general welfare of the [town’s] inhabitants.” [Mamaroneck, New York, Town Code § 207-1]. All property owners and applicants for subdivision or site plan approval are required to obtain a permit to remove or destroy any tree exceeding a diameter of six inches at four feet or more from the ground. The only exception is for improved lots of 20,000 square feet or less. Larchmont, an incorporated village in the town, regulates the maintenance, removal, and planting of trees only on public streets and grounds. [Larchmont, New York, Code Chapter 209].

Specific authority to protect and conserve trees and other vegetation is established by New York’s General Municipal Law § 96-b, which expressly recognizes a “direct relationship” between trees, shrubs, and similar vegetation and the health, safety, and welfare of a community’s citizens. Cities, towns, and villages can regulate the removal or destruction of trees, the alteration of areas near trees, and the replacement of trees, and can impose landscaping requirements. Subdivision regulations can also require that trees be maintained or installed and landscaping be done in accordance with municipal standards. [N.Y. Town Law § 277(2)(c); N.Y. Village Law § 7-730(2)(c); N.Y. Gen. City Law § 33(2)(c)]. Site plan regulations can require applicants to submit information regarding screening, landscaping, and the site’s physical features, including the trees and other vegetation located on or adjacent to the site. Planning boards can condition subdivision and site plan approvals on the maintenance or replacement of trees and vegetation. Local tree preservation

laws may also be adopted under the Municipal Home Rule Law. [N.Y. Mun. Home Rule Law § 10.1(ii)(a)(11)].

Watershed Protection

Watershed management is much like the traditional planning and regulating that is done within a municipality except that, instead of being confined to a locality's borders, the plans and regulations are applicable to an area defined by an aquatic resource. It is a broad concept that incorporates all currently available programs, resources, and regulatory tools to protect aquatic ecosystems and human health.

Watersheds are not usually confined to one set of political boundaries. Thus, watershed areas are often governed by the uncoordinated regulations of authorized local, county, state, and federal agencies. Often these various regulations, taken together, do not constitute an effective program for protecting and preserving aquatic resources. The purpose of an effective watershed management program is to coordinate these existing provisions into a cohesive program for appropriate land use within the designated area. This will insure more comprehensive and effective protection of watershed resources.

Most local governments, whether rural, developed, or developing, should consider identifying their principal watersheds. They should also be interested in assessing watershed quality and in examining the existing and future land uses and changes that might negatively affect the water bodies. Watershed management is initiated both to reclaim lost natural functions and attributes essential to the health of the community and to prevent their future deterioration. It is particularly needed when habitat is limited, biodiversity is threatened, recreational uses are impacted, drinking water quality is eroded, and the scenic quality of the community is implicated.

A watershed management program involves several phases. These include:

- identifying a stream, river, lake, or other water body in need of protection;
- drawing the boundaries of the land that drains into that water body;
- knowing the agency or agencies that will assume responsibility for the quality of water in that land area;
- understanding the causes of the deterioration of the quality of that water; and
- developing an effective plan of action to preserve and enhance the quality of the water.

A typical watershed management plan will include a physical description of the watershed area and a clear description of the land uses that threaten its future quality. It will also prioritize the features and areas of the watershed that must be preserved and improved to insure its vitality as a habitat, source of drinking water, or recreational resource.

The following is a summary of the existing intergovernmental statutory framework within which local governments act to regulate resources or land uses on a watershed basis.

The Watershed Protection and Flood Prevention Act authorizes the Secretary of Agriculture, in cooperation with federal, state, and local agencies, to survey watersheds and other waterways to develop coordinated management programs.

The Coastal Zone Management Act provides for state environmental planning, protection, and restoration programs in coastal areas. It provides federal grants to states to develop and implement management programs to address the effects of land uses on the resources of the coastal zone. In New York, incentives are given to local governments to adopt and enforce local waterfront revitalization plans independently or with one or more adjacent communities in the coastal zone.

The Endangered Species Act allows for the creation of critical habitats for each endangered species. The destruction or substantial modification of critical habitats is prohibited if it will result in a reduction in numbers or distribution of a species.

Under a variety of New York State statutes, state agencies are authorized to take actions that can have a positive impact on maintaining the quality of the state's critical watershed areas:

Interstate Pollution Control Compacts: New York State participates in four interstate water pollution control compacts that require planning on a watershed basis: the Delaware River Basin Compact, the Great Lakes Basin Compact, the Champlain Basin Compact, and the Susquehanna River Basin Compact. These compacts offer an example of express authority to manage water resources on an interstate watershed basis. They apply, however, to only a few of New York's many watersheds.

Local and Regional Water Resources Planning and Development: Under Title 11 of the Water Resources Law, the Department of Environmental Conservation (DEC) is authorized to undertake comprehensive planning for the protection, control, conservation, development, and beneficial utilization of the water resources of the state. Any county, city, town, or village may submit a proposal for survey and study of regional water resources by the DEC and receive comprehensive planning assistance.

Freshwater Wetlands Act: Article 24 of the Environmental Conservation Law grants authority to the state to regulate wetlands 12.4 acres or larger and their 100-foot buffers, or wetlands that are deemed to be of unusual local importance. Local governments may regulate these and smaller sized wetlands by adopting

freshwater wetland laws that are as strict as or stricter than the state's regulations. These authorities allow state and local agencies to issue, deny, or condition permits for land use activities proposed in the regulated wetland areas.

Waterfront Revitalization and Coastal Resources Act: Article 42 of the Executive Law authorizes the Department of State to assist local governments in developing comprehensive plans for their coastal areas. One or more local governments can develop Local Waterfront Revitalization Plans, implement those plans using their local land use authority, and require state and federal actions to consider and to conform to those plans.

Wild, Scenic, and Recreational River Designation: Title 27 of the Water Resources Law provides for the management, protection, and enhancement of certain wild, scenic, and recreational rivers. Under the statute, rivers can be designated wild, scenic, or recreational and then managed according to established management standards. There are specified management directives for each type of designation. Local governments and citizen groups are permitted to conduct studies and write proposals concerning the designation of rivers as wild, scenic, and recreational.

Coastal Erosion Hazard Ordinances: Article 34 of the Environmental Conservation Law encourages localities to use all applicable authority to minimize erosion hazards caused by development in the coastlines of the state. The statute allows municipalities to enact local erosion hazard area laws in conformance with the DEC regulations.

Intermunicipal Agreements: Ample authority exists for the regulation of watersheds through the use of intermunicipal agreements. The state legislature has provided express authority for municipalities to enter into cooperative agreements in order to prepare a comprehensive plan and enact and administer land use regulations. This could be done on a watershed basis.

County Small Watershed Protection Districts: Article 5-D of the County Law was enacted to encourage cooperation between federal agencies and counties of the state to prevent flood damage and to protect the state's land and water resources. The board of legislators of a county is authorized to delegate to its soil and water conservation district board the authority to submit watershed work plans to the commissioner of the DEC for approval. The work plans have the purpose of undertaking, constructing, and maintaining projects for flood prevention, land treatment, and the conservation of water. The commissioner may approve the plan after a public hearing. The soil and water conservation district board is then required to petition the board of legislators, known in some counties as the board of supervisors, to delineate areas of the county as watershed districts.

County Lake Protection and Rehabilitation Districts: Article 5-A of the County Law provides that a county board of legislators may establish county districts for lake protection and rehabilitation. Upon petition by the affected municipalities, or at least 25 owners of real property in the district, the board may direct that maps and plans be prepared for the establishment of certain areas as county lake protection and rehabilitation districts.

Soil and Water Conservation Districts: The counties can create soil and water conservation districts to implement the Soil and Water Conservation Districts Law. Conservation district boards are established under this law to prevent soil erosion, flooding, and sediment damage, to control and abate nonpoint sources of water pollution, and to provide for agriculture water management.

Watershed Planning at the Municipal Level

Most local land use controls are not designed to protect watersheds, although they can be. The basic land use control is the zoning map. It divides the municipality into use districts and typically allows every conforming parcel to be developed for that use. In most communities, zoning district lines are not drawn with watershed boundaries in mind. Areas that contain unusual environmental features such as wetlands, floodplains, or woodlands can be zoned for large-lot residential development. This lessens developmental density, traffic, impervious coverage, and population impacts but still allows the critical areas of watersheds to be developed. In addition, the location of buildings and improvements may be affected by subdivision standards or wetlands regulations. The standards in these regulations can protect natural features on individual parcels. Such protections are limited, however, by the boundaries of zoning districts, which typically are not drawn around watershed boundaries.

A few municipalities have enacted natural resource ordinances to further protect environmental features. These may take the form of sedimentation and erosion controls, floodplain regulations, or coastal zone protection provisions. Municipalities may also amend their comprehensive plans to designate watershed areas in need of protection and formally establish those areas as conservation overlay districts. Within those districts, detailed standards for the protection of the watershed can be adopted to control development, and other techniques, such as conservation easements, can be used to achieve the district's conservation.

The Environmental Protection Agency (EPA) suggests that there are three phases to enacting a watershed protection approach to land conservation: assessment; planning; and implementation and evaluation.

Assessment: The EPA recommends that the community identify the primary threats to human and ecosystem health within the watershed and then involve

the leaders of involved or affected constituent groups in the watershed planning and management process.

Watershed Planning: It then recommends the development of a comprehensive management plan that confronts the key issues and results in a vision for the entire watershed. Planning on a watershed basis is similar to land use planning for a municipality, except that the plan focuses principally on watershed issues and develops strategies to protect the entire watershed. This may require intermunicipal cooperation where two or more communities share the watershed.

Implementation and Evaluation of the Watershed Plan: Once the plan is developed, it can be implemented by measures such as the redesign of zoning districts or the creation of an overlay district that is coterminous with the watershed. Then the involved municipalities may adopt regulatory standards to protect the watershed and enforce them in all their local project review, conditioning, and approval processes.

Wetlands and Watercourses

Wetlands and the watercourses associated with them are “an interrelated web of nature essential to an adequate supply of surface and underground water; to hydrological stability and control of flooding and erosion; to the recharging and purification of groundwater; and to the existence of many forms of animal, aquatic, and plant life.” [North Haven, Connecticut, Wetland Regulations § 1.1]. Wetland areas—swamps, bogs, marshes, bayheads, or wet prairies—typically contain waterlogged or submerged soils, and support a wide range of vegetation. They may be either freshwater or tidal and serve as chemical and biological oxidation basins and as sediment and nutrient retention basins. Wetlands of all types are formed along rivers, lakes, and estuaries where flooding is likely to occur, or may be found in isolated depressions surrounded by uplands where surface water collects.

Many wetland areas have been destroyed or are in danger of destruction because of road or building construction, dredging, grading or filling, timber harvesting, water pollution, or diversion of water flow. Nearly all types of construction and development activities that are regulated by local land use laws may also be regulated by federal, state, and municipal wetlands laws. Under these laws, many activities affecting a regulated wetland or buffer area may not proceed without a permit: the construction of a home or commercial building, for example, or the extension of an existing structure, or the placing of any impervious surface on the land. Activities that are not normally regulated under local land use laws—such as the harvesting of wetlands vegetation, animal grazing, or the application of fertilizers or pesticides—may be regulated under wetland ordinances. Use of certain hazardous materials within wetland areas may be prohibited altogether. Wetland regulations typically exempt certain activities, such as the construction of irrigation ditches, from the wetland

permitting process. Conditions may be placed on permitted activities in order to minimize adverse impacts on wetlands.

In New York, wetlands on private property may be regulated by federal, state, and local laws. The federal Clean Water Act authorizes the Army Corps of Engineers and the Environmental Protection Agency to regulate designated wetlands throughout the country. New York State, through the Freshwater Wetlands Act, has authorized its Department of Environmental Conservation (DEC) to regulate wetlands of 12.4 or more acres, and smaller wetlands of unusual local significance. The state regulations include buffer areas within 100 feet of a wetland boundary. Local governments can elect to replace the DEC as regulator of wetlands within their jurisdiction. [Env. Cons. Law, Art. 24, § 24-0501].

Most local wetlands regulations in New York are enacted under the authority of the Municipal Home Rule Law to adopt laws to protect the “physical and visual environment” and for the “safety, health, and well-being of persons or property” within a municipality’s jurisdiction. [MHRL §§ 10(1)(ii)(a)(11) and (12)]. Under this authority, wetlands of any size may be regulated. Local regulations adopted under home rule authority are concurrent with DEC regulations, and landowners must comply with both sets of standards separately, as well as applicable federal requirements. Local governments in New York may also protect wetlands by regulating the review and approval of development applications. Subdivision, site plan, and special permit regulations may contain standards to protect wetlands. Some localities also protect wetlands by adopting floodplain, erosion and sedimentation, timber harvesting, or clearing and grading regulations or by designating sensitive areas for overlay protection.

Some local wetland ordinances in other states focus on the hydrology of wetlands and establish protection zones as a means of preserving water quality and quantity. Others specify the distance from wetland and watercourse areas at which any permitted land-disturbing activities can take place. In areas where watercourses cross political boundaries, municipalities may join together to establish regulations to adequately protect their resources. Many ordinances incorporate mitigation sections to reduce or compensate for disturbance to sensitive areas.

Nearly all types of construction and development activities that are regulated by local land use laws may also be regulated under applicable federal, state, or municipal wetlands laws. There are a number of land use activities that may not proceed unless the landowner receives a wetlands permit if the activity affects a regulated wetland or buffer area. These include the construction of a home or residential subdivision, the development of a commercial store or strip mall, the extension of a driveway or road, the addition of a room, garage or tennis court, or the placing of any impervious surface on the land. In addition to this permit, the landowner must also receive approval under any applicable local regulations,

such as those governing land subdivision, site plan development, and the award of special permits or variances.

Other activities not typically regulated by local land use laws may be governed by wetlands laws. These include agricultural activities such as animal grazing, harvesting wetlands vegetation, draining or filling of any wetland, fence construction, fertilizer and chemical applications, and other personal or business activity on the land that could pollute a wetland or diminish its viability.

Wetlands laws typically contain a list of activities that are exempt from wetlands regulation. Examples of exempt activities include certain agricultural operations such as irrigation ditch construction and non-intensive recreational uses. Particularly harmful activities, such as the deposit of hazardous chemicals, may be prohibited altogether. Generally, landowners who propose to conduct regulated activities must apply to the designated administrative agency for a permit. Where certain standards and conditions can be met, a permit may be granted allowing the regulated activity to proceed. Conditions may be placed on the permit to avoid, minimize, or mitigate the loss or degradation of wetlands.

Local planning and zoning boards may also regulate activities that affect wetlands as they review and approve development applications. This happens, for example, when the local legislature adopts standards to protect wetlands in subdivision, site plan, and special permit regulations. Localities may also add such standards to their procedures for issuing variances and for conducting environmental reviews of all development applications. If such standards are added, then local administrative bodies may take the impact of proposed projects on wetlands into consideration and impose conditions, or deny applications, to protect the wetlands' functions as a routine part of their development review and approval process. Some localities also protect wetlands by adopting floodplain, erosion and sedimentation, and clearing and grading regulations or by designating specific sensitive areas for extra protection.

Case Study

The Town of Kent, in Putnam County, adopted its Freshwater Wetlands law in 1988 as Chapter 103 of its municipal code. It was adopted "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands and to regulate the development of such wetlands in order to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the town." The town's law regulates contiguous wetlands covering at least 40,000 square feet – about one acre – that are identified by water saturation during at least three consecutive months or by the presence of aquatic or semiaquatic vegetation of the type listed in § 24-0107 of the state Freshwater Wetlands Act or certain listed soils types as defined by the United States Department of Agriculture Natural Resource Conservation Service.

Kent's wetlands law regulates a number of listed activities, including erecting or enlarging any structure of any kind, road construction, digging wells, installation of septic tanks, sewage treatment effluent discharge, draining, dredging, excavation, any form of deposit or storage of any material, use of off-road vehicles, tree and brush cutting, and "any other activity which substantially impairs any of the several functions served by wetlands." Certain activities are permitted as-of-right on wetlands within limits. These include gardening, removal of natural products of wetlands, outdoor recreation, grazing and farming, and dam operation and maintenance.

Under this local law, any person proposing a regulated activity must file an application for a permit. The law provides for split jurisdiction regarding the review of an application for a permit. When a regulated activity also requires an application to the town board, planning board, or zoning board of appeals, that body is given jurisdiction over the wetlands application and issues or denies the wetlands permit. These approving authorities must refer the matter to the local wetlands inspector and conservation commission for their review and written report on the matter. This referral can take no longer than 30 days, and inaction by the inspector and commission during this period is deemed to indicate no objection to the application. Where no application and approval other than the wetlands permit is required, the town engineer is designated the approving authority regarding wetlands protection. Public hearings on the wetlands permit application are held in conjunction with any public hearing required for any other land use approval that the regulated activity requires.

Where the activity is subject to other land use approval, a decision on the wetlands permit is to be made simultaneously with the determination on that other approval. Otherwise, the authority considering the application must approve, deny, or approve with modifications within 60 days of its receipt. The Kent law contains a list of standards to be used in determining whether to approve, condition, or deny a permit application. These include the environmental impact of the proposed activity, alternatives to it, the suitability of the activity in the area, alternatives to the activity, and "the extent to which the exercise of property rights and the public benefit derived from [the activity] may outweigh or justify the possible degradation of the wetland." Enforcement of the provisions of the town's wetlands law is delegated to the wetlands inspector.

Wildlife Habitat Protection

Biodiversity represents the full range of natural life: plants, animals, insects, microorganisms, and the ecosystems and ecological processes of which they are a part. Ecological principles demonstrate that a balance of species, food supply, and adequate habitat is needed for the survival of individual species. If diversity is lost, the food web breaks down and an ecosystem is unable to renew itself.

One of the greatest threats to biodiversity is habitat destruction. Efforts to restore plant or animal populations are futile if there is no habitat to support them. Federal and state environmental statutes often do not protect small natural resource areas such as wooded lots or small wetlands or other wildlife habitats. Local environmental law plays a vital role in preserving areas that are not regulated by federal and state law. The overall goal for planners is to maintain extensive, well-connected areas of habitat. To achieve this goal, the best approach is to plan for an entire landscape—to consider and coordinate an entire range of land uses.

New York State has adopted a formal biodiversity policy and an endangered-species law that protects wild animals, plants, and significant habitats. Unlike its federal counterpart, the law does not require recovery plans, critical habitat designation, or agency consultation. Many communities in New York, however, have included the protection of wildlife and wildlife habitat in the purpose sections of their zoning regulations and in standards for site plan and subdivision review. Overlay zoning, cluster subdivision regulations, open space provisions, wetland, ridgeline, steep slope, tree preservation, and floodplain ordinances all may include the protection of wildlife as one of their purposes. The town of Greenburgh, New York, has enacted an ordinance specifically protecting endangered species on town parkland, in the interests of the public health, safety, and welfare. Other communities may identify critical wildlife species and habitat and regulate land-disturbing activities that threaten these resources.

The local legislature may consider wildlife and habitat protection in its adoption of a comprehensive plan and other land use regulations. It may establish standards to protect wildlife as part of the development approval process. The planning board and other advisory boards, such as a conservation advisory council, conservation board, or wetlands commission, may identify species and areas in need of protection and may recommend measures for adoption by the local legislature. Citizens, environmental activists, developers, and other stakeholders in the approval process can contribute to identifying and assessing the need for the protection of wildlife and habitat in the community.

A biodiversity assessment of the community is a crucial first step in protecting habitats. On the basis of this assessment, the community can develop a priority list of areas and habitat types, taking into consideration size, connectivity, habitat

quality, local habitat diversity, local ecological importance, and compatibility with existing and anticipated community needs.

The American Planning Association (APA) recommends that communities maintain buffers in areas where human activity can affect core areas of wildlife habitat. The design of roads, and even of curbing—which can be angled to allow turtles, for example, to move across the road—has a great influence on the movement of wildlife across the landscape. Hiking paths and bikeways also can influence animals' movements. The APA suggests that planners maintain a dense core area of habitat surrounded by buffer areas that accommodate gradually increasing amounts of human activity.

Communities in New York State have included the protection of wildlife and habitat in a wide range of local regulations:

- The town of Clarkstown's Conservation Density Residential District was established in part "to encourage the creation, preservation, or enhancement of wildlife cover and habitat, and to foster the continuity of natural ecosystems."
- The town of Dover has adopted Rural Siting Principles that include the preservation of "stone walls and hedgerows which create corridors useful for wildlife."
- The town of Huntington has called for 25-foot-wide buffer strips in its Retirement Community District to provide "habitat for wildlife and visual relief for the neighbors."
- The town of Parma has established large woodland protection districts, small woodland protection districts, and stream corridor protection districts in part to protect wildlife.
- Suffolk County's Farmland Preservation ordinance states that habitat restoration initiatives will improve the county's quality of life. The county's Aquatic Habitat Restoration ordinance concerns wetlands preservation and enhancement; submerged aquatic vegetation; bay scallops; open marsh water management; native plantings and other near-shore vegetative preservation and restoration; shore stabilization and restoration; and preservation or restoration initiatives targeted at protecting rare or endangered species.
- The town of Thompson includes the preservation and protection of wildlife habitats in the purpose section of its zoning ordinance and incorporates development standards to protect wildlife in its cluster and planned unit development regulations.
- The town of Warwick's Ridgeline Overlay District regulations state that, in the interest of preserving habitat, project proposals may be referred to the state Department of Environmental Conservation or the New York Natural Heritage Program for review and recommendations.

Open space preservation, floodplain and stormwater regulations, landscaping, buffering, and tree removal provisions all have been used in New York to protect wildlife. Greenway, park, trail, and recreation ordinances, leash laws and regulations concerning pets, regulations restricting the operation of boats and all-terrain vehicles, mobile-home park and cellular telephone tower siting, and the siting of recycling facilities affect wildlife and habitat. Suffolk County has banned the sale and prohibited the incineration in a recycling facility of mercury fever thermometers, because exposure to elevated levels of mercury in the environment has resulted in serious harm to fish-consuming wildlife.

Habitat protection measures are most often included in subdivision and site plan regulations. The site plan review regulations of the town of Southeast establish a number of ecological standards that the Planning Board must apply:

- To protect watercourses and wetlands from pollution, soil erosion, and sedimentation caused by stormwater runoff, the applicant must make provisions for stormwater management.
- Proposed developments must limit the degradation of unique natural features such as streams, wetlands, aquifer recharge areas, steep slopes, and wildlife breeding grounds.
- Provisions for the control of erosion and sedimentation must be made on the site plan.
- A parcel's landscape is to be preserved in its natural state insofar as is practicable and environmentally desirable. This requires the least possible tree and soil removal consistent with allowing site development. Special attention must be given to replanting wherever site development necessitates the removal of established trees.
- Proposed development must also consider the relation between structures and their natural surroundings: structures must be related harmoniously to the terrain and to nearby buildings and roads.
- Any scenic, historic, archaeological, or landmark sites located on or adjacent to the proposed development must be protected.

Permits for regulated activities will not be approved where the proposed development will alter groundwater reservoir capacities, decrease watercourse flood carrying capacities, deteriorate water or air quality, alter water retention capabilities, increase downstream siltation, alter the natural wildlife balance, or impair any natural function of a wetland.

The community must identify habitats and species in need of protection. Preservation efforts can be prioritized, both to identify the most critical needs and to allocate available funds and staff resources. Wildlife protection measures ideally can be incorporated in the community's comprehensive planning and can be part of intermunicipal or regional planning for open space preservation and the maintenance of unfragmented landscape corridors and viewsheds. In the absence of such planning, protection measures can be incorporated in the wide

range of individual local ordinances and regulations that directly affect wildlife and habitat.

DEVELOPMENT TOOLS

Development Agreements

Development agreements can benefit both communities and developers. In return for the developer's agreement to build a project desired by the community, the community agrees to provide the developer with a streamlined and predictable approval process and not to change the zoning after the project is approved. Development agreements may specify how the development process is to be conducted, what standards apply, the type of project that can be approved, and the amenities that the developer will provide. Through these agreements, communities can insure that projects conform to their comprehensive plans and to the expectations of their citizens, and may also acquire needed affordable housing, open space, or infrastructure. Developers can obtain a streamlined and predictable approval process. Where that exists, the developer saves money and can offer the municipality a more affordable project as well as needed public benefits.

Under New York law, developers do not have vested rights to develop their properties in a particular fashion until they have (1) received a valid building permit, (2) completed substantial construction, and (3) made substantial expenditures in reliance on the permit. The cost of the land, the demolition of existing structures, processing and consulting fees, and even excavation work in preparation for construction are not enough to vest rights. The developer must show that he has completed some construction on the project, at a relatively substantial cost, before a court will find that his rights have vested and that existing land use regulations may not be changed. When a court finds that a property owner has vested rights in a validly issued permit, the approved project is effectively immunized from further changes in zoning or other land use regulations. This judicially created doctrine is called "common law" vested rights.

The lack of any guarantee that the developer's investment in a project will be rewarded is a major obstacle to appropriate development. When a community knows what kind of project it wants on a particular parcel of land, it may enter into a development agreement with the developer to provide predictability and certainty as incentives to proceed.

The local legislature enters into development agreements with developers with good track records. Development agreements are, in practice, a common method for establishing the ground rules for a given development project. The municipality enters into a written agreement with the developer to address the various aspects of the project. This agreement serves as the basis by which the development process is to proceed.

Development agreements may be used with any project, but are generally used when a community wants a parcel of land to be developed in a particular way.

The project must be an important one, since a development agreement may be time-consuming and costly to negotiate. Particularly for a large, complex project, negotiation of issues at the outset may save considerable time and money, and prevent legal challenges.

In New York, there is no established time at which parties enter into development agreements. If the agreement is entered into before the environmental review is done on the proposed project, the development agreement itself may require an environmental assessment. Early in the process, the agreement may be limited to procedural issues, and then be amended after the preliminary approval and environmental review are complete.

A development agreement protects rights of both parties to a project—the developer and the municipality. At the outset, there is an opportunity for the parties to discuss the project and to create a common plan for the development of the land and the process by which the proposal will be approved. The municipality can influence the project's design, and can also obtain needed public benefits. The developer can gain efficient approval of the project and the right to develop the land in the way that is agreed upon. In some cases, these benefits can be increased by awarding the developer zoning incentives, such as greater density.

A development agreement is created much like any other contract. The two parties discuss and weigh the benefits of entering into an agreement. Once it is decided that an agreement is appropriate, the parties enter into negotiations.

The development agreement must be in accordance with the community's comprehensive plan and in the interest of the public health, safety, and welfare. The approval process agreed to must comply with all legal requirements, including public participation. Any incentive offered to the developer must conform to state statutory requirements regarding such zoning matters.

The community can take advantage of pre-agreement negotiations to secure public benefits, and to save time and possible litigation costs. Securing public benefits may help to build community support for the project. By addressing and resolving issues at the outset of the project, the local government and the developer can meet the needs of members of the community who might otherwise fear the development or adopt a "not-in-my-backyard" (NIMBY) approach.

Through negotiations regarding the project, the community can bargain for open space, design considerations, and other public amenities that are not specifically addressed by the zoning law or in the approval process. This allows the municipality to maintain greater control of the project than it would have without the development agreement.

Under the New York system, in spite of the fact that the community is required to act in good faith, developers may feel that there is little incentive to enter into an agreement, since all state law requirements must still be followed and vesting may occur only slightly earlier. An often overlooked benefit of the agreement is that it gives the parties a chance to discuss their expectations of the project. The municipality has a chance to discuss possible community concerns, and the developer has a chance to react to those concerns before the approval process begins. By anticipating conflicts, a developer can improve the project, create a positive relationship with the community, and avoid delays in approvals and litigation.

A development agreement ensures that the municipality will not unreasonably impede the developer's progress. This provides lenders with a heightened sense of security as well, and increases the developer's ability to secure loans for the project.

Floating Zones

A floating zone is a zoning district created by the local legislature, but not designated on the municipal zoning map until a landowner or developer applies to have a particular parcel rezoned for the floating zone's permitted uses. The floating zone is an innovative technique developed to resolve the tension between having to address the future land-use needs of a community and not knowing, in the present, precisely where to provide for that need. Floating zones allow the local legislature to create the use district *now* and define its geographic boundaries *later*. When conditions become favorable for an appropriate parcel of land to be developed for uses allowed by the floating zone, the property owner can seek to rezone the parcel. Upon approval by the local legislature, the parcel is rezoned to reflect the new use and becomes a small zoning district; its development is governed by the use, dimensional, and other provisions of the floating zone.

A floating-zone district is created using a two-step process. The first step is an amendment to the zoning ordinance creating a district in which a particular use will be allowed. The second step, which may occur years after the first, is to define the geographic boundaries of the floating-zone district. This second step is taken when a property owner, whose property conforms to conditions set forth in the zoning amendment creating the floating-zone district, petitions the local authority to have the property rezoned for the use authorized in the floating-zone district. That property is then rezoned for the new use and the zoning map is amended accordingly. Normally, a parcel is not eligible for the application of the floating zone if it is not of a stipulated size, sufficient to allow the buffering of its development from the surrounding area. An owner who requests that the zone be applied to a particular parcel must demonstrate that a variety of impacts will be properly handled, such as traffic and site access, water and sewer service,

design continuity, effect on natural resources, visual and noise impact, preservation of open space, and the effect on nearby property values

The floating zone law contains a number of provisions intended to mitigate the impact of its development on the surrounding area. Normally, for a parcel to be eligible for rezoning under a floating zone, it must be of a sufficient size to insure that the development can be fitted properly into its surroundings. An owner who requests that the zone be applied to a particular parcel must demonstrate that a variety of impacts will be properly handled, such as traffic and site access; water and sewer service; design continuity; effect on natural resources; visual and noise impact; preservation of open space; and the effect on nearby property values.

The purpose of adding one or more floating zones to a community's zoning law is to add flexibility to that law, enabling it to accommodate new land uses. As a community's needs change, uses that are not readily accommodated by the adopted zoning law may be desired by local leaders. These uses may be unique and have a relatively significant but manageable impact on their surroundings. Local officials may be unclear as to where such uses should best be accommodated and where developers would prefer to locate them to insure that they are successful economically.

Floating zones are usually added to existing zoning laws to define certain uses when the community desires them but, for various reasons, does not know where they should be located. Floating zones allow developers some needed flexibility in locating sites and determining how new land uses can be designed and buffered to fit into their surroundings. In some communities where affordable housing is desired, for example, a multi-family district may be created by the legislature but not located on the zoning map. This allows developers the maximum flexibility to scout out sites and design developments that mix housing types, tenures, and costs to accomplish the municipality's objective of producing affordable housing while requiring the project to fit properly into the neighborhood. Similarly, a community may want to create an office park but may not want to limit its location, in order to give developers ample opportunity to find a site best suited to current market needs.

Since both multi-family housing and office parks can be buffered, serviced, and designed to fit into a variety of contexts, the legislature may be comfortable with the floating zone mechanism to enhance the community's chances of attracting private capital for such developments without unduly impacting adjacent properties.

A floating zone district identifies a use—such as an office complex, a research laboratory, or multi-family housing—that the community wants to encourage. Local officials may not be certain where the use can be accommodated or where a developer would prefer to locate it to assure its economic success. Floating

zones can help a community accommodate new uses, direct growth, buffer existing properties, and protect unique natural and historic features while at the same time attracting development, responding to market forces, and providing for a streamlined approval process.

The authority of local governments to adopt floating zones was sustained by the Court of Appeals as part of the municipal authority to divide the community into zoning districts. In that case, Tarrytown's floating zone for garden apartments was attacked as a violation of the requirements that zoning districts be uniform, as invalid spot zoning, and as an impermissible delegation of legislative authority to the planning board.

In sustaining the floating zone, the court wrote:

Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise. Accordingly, the power of the village to amend its basic zoning ordinance in such a way as to reasonably promote the general welfare cannot be questioned.

It held that courts must defer to legislative judgment when “the validity of the legislative classification for zoning purposes [is] fairly debatable” and that the burden of showing that an ordinance is not justified under the police power of the state rests with the person attacking the ordinance.

Applying that test to the facts of the case, the court upheld the purposes behind the creation of the new district as following “sound zoning principles” and as being in accordance with a comprehensive plan. Those purposes included providing housing for young families in the area, attracting businesses, and protecting the local tax base. Then, addressing the validity of floating zoning as the method chosen by the village to achieve those goals, the court held that the village's requirement for “separate legislative authorization for each project present[ed] no obstacle or drawback” and that the board of trustees' choice of this procedure was “neither arbitrary nor unreasonable.”

The court also noted that the board had not improperly divested itself of its legislative power. It reasoned that even if a property owner met physical standards required for the district, the board could, in the exercise of reasonable discretion, refuse to rezone the property. The court dismissed the allegation of illegal spot zoning, stating that if “an ordinance is enacted in accordance with a comprehensive zoning plan, it is not ‘spot zoning,’ even though it (1) singles out and affects but one small plot . . . or (2) creates in the center of a large zone small areas or districts devoted to a different use.”

Finally, the court held that the law creating the new district was not invalid for its failure to set boundaries for the new district at that time. The court reasoned that the law only set forth the specifications for the new district and there was no need to set the boundaries at that time. The original legislation, the court held, “was merely the first step in a reasoned plan of rezoning, and specifically provided for further action on the part of the board.”

In addition to the use of a floating zone to create garden apartments in a single-family zone, the technique has allowed land, otherwise zoned, to be used for laboratories and office parks, gasoline stations, high-rise housing, mixed-use developments, and clustered residential developments.

Case Study

The Town of Brookhaven’s zoning ordinance uses this language regarding its floating zone:

The Planned Development District (PDD) is hereby established as a floating zone with potential applicability to any property in the Town where its use will serve to further the legislative intent of this Article. The boundaries of each PDD shall be fixed by amendment to the official Zoning Map wherever this District is applied. A metes and bounds description of each such District shall be kept on file in the office of the Town Clerk. Although it is anticipated that the PDD rezoning applications will be submitted on a voluntary basis by applicants, the Town Board may, on its own motion, rezone property to a PDD. This District is intended for sites of at least 50 acres, but the Town Board may consider applications for smaller properties if special circumstances warrant.

Incentive Zoning

A local legislature can provide a system of zoning incentives to land developers in exchange for community benefits provided by those developers. In setting up such a system, the legislature leaves existing zoning provisions in place, but permits more intensive development of the land in exchange for certain community benefits. Incentives can be provided to developers of raw land or to those who propose the expansion of existing structures, the adaptive reuse of older buildings, or the redevelopment of brownfield sites and other distressed parcels in older, developed areas.

The incentives that may be offered to developers include adjustments to the density of development, for example, allowing more residential units or a greater building floor area than is otherwise permitted under the zoning law. Incentives can also include adjustments to the height, open space, use, or other requirements of the underlying zoning law.

These incentives are given in exchange for the developer providing one or more community benefits, including open space or parks, affordable housing, day care or elder care, or “other specific physical, social, or cultural amenity of benefit to the residents of the community.” Where the community benefit cannot feasibly or practically be provided directly by individual developers, the system can provide for developers to make cash payments to the locality. Such sums must be held in a trust fund to be used exclusively for the community benefits specified.

Incentive zoning has been used frequently to induce land developers to provide affordable housing for senior citizens, local workers, or low and moderate-income citizens. The developer is allowed to build a greater number of homes than otherwise permitted by the zoning law and to sell or rent some of these “bonus units” at market value. In return, the developer is required to use some of that profit to reduce the cost of the affordably constructed residential units. These affordable homes must then be rented or sold to persons or families of low or modest income, or senior citizens.

The purpose of incentive zoning is to advance the locality’s physical, cultural, and social objectives, in accordance with the comprehensive plan, by having land developers provide specific amenities in exchange for zoning incentives. Development brings with it the need to provide municipal services and facilities to serve and absorb the impacts of additional population, traffic, sewage, water consumption, and the like. One cost-effective way of providing those municipal services and facilities is to concentrate new development in serviceable districts. This can be done by providing density bonuses, or incentives, to developers in such districts on the condition that they provide or pay for the services and facilities needed in the area or in the community as a whole.

The system of zoning incentives must be adopted by the local legislative body: the town board, the village board of trustees, or the city council. A local incentive zoning program can authorize the planning board to award specified bonuses in exchange for stipulated benefits in designated areas or zoning districts.

Generally, community benefits, such as infrastructure and municipal services, are paid for in two ways. Normally, they are covered by the municipality directly out of the revenues derived from taxing real property. Occasionally, they are required to be provided by the developers of specific projects to mitigate the direct impacts of the developments on the community. Developers may be required to pay impact fees, in lieu of providing facilities such as parks, traffic improvements, or water system improvements necessitated by the project. Where authorized by law, requirements for the provision of community benefits or the payment of fees must bear some rough proportionality to the measurable impacts that the specific development will have on the community.

Incentive zoning provides a third alternative: having developers use some of the economic benefits afforded by the incentives to provide or pay for facilities and services. With amendments to the Town, Village, and General City Law adopted in 1991 and 1992, local authority to create an incentive zoning system is clear. Further, because economic incentives are used to encourage developers to provide needed benefits and because such systems are voluntary, developers tend not to oppose them, although they might often challenge impact fees and mitigation requirements. Finally, because an incentive zoning system can be designed with the needs of an entire district or service area in mind, it can be a more potent system of meeting community facility and service needs than proceeding one development project at a time.

Incentive zoning advances the physical, cultural, and social objectives of the community's comprehensive plan, by having the land developer provide needed benefits in exchange for the incentives. Development requires municipal services and facilities to serve and absorb the impacts of additional population, traffic, sewage, water consumption, and the like. A cost-effective way of providing municipal services and facilities is to concentrate new development in serviceable districts. This can be done by offering density bonuses, or incentives, to developers in such districts on the condition that they provide or pay for the services and facilities needed in the area or in the community as a whole.

Municipalities in New York have long been empowered to adopt incentive zoning systems. Because this authority had been used sparingly, the state legislature amended the Town, Village, and General City Law to clarify this authority and to provide a specific procedure for creating a system that all municipalities can rely on.

Amendments to the Town, Village, and General City Law adopted in 1991 and 1992 make it clear that the specific grant of authority for incentive zoning is in addition to “authorization to provide for the granting of incentives, or bonuses, pursuant to other enabling law.” The underlying authority can be found in the zoning enabling statutes of the Town, Village, and General City Law and the Municipal Home Rule Law. Prior to the 1991 and 1992 amendments, it was held that the general grant of authority in the zoning enabling statutes gave municipalities the authority to adopt incentive zoning systems.

Now that state statutes provide specific procedures for incentive zoning, it is not clear whether local legislatures must use their supersession authority under the Municipal Home Rule Law if they wish to adopt a system in a manner that does not fully comply with the detailed provisions of the new statutes. Any doubt on this subject, however, can be removed if the local government references the incentive zoning provisions of the relevant 1991-1992 statute in its findings, expresses its intent to supersede it, mentions the provisions superseded, and otherwise complies with the requirements for superseding state law.

The system of zoning incentives must be adopted by the local legislative body: the town board, village board of trustees, or the city council. Incentive zoning provisions are adopted in the same manner as other zoning ordinances, laws or amendments. Requirements for public notice and hearings, conformance with the comprehensive plan, and compliance with environmental review must be followed. There are a number of additional requirements that must be met if the local legislature creates the incentive zoning system under authority granted by the 1991-92 amendments to the Town, Village, and General City Law. These provisions are as follows:

- Each existing zoning district in which incentives can be awarded must be designated and incorporated in any zoning map adopted in conjunction with the system.
- The legislature must find that each of these districts has the capacity to absorb the additional development authorized by the incentives. Fire, transportation, water, sewer, waste disposal, and community facilities and services must be found to be adequate for this purpose, after accounting for the community benefits to be provided for by developers in each district.
- The legislature must find that the development allowed by the zoning incentives will have no significant environmentally damaging consequences, that each affected district contains adequate environmental quality, and that the additional development provided for is compatible with the development otherwise permitted under the underlying zoning ordinance.

- Where the legislature finds that the development allowed by the zoning incentives may have a significant effect on the environment, it must prepare a Generic Environmental Impact Statement (GEIS) and provide that a proportionate share of the cost of the GEIS shall be paid by each applicant for incentives under the system. This may allow significant streamlining of projects that receive incentives, if they conform with the GEIS and raise no significant environmental impacts not adequately covered by it. In such a case, projects may not be required to go through the time consuming process of preparing a full Environmental Impact Statement.
- The legislature must determine whether the system of zoning incentives will have a negative impact on the provision of affordable housing in the community and, if so, the legislature must take action to compensate for that impact.
- A procedure for applying the zoning incentives to specific parcels must be established by the local legislature, including:
 - The specific incentives that may be granted to an applicant;
 - The community benefits that must be provided by an applicant;
 - The standards for approving an application for incentives, including how to assess that the benefits received are adequate given the incentives granted;
 - The requirements for submitting an application for incentives, and the process for reviewing, approving, and imposing conditions on applications for incentives. (Although the amendments are silent on this subject, it appears that the legislature may delegate the authority to provide incentives to an appropriate review and approval body such as the planning board or zoning board of appeals);

The provisions for public notice and hearing prior to the award of incentives, where a hearing is required by the law or ordinance under which the zoning incentive system was adopted; and provisions for the receipt of cash in lieu of the direct provision by the developer of the benefits, where the legislature determines that such benefits are not immediately feasible or otherwise practical. In such an instance, the legislature must establish a trust fund into which all cash payments are deposited. This fund is to be used exclusively for the specific benefits authorized by the incentive zoning system.

Planned Unit Development

Planned unit development (PUD) zoning provisions permit large lots to be developed in a more flexible manner than is allowed by the underlying zoning. PUD ordinances may allow developers to mix land uses, such as residential and

commercial, on a large parcel and to develop the parcel at greater densities, and with more design flexibility, than is otherwise allowed by the underlying zoning district. PUD provisions often require developers to compensate for the impacts of their projects by setting aside significant and usable open space, providing infrastructure needed to service the development, or offering other community facilities and services.

There is no statutory definition of a PUD. Local governments' use of the technique has established a number of optional methods of designating large lots for more flexible development. PUD ordinances typically leave the underlying zoning in place and offer an alternative to landowners to develop the site in accordance with the PUD provisions.

Most PUD ordinances state that their purpose is to achieve greater design flexibility and economies of scale in the development of large lots within the community. The Village of Malone, for example, adopted a PUD provision stating that its purpose was "to provide a means of developing those land areas within the community considered appropriate for new residential, recreational, office space, commercial or industrial use, or a satisfactory combination of these uses, in an economic and compatible manner, while encouraging the utilization of innovative planning and design concepts or techniques in these areas."

The local legislature adopts a Planned Unit Development (PUD) ordinance, in conformance with the comprehensive plan and with the advice of the planning board, citizen advisory committees, developers, and landowners interested in adding flexibility to the zoning law. The legislature may delegate to the planning board or zoning board of appeals the authority to approve applications to establish PUD's. A developer who has assembled a large parcel may apply to have the PUD district applied to the parcel and then apply for a special permit to combine the land uses permitted in the PUD district. Owners of several smaller lots may work together to combine ownership of their land and take advantage of the PUD designation.

A developing community that anticipates receiving a rezoning or site plan application for the development of a large shopping mall or discount warehouse could use a mixed-use PUD law to negotiate significant design and use changes in the development. Instead of ending up with another faceless commercial strip, the community may use its PUD provisions to provide the leverage, incentives, and process necessary to encourage the development of a better commercial project, reinforced by the addition of some residential uses, community facilities, and attractive landscaping and building design.

The same community, faced with the prospect of one or more large residential developments, could avoid the proliferation of single-lot subdivisions or uniform condominium developments by using PUD provisions to provide for some on-site shopping and services for homeowners. This can be accomplished by adopting

a residential PUD provision that allows mixing a variety of housing types and styles with some neighborhood commercial uses. Through design flexibility and control, an appropriate neighborhood can be created, properly serviced by infrastructure, and appropriately landscaped and designed to protect surrounding areas from its impacts.

An urban community could adopt a PUD ordinance as a means of attracting developers of unique large lots. By offering a mix of land uses and flexible design options, developers are free to create a project that is economically and environmentally viable for the site. In a similar way, a rural community could adopt PUD provisions, in advance of development, as its way of indicating the areas that are appropriate for mixed-use and more intense development.

Although PUD development is designed for large-lot development, this does not necessarily mean that its use is limited to communities with one or more large lots that are under single ownership. The PUD provisions can be drafted to present an opportunity to the owners of several medium-sized or smaller lots to work together to combine ownership and take advantage of the PUD development option.

Until this year there was no separate authorization under Town, Village, General City Law for including PUD provisions in local zoning laws. The authority to do so was implied in the delegation to local governments of the power to enact zoning restrictions and create zoning districts. One purpose of zoning is to insure that its provisions consider the character of areas and their suitability for particular uses with a view toward conserving the value of buildings and encouraging the most appropriate use of the land throughout the municipality. PUD zoning accomplishes these purposes. Several court decisions had considered various applications of previously adopted PUD ordinances, implicitly upholding their legality.

Notwithstanding this judicial evidence of implied power to adopt PUD provisions, on July 29, 2003, the governor signed a bill adding General City Law § 81, Town Law § 261-C, and Village Law § 7-703-A to expressly authorize the local legislative body to enact, “as part of its zoning law or ordinance, procedures and requirements for the establishment and mapping of PUD zoning districts.” The enabling statute’s stated purpose for “Planned Unit Development District Regulations are to provide for residential, commercial, industrial or other land uses, or mix thereof, in which economies of scale, creative architectural or planning concepts and open space preservation may be achieved by a developer in furtherance of the town comprehensive plan and zoning local law or ordinance.”

The New York statute grants express authority to communities to enact PUD regulations, but does not contain requirements for its enactment. The limited scope of the statute preserves the diversity of its application in the state by

communities that have enacted PUD regulations and encourages more communities to do the same. Planned unit development zoning provisions give municipalities an alternative to the typical Euclidean method of zoning. They permit large lots to be developed in a more flexible manner than is allowed by the underlying zoning. PUD ordinances may allow developers to mix land uses, such as residential and commercial, on a large parcel and to develop the parcel at greater densities, and with more design flexibility, than is otherwise allowed by the underlying zoning district.

Case Study

The City of Binghamton adopted its PUD provisions “to encourage and promote flexibility, land use efficiency, new development concepts, and quality design in the construction of large-scale projects. These objectives are to be achieved by substituting an approved comprehensive development plan for conventional land use regulations, with such comprehensive development plan to be approved by the planning commission and to become the basis for continuing land use controls in the PUD area.”

Binghamton’s PUD law was adopted with the primary objective of promoting housing. It allows the planning commission, however, to permit some nonresidential uses in a PUD if the applicant for PUD designation can show that such nonresidential use will promote the objective of the City’s comprehensive plan, contribute to the quality of the housing development, and enhance the surrounding neighborhood. These nonresidential uses can occupy no more than 25% of the gross lot area. In this urban context, the PUD provisions require a minimum lot size of three acres. The law allows for a density increase of 30% over the “maximum density normally permitted in the district where the PUD is to be located.”

In the Town of Bethlehem, PUD provisions of the zoning law were added “to provide for new residential, commercial, or manufacturing uses in which economies of scale or creative architectural or planning concepts may be utilized by the developer.” The provisions state that “application for the establishment of a planned development district shall be made to the Town Board by the owners of the lands to be included in the district or by a person or persons holding an option to purchase the lands contingent only upon approval of the application for the change of zone.”

In Bethlehem, the application is referred by the town board to the planning board of the town. The applicant is required to submit adequate data, maps, and preliminary plans to allow the planning board to determine the desirability of the proposed project in the proposed location. After reviewing and requiring revisions in the plans, the planning board is to approve, approve with modifications, or disapprove the application and report its findings and decision

to the town board. The town board then holds a public hearing, after which it may approve the establishment of the PUD district.

After the district is established in this way, applications for the approval of a building project in the district are made to the town board, which again refers such applications to the planning board. The planning board holds the required public hearing on the building application and may approve, approve with modifications, or disapprove the application and report its decision and findings to the town board. If the planning board denies the building application, the town board may approve the project with any stipulations or conditions it deems necessary to achieve the objectives of the zoning ordinance.

The Bethlehem PUD law contains a schedule governing the use, area, density, and building area ratio and yard dimensions allowed in a PUD district. For residential and commercial districts, five acres or more are required and, subject to certain limitations, commercial and residential uses may be mixed. In a residential PUD, eight multi-family dwelling units per acre are allowed; in a commercial PUD, up to 16 multi-family dwelling units per acre are permitted.

Transfer of Development Rights

New York statutes define transfer of development rights (TDR) as “the process by which development rights are transferred from one lot, parcel, or area of land in a sending district to another lot, parcel, or area of land in one or more receiving districts.” Local governments are allowed great flexibility in designing a TDR program; they can establish conditions that they deem “necessary and appropriate” to achieve the purposes of the TDR program.

There are three basic elements to a TDR program: the sending district, the receiving district, and the TDR credits themselves. The sending district consists of the area to be protected from development. The receiving district is located where additional density can be absorbed and supported with existing or expanded infrastructure and services. The TDR credits are a legal representation of the abstract development rights that will be severed from property in the sending district and grafted onto property in the receiving district. The TDR credits are traded in a free market, although a TDR bank may be established to facilitate exchanges. When a TDR credit is purchased from a property owner in the sending district, that property owner records a deed restriction prohibiting development on the property. The TDR credit can then be applied to property in the receiving district as a density bonus. In New York’s Long Island Pine Barrens’ TDR program, a 52,500-acre sending district and a 47,500-acre receiving district were established that crossed the jurisdictions of three towns and two villages.

In many TDR programs, the zoning provisions applicable to the sending district are amended to reduce the density at which land can be developed. While losing their right to develop their properties at the formerly permitted densities, property owners in the sending district are awarded development rights. These development rights are regarded as severable from the land ownership and transferable by their owners.

TDR programs usually establish some method of valuing the development rights that are to be transferred from the sending to the receiving district. Some communities establish development rights “banks” that purchase development rights from landowners in sending districts and sell them to landowners in receiving districts.

Property owners in the receiving district are eligible to apply for zoning incentives that increase the densities at which their lands may be developed. To qualify for these incentives, the property owners must purchase the development rights from landowners in the sending district or from the development rights bank.

According to New York statute, the purpose of a TDR program is “to protect the natural, scenic, or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic, or economic interest or value, and to enable and encourage flexibility of design and careful management of land in recognition of land as a basic and valuable natural resource.”

An effective TDR program allows a community whose zoning law creates a hard-to-service, spread-out development pattern, to develop in a more cost-effective manner. An effective TDR program can increase the tax base while minimizing the costs of servicing land development. It can preserve threatened conservation areas while allowing owners of land in that area to be compensated through the sale of some or all of their former development rights.

TDR programs are most often created in response to a perceived crisis in the area that becomes the sending district. That area, for example, may contain a precious resource such as an endangered species, a valuable economic resource such as viable agricultural soils, or a drinking water supply whose existence is threatened by development.

The TDR technique was also designed to combat inefficient land development patterns that can result from the build out of conventional zoning laws. Once the community realizes that its zoning law is creating a high-cost, environmentally questionable pattern of land use, it can create a TDR program to adjust zoning densities. Instead of rezoning to lower densities in the sending areas and increasing densities in the receiving areas (creating a loss of investment expectations in the former and a windfall in the latter), the community can elect to

provide for the transfer of development rights as its method of changing its zoning strategy.

The authority to create a TDR program is implied from the delegation of authority to local governments to adopt zoning ordinances and create zoning districts. Because this authority had been used sparingly, the state legislature, in 1989, amended the Town, Village, and General City Law to clarify local TDR authority and to provide a specific procedure for creating and implementing a TDR program.

Although the statutes set out a specific process for establishing a TDR program, they also allow local governments to continue previously created programs and, apparently, to create programs in a different manner from that contained in the statutes. It is not completely clear, however, whether local legislatures must use their supersession authority under the Municipal Home Rule Law if they wish to adopt a TDR program that does not fully comply with the specific provisions of the statute. Any doubt on this subject can be removed by referencing the TDR provisions of the relevant 1989 statute, expressing the intent of the local legislature to supersede them, mentioning the provisions superseded, and otherwise complying with the requirements for superseding state law.

In creating a TDR program, all procedures required for adopting and amending local zoning ordinances or laws, including all provisions for notice and public hearing, must be followed. The local TDR program must be established in accordance with the comprehensive plan.

What constitutes an appropriate sending district is defined by the authorizing statute: it must consist of natural, scenic, recreational, agricultural, forest, or open land or sites of special historical, cultural, aesthetic, or economic value sought to be protected. The statute allows municipalities to establish development rights banks to purchase development credits from landowners in sending districts and to sell them to landowners in receiving districts.

Communities that elect to create their TDR programs under the authorizing statutes must designate sending and receiving districts in a particular fashion, make a variety of detailed findings, and take other specific action.

Before receiving and sending districts are designated, a generic environmental impact statement must be prepared for the receiving district. Subsequently, individual projects developed in the receiving district need to comply with the environmental review procedures of state law only to the extent that their impacts were not reviewed in the generic environmental impact statement.

Receiving districts must be found that contain adequate resources and infrastructure to accommodate the increased development. The board must determine that no significant environmental damage will result from this increase

and that the additional development is compatible with that permitted in the underlying zoning ordinance. This finding must be made after evaluating the impacts of the potential increased development permitted by the transfer of development rights to the receiving district.

The locality must evaluate the effect of the TDR program on the potential development of low- or moderate-income housing that might be lost in the sending district or gained in the receiving district. If losses and gains are not roughly equivalent, the locality must take action to compensate for any net loss of such housing.

If the sending and receiving districts are in different taxing districts, the locality must find that the TDR program will not unreasonably transfer the tax burden between the taxpayers of such districts.

A local TDR program must provide for the execution and filing of conservation easements on land in the sending district whose development rights have been purchased under the program. The easement must specify that it is enforceable by the local government.

The program must, in addition, provide for the reassessment, within one year, of the property tax value of any parcel whose development rights have been transferred.

Case Study

A significant TDR program was created in eastern Long Island in the Central Pine Barrens, an environmentally fragile and resource-rich area encompassing over 100,000 acres. Faced by requests for over 220 development projects in the area and stymied by time-consuming and costly litigation over their environmental impacts, the towns, landowners, developers, citizens, and environmentalists joined together to develop a plan, including the use of TDR, to preserve a core area of about 55,000 acres.

The Long Island Pine Barrens TDR program was modeled after the New Jersey Pine Barrens program. The Long Island program was established under state legislation adopted in 1993 and is implemented under a comprehensive land use plan adopted in April, 1995. Several municipalities with jurisdiction over the Pine Barrens area are involved in the program. The comprehensive plan allocates Pine Barrens credits to land in designated sending districts based on their development yield. Land in the sending district is not allowed to be developed under the zoning law. Instead, that zoning is used to determine the development rights that may be transferred. The development yield varies according to the number of units the zoning law permits per acre. If zoning permits four units per acre, the development yield factor established is 2.7, yielding that number of credits.

The comprehensive plan establishes overlay districts into which development rights can be transferred. If a developer purchases one credit, he will be able to build one unit above the density allowed in a receiving district. Overall, the receiving areas are structured to provide a demand for credits in the receiving sites that exceeds the number of credits created in the sending sites by a ratio of 2.5 to 1. This ratio was calculated to create sufficient competition to insure an active market for the development credits in the sending districts. The state legislation creating this program established a TDR bank, funded by an allocation of five million dollars to provide an initial market for the credits. The bank is authorized to purchase credits from owners in sending districts and sell them to owners in receiving districts.

TDR programs are complex. They require municipalities to engage in a sophisticated analysis of the impacts of the program in both sending and receiving districts. Programs typically raise significant issues that concern residents and owners in both sending and receiving districts. How much development potential is to be lost in the sending districts? How are these development “rights” to be measured and valued? How can a viable market for these rights be created? How many properties in the receiving district must be eligible for more intense development to create a viable market for the development rights created by the program in the sending district? Should a development rights bank be created? How are the administration of the bank and the execution and filing of the required conservation easement documents to be handled? What process should be put in place to review and approve development projects in the receiving district?

A particularly difficult aspect of designing a TDR program is determining how to define and value the development rights that are severed from the land and eligible to be transferred. According to the statute, a formula can be used to quantify the development rights to be transferred based on such factors as the lot area, floor area, floor area ratios, density, height limitations, or any other criteria that effectively quantify an appropriate value. The formula chosen converts development rights into specific development credits. When a development credit is purchased, it carries the right to a certain additional density in the receiving district.

How development rights are valued and how a market for them is created will determine the viability of the TDR program and, perhaps, its legal validity. In recent programs, the agencies created from two to two and a half times the demand for development credits in the receiving district as the number of development credits in the sending district. For this market to work, there must be development pressure in the receiving area resulting in a desire by landowners to purchase development credits from the sending area. Whether such ratios can be established and whether sufficient development pressures

exist are factors that must be considered by local leaders who create TDR programs.

Traditional Neighborhood Zoning Districts

Traditional Neighborhood Development (TND) is a relatively new alternative to conventional zoning practices. A TND zoning district encourages mixed-used development in compact areas. TND districts provide for efficient land uses, building locations, and transportation systems to create pedestrian-friendly neighborhoods. Conventional zoning districts, in contrast, separate land uses into single-use districts that force residents to depend upon automobiles for travel from home to work or stores. A TND neighborhood contains several well-defined residential areas within walking distance of a mixed-use center, connected by a network of thoroughfares that service cars and pedestrians equitably.

In a TND neighborhood, buildings that face streets are limited by maximum rather than minimum setback restrictions so that buildings are close to sidewalks and become part of the public landscape rather than removed from it. Street design, although able to accommodate automobile traffic, is focused on creating a pedestrian-friendly environment. Diverse types of housing provide affordable residences for people at different income levels and provide for varied building design. By mixing land uses, TND includes many different types of buildings within a relatively small area, offering diversity rather than homogeneity as its objective. TND zoning provisions – often referred to as “urban regulations” – generally contain much more specific design standards than conventional zoning.

With suburban sprawl being blamed for a host of social, economic, and environmental problems, the issue of how land is developed has emerged as a cornerstone development issue. A TND zoning district aims to create an alternative vision to conventional development patterns. Its proponents argue for the creation of cohesive neighborhoods that differ markedly from the standard, single-use subdivision neighborhood that characterizes urban sprawl. A TND zoning district’s purpose is partly social – to actively promote a sense of community through design-oriented regulation rather than regulation of use. The arguments for TND zoning are several: A confined, walkable neighborhood with mixed-use development encourages a sense of belonging in homeowners and local business owners alike; Homes and businesses designed with entrances facing and close to streets foster a sense of being part of the community rather than separate from it; Relatively narrow, interconnected, and multiple-use streets calm traffic, avoid congestion, and provide a balanced transportation system while remaining pedestrian-friendly; TND districts also provide for the development of efficient systems of central water and sewer delivery, public transportation, and emergency services.

TND regulations may be used to provide for newly developed neighborhoods or for the continued development or reuse of existing urban neighborhoods. When

significant tracts of open land under single ownership are involved, the TND ordinance can provide for parks, squares, and greenbelts to complement and relieve the generally higher density provided in a TND district. In more developed areas, TND design standards and multiple-use provisions can provide for a neighborhood's gradual transition from its current status to a traditional neighborhood's pattern of land use.

In developing communities, local legislatures may consider adopting a TND district as a method of complementing its smart growth strategy. A TND district can provide for, and accommodate, greater density than most conventional zoning ordinances. It offers a method of providing for water, sewer, transportation, and other services in cost-effective concentrations. A TND zoning district can relieve development pressures on outlying natural resource areas, on farmlands, and on other critical environmental areas.

The power to adopt a comprehensive plan and conforming zoning laws has been delegated to towns, villages, and cities by the state legislature. One statutory objective expressed by the state legislature in delegating this authority is to encourage the most appropriate use of land throughout the municipality. The courts have made it clear that as long as this objective is the motivation for a zoning technique created by a local government, the judicial branch will sustain novel devices. The use of planned unit development zoning, which provides for mixed-use, higher density zoning in developing communities, has been sanctioned by the courts and is employed in many communities but is not discretely authorized by state legislation. Under this implied authority, local governments are free to adopt TND zoning districts, including provisions that accomplish the purposes discussed above.

Two primary implementation schemes have been used to incorporate traditional neighborhood development into local land use law. First, municipalities have rezoned conventionally zoned land to create new TND zoning districts. Alternatively, some municipalities have created TND districts in the form of overlay districts that allow, but do not require, new development to conform to their provisions.

A variety of existing mechanisms can be adapted for the implementation of TND: Municipalities can designate growth districts and rezone them as a TND district to increase density as a matter of right. This mechanism helps insure the viability of a TND district's commercial and retail center as well as its transportation system by providing an adequate supply of consumers in the surrounding neighborhoods.

Alternatively, a TND overlay zone can be created providing for mixed-use, higher density zoning as an alternative to the conventional pattern in place in the area. Incentive zoning can be used in the overlay zone to grant waivers of standard zoning requirements to developers in exchange for their willingness to provide

public amenities such as transportation, parks, affordable housing, or social services in the district. Incentive zoning allows the community to offer density bonuses to a developer to construct more residential units or square feet of commercial space per acre in exchange for achieving the more compact development required by TND.

Bulk and area requirements which govern local setbacks, lots sizes, and street configuration can be used to shape public space into a pedestrian-friendly, identifiable community. On a regional level, intermunicipal agreements may be used to establish transit corridors and achieve other regional land use objectives. In this way, the goals of a TND plan can be extended throughout an area while at the same time allowing the local neighborhoods to remain compact.

Case Study

Pawling, New York offers an example of a municipality's attempt to reshape its future through the use of TND design regulations. In 1990, the town began a process that led eventually to the adoption of a new comprehensive plan and zoning ordinance that combined features of both conventional and TND zoning practices. While still providing for some traditionally-zoned districts, Pawling's new comprehensive plan called for more concentrated land patterns that incorporated dedicated open space, a network of trails, a regional green-space network, and residential developments placed around a revitalized central business district. The plan also took the unusual step of identifying four large tracts of property in one-acre residential zones and detailing conceptual development plans for those tracts. These parcels are allowed an increased number of residential units per acre, a greater number of houses on smaller lots, and more preserved open space within each tract in an effort to encourage TND development.

To implement these comprehensive plan provisions, Pawling amended its zoning law in 1995. Pawling Zoning Law § 98-13 and Schedule B allow six building types in specified zoning districts. The ordinances also include detailed illustrations for alternative lot layouts, building designs, setbacks, and the location of parking, provisions not included in the original zoning ordinance. Furthermore, the zoning code provides a density bonus of 30% for any new subdivision proposed on the parcels identified on the comprehensive plan that meets the TND design guidelines. To qualify for that bonus, the plans must conform to the open space requirements, guarantee the affordability of 15% of the dwelling units, and be connected to the village water and sewer system.

CHAPTER SIX: SPECIAL TOPICS

INTERMUNICIPAL COORDINATION

Municipalities in New York have extensive authority to cooperate with one another to accomplish their land use objectives. Where villages, towns, and cities share natural resources, transportation corridors, or economic markets, they are authorized to enter into intermunicipal agreements to perform together any municipal function they have power to undertake individually.

The state legislature has made it clear, through enabling legislation, that authority to cooperate includes the power to adopt consistent comprehensive plans, zoning laws, and land use regulations, to combine local land use agencies, and to enter into joint enforcement and monitoring programs. The legislature has also made it clear that county governments may provide technical and advisory services in the land use field to their constituent localities. The Hudson River Greenway Communities Council has been authorized by state statute to provide incentives for localities that adopt local plans and regulations that are in conformance with Greenway planning principles.

Local governments have begun to use this authority in a number of creative ways as they have discovered that it provides them with a new method of expanding their control over the forces that determine their future. As population has grown and natural resources have become more threatened, local governments have embraced the notion that they can control shared wetlands and waterways, floodplains, transportation corridors, and economic markets by entering into compacts with one another, with their counties, and with regional agencies established to help them accomplish their land use objectives.

Grassroots Regionalism

Today, local land use decisions regularly have regional impacts. This was not the case when the land use system was created in the early years of the twentieth century, when communities were separated geographically. Eighty years of urban sprawl, hastened by the automobile and expansive highway system, have brought local jurisdictions and their residents into such close proximity that their actions greatly affect one another. Citizenship for most local residents is interjurisdictional, as well. They live in one locality, work in another, and shop and recreate in still others. Although the courts recognize these intermunicipal connections and encourage local zoning to accommodate regional needs, there is no statutory requirement in New York that local planning defer to regional interests.

The wall built as a result of divided jurisdictions has isolated communities and compartmentalized the state making it difficult to solve regional problems. However, in an era of economic and environmental interdependence, municipalities are beginning to cooperate to preserve shared natural resources and to plan for future economic development. Through the use of intermunicipal agreements, localities are finding solutions to problems shared with neighboring communities.

Through intermunicipal agreements, adjacent localities are learning that these agreements are needed to manage intermunicipal environmental resources such as watersheds, to provide a vibrant regional economy, and to avoid border wars where projects in one community adversely impact others.

BENEFITS

- Protect Natural Resources
- Coordinate Future Development
- Increase Efficiency
- Reduce Costs
- Develop Joint Projects
- Solve Regional Issues
- Gain Control of Cross-border Impacts

Border Wars

While a community is required to adhere to its own comprehensive plan in adopting land use regulations, there is no requirement that it defer to the needs of neighboring communities, even if the regulation affects land in those communities. The result is that local planning and zoning is often introspective in nature, focusing only on impacts within the locality's borders. When projects in one community have adverse effects on neighboring communities, border wars erupt and the courts are asked to intervene. The following case study illustrates how frustrating this can be for the impacted community and those affected by the cross border effects of local land use decisions.

TOWN OF BEDFORD V. VILLAGE OF MOUNT KISCO

In the early 1970's the "border war" issue was raised before the New York Court of Appeals in *Town of Bedford v. Village of Mount Kisco*. In dispute was a 7.68-acre parcel of land in Mt. Kisco that was described by the lower court as "an island within the Town of Bedford." The property was separated from the Village of Mt. Kisco by the Saw Mill River Parkway and was grounded on the remaining three sides by the Town of Bedford. The only access to the property was by way of Bedford roads. In 1969, the village rezoned the parcel of land from single-family residential to multi-family, high-rise use. The Town of Bedford voiced its opposition to the rezoning and subsequently alleged that the Board had not addressed these concerns. While the rezoning was admittedly not in conformance with the village's 11-year old comprehensive plan, the village did submit evidence to show that the village board had considered the changes in

the village since the time the comprehensive plan was adopted and that the benefits of rezoning had been considered. The Town of Bedford contended that the rezoning would have a negative impact on the town, which the village had failed to consider. Primarily, the town was concerned that the proposed development would lead to an increase in traffic and a resulting increase in police activity. Further, the town was concerned that the rezoning would depreciate the value of the adjoining land in Bedford. Based on these alleged injuries, the town challenged the rezoning, alleging that the decision to rezone by the village board was arbitrary and capricious because it was not in conformance with the 1958 comprehensive plan.

The Court of Appeals disagreed and upheld the village's rezoning. It pointed to six findings made by the village board all of which dealt with changes within the village since the 1958 plan was adopted and which detailed the benefits to the village of the rezoning. These findings were sufficient to constitute a *de facto* amendment of the comprehensive plan, in the court's opinion. Nothing in the opinion indicates that the village considered, measured, or was influenced by the alleged negative impacts on the town. The court noted that "the [village] Board of Trustees considered the welfare and economic stability of Mount Kisco as its *first concern*.... Bedford understandably differed from the conclusion reached, but that difference must be regarded as the necessary result of conflicting zoning policies that are confronted at the edge of every municipality." (Emphasis added).

What is an Intermunicipal Agreement

An intermunicipal agreement (IMA) is a cooperative or contractual arrangement between two or more municipalities. Under the Town, Village, and General City Law, local governments are specifically authorized to enter into IMAs to adopt compatible comprehensive plans and zoning laws as well as other land use regulations, including wetlands and floodplain laws; aquifer protection, watershed enhancement, and corridor development plans; and historic preservation, cultural resource protection, erosion control, and visual buffering programs. Local governments also may agree to establish joint planning, zoning, historic preservation and conservation advisory boards and to hire joint inspection and enforcement officers. Specifically mentioned in the enabling legislation is the use of IMA's to create an "intermunicipal overlay district for the purpose of protecting, enhancing, or developing community resources that encompass two or more municipalities."

IMA's can be used to provide for more cost-effective and consistent enforcement of existing land use plans and regulations. One municipality may agree to be responsible for hiring and supervising enforcement officers on behalf of itself and one or more others. Two or more municipalities may agree to hire enforcement and administrative personnel for land use purposes and to supervise them jointly and share the costs. Any local administrative agency that handles land use issues can be established as a joint board with one or more nearby communities.

There are several reasons for municipalities to enter into IMAs. First, IMA's may be adopted to achieve cost-efficiency: to create a more optimal scale of operations for fiscal purposes and administrative efficiency. Second, they can be formed to use citizen board members more capably and efficiently. Third, they can be used to effect control of natural resource or economic market areas that extend beyond municipal borders. Fourth, they may be used to limit the negative impact of projects and activities approved by neighboring municipalities. Fifth, municipalities entering into IMA's may qualify for incentives and funding that would not otherwise be available.

Municipalities in rural and sparsely settled regions of the state have used this authority to establish cost-effective and practical approaches to zoning and planning administration. In these instances, volunteers to serve on local administrative bodies are limited and the number of matters coming before local boards are relatively few. There are many examples of communities in such settings establishing joint planning and joint zoning boards and hiring joint land use enforcement officers.

In more densely settled or rapidly developing regions, some municipalities and counties are using IMA's to manage their common waterfront areas, to coordinate their efforts to conserve shared watershed and wetlands areas, to exert control over a larger economic market, and to achieve administrative and fiscal efficiency.

Local officials are often frustrated by the land use actions of their neighbors. Sometimes this is due to the negative intermunicipal impact of a particular development project. Other times it may be because one municipality, acting alone, cannot achieve its objectives. Economic development activities in one community, for example, cannot reverse negative trends in the larger economic market area. Parallel action among localities in the entire market area may be required for any noticeable effect to be had. One community, for example, cannot create enough supply to meet the regional demand for affordable housing. Efforts in one community to protect natural resource areas that are shared with adjacent municipalities frequently do not achieve resource preservation without compatible efforts in all the communities.

Economic development, housing demand, and resource protection are but three examples of issues that often require joint action to be effective. When communities are confronted with such challenges, intermunicipal agreements offer them an opportunity to develop mutually compatible land use plans, regulations, and enforcement programs to accomplish together what they cannot achieve alone.

The New York State Legislature has made it abundantly clear that towns, villages, cities, and counties have extensive authority and great flexibility to

cooperate in the adoption and enforcement of their land use plans and regulations.

In 1960, the General Municipal Law was amended to give all municipal corporations, including towns, villages, cities, and counties, the authority to enter into intermunicipal agreements for the joint performance of their respective functions. In 1992, provisions were added to the Town, Village, and General City Law to encourage intermunicipal cooperation regarding land use planning and regulation. Finally, in 1993, the General Municipal Law and the Town, Village, and General City Law were amended to make it clear that local governments may enter into cooperative agreements with county governments, allowing counties to assist localities with the preparation of comprehensive plans and land use regulations, and with the administration and enforcement of local land use plans and regulations.

Once the municipalities involved reach an agreement to cooperate on a land use issue, the legal process for proceeding is relatively straightforward. First, the IMA must be adopted by a majority vote of the legislative bodies of each participating municipality. Then the IMA must be carried out according to its terms.

Getting started often presents a stumbling block for interested municipalities. The first step in the process is to determine what land use issues have intermunicipal implications that two or more communities are willing to handle compatibly. Some communities use this step in the process to engage their citizens in the development of an intermunicipal vision for their area and in the development of a clear idea of how each community can help accomplish that vision. The next step is to form an intermunicipal committee or task force to look into the issues identified and determine whether it is practical to develop an intermunicipal strategy to resolve them. Cooperating municipalities may establish a formal "intergovernmental relations council" for this purpose. Such councils may be funded through local revenues.

Once such an approach is deemed potentially fruitful, the committee must develop the details of the agreement that will eventually be drafted by the attorneys for the municipalities and presented to the legislatures for their consideration. Where there are controversial matters to be resolved in this process, it may be helpful to retain an independent mediator to facilitate the resolution of the issues among the members of the intermunicipal committee.

The terms that should be contained in an IMA include, among others:

- The responsibilities of each municipality with respect to the adoption or amendment of local regulations.
- The commitment of resources to implement or enforce those regulations.
- The hiring and termination of joint personnel.

- The detailing of their responsibilities and how their time and payment will be divided.
- Insurance.
- Dispute resolution.
- The duration, monitoring, review, amendment, extension, and termination of the agreement.

See Starting Ground, A Local Land Use Leader's Guide to Intermunicipal Land Use Cooperation for more information regarding Intermunicipal Agreements.

MEETING HOUSING NEEDS

Local housing initiatives can aim to serve any income or age group that is priced out of the local market and may take a variety of forms. Localities may wish to encourage or assist either rental housing or housing that is for sale. Municipally encouraged or assisted affordable housing may be multifamily townhouses, garden apartments, attached low-rise units, single-family modular units, assisted living housing for seniors, accessory apartments or any other housing type that can be constructed affordably. Regardless of the type of housing encouraged, communities seek to provide housing that is accessible to groups that are not able to afford to live in the available housing stock.

Affordable Housing: What's in a Name?

What does "affordable housing" mean? To some, the term is defined by past experience where affordable housing meant mediocre architecture, high-rise buildings, and crime and litter-ridden neighborhoods. Some government subsidy programs define the term as housing affordable to households whose incomes do not exceed 50% or 80% of area median income. This implies that affordable housing is government-subsidized housing, defined by household income and regulated by a distant bureaucracy. Others ask, since all the housing that is being built in their community is selling to someone, "isn't it all affordable?"

From a community planning perspective there is no fixed definition of affordable housing. Part of master planning is to determine who should live in the community. Does the community, for example, want young people who have grown up there and are forming households to continue to live there? Or seniors who have lived in the community all their lives and must now sell their homes and live on limited income? Or those who volunteer as firefighters, or teachers in the schools, or town employees and others who work locally? What about the aging parents of local residents? The question becomes whether there is housing stock in the community designed for and affordable to these groups. If the answer is no, then affordable housing for this community means housing that is affordable to the people who are "housed out" but who are needed to create the kind of community its residents would like to have.

Some community leaders think of this as "accessible housing." By this they mean housing that is accessible economically and structurally to groups that the community wants to include but who are housed out by the cost and type of housing currently available. Once the term and the people are defined, then planning continues by selecting strategies available to communities to create this accessible housing.

It is considered an implied power of local governments to exercise their zoning authority in a way that encourages the provision of affordable housing. In addition, a state statute specifically authorizes cities, towns, and villages to provide zoning incentives, such as additional development density or waivers of zoning requirements, to developers in exchange for the provision of affordable housing. Both the New York State Private Housing Finance Law and the Public Housing Law authorize localities to subsidize and facilitate the provision of low-, moderate-, and middle-income housing in a variety of ways including the provision of land, operating subsidies, mortgage financing, and tax exemption.



What is Affordable Housing?

- No standard definition of affordable housing to direct or bind a municipality.
- Local affordable housing initiatives can serve any income group that is priced out of the local housing market.

When local zoning ordinances prevent non-affluent households from living in the community, those ordinances are called *exclusionary zoning* and can be declared unconstitutional by the courts. Zoning ordinances and other municipal actions that are aimed at providing housing for persons of modest income are called *inclusionary zoning*. State statutes provide municipalities with a variety of mechanisms that can be used to encourage and provide desired affordable housing.

Exclusionary Zoning

In New York, municipalities may not exclude from their residential zoning districts types of accommodations, such as multifamily housing, that generally are more affordable than single-family homes on individual lots. The legal principal is that since localities get their power to zone from the state, they may not exercise that power in a way that excludes those citizens in search of housing. Developers are given standing to challenge zoning ordinances that exclude more affordable types of housing since their rights to provide housing cannot realistically be separated from the rights of nonresidents who need housing. A locality that has been found zoned in an exclusionary fashion can be required by the court to amend its zoning ordinance to accommodate more affordable types of housing. This is one of the few instances in New York when the courts will issue a writ of mandamus to a legislative body – a court order that directs a local legislature to take a particular action such as rezoning to accommodate a specific amount of affordable housing.

Inclusionary Zoning

State statutes in New York State encourage local governments to adopt inclusionary programs regarding affordable housing. Inclusionary zoning is achieved when a municipality exercises its zoning authority to allow for the provision of multifamily and other more affordable housing types. Such zoning ordinances permit the construction of accessory apartments, townhouses,

factory-constructed and modular homes, and garden apartments, just to name a few. Municipalities may use incentives to encourage developers to provide affordable housing.

State statutes encourage local governments to adopt inclusionary programs regarding affordable housing. Localities have specific authority to provide zoning incentives, such as additional development density, to encourage private developers to set aside a percentage of residential units in a proposed development for affordable housing. Municipalities may abate local taxes, provide mortgage financing, acquire and dispose of property, and subsidize and provide infrastructure for affordable housing built by private and non-profit corporations organized under state housing laws. Cities, towns, and villages are authorized to establish municipal housing authorities that can issue bonds and make land available, provide infrastructure, and subsidize the costs of operating the projects of their municipal housing authorities. Another method localities use to create inclusionary communities is to require housing developers to make a percentage of houses built in a multifamily or overlay zone available for lower- or middle-income occupancy.

Purpose of Meeting Housing Needs

The purpose of meeting housing needs is to provide housing for households that the community wishes to accommodate to create a more efficient, workable, and equitable community. Local governments are encouraged to consider regional housing needs in their comprehensive plans and to respond to the present and future housing needs of their current residents. The comprehensive planning studies of the community may identify a particular housing need for senior citizens, young families, or other special population group.

Local governments in New York have used their zoning authority to encourage the development of housing for all types of households: senior citizens, middle-income families, homeless families, employees of the town, volunteer firemen, farmworkers, and first-time homebuyers. Another purpose of providing affordable housing is to avoid costly litigation attacking the community for exclusionary zoning practices that can result in court orders to rezone private land to accommodate a developer's affordable housing proposal.

But can localities ensure that housing will remain affordable?

The answer is yes! When a developer has agreed to provide affordable housing, a building permit will not be issued until a deed restriction has been filed with the land records office that requires the sale or rental of the housing to income-eligible households. These deed restrictions allow modest profit on re-sale or limited rent increases, within established limits. Local governments can maintain a list of income-eligible households and the deed restriction can provide that affordable housing units must be offered first to households on this list.

Why Should A Community Meet Its Housing Needs

When local legislators discover that municipal employees or volunteers, senior citizens, young families, or other groups are having trouble locating affordable housing in the community, they may wish to take some action to encourage its development. Localities may want teachers, municipal employees, police officers, and fire fighters to live in the community for a variety of reasons related to the public interest. In high cost areas, older residents who have lived in the community for decades and young adults who grew up in the community may not be able to locate affordable housing there and may be forced to move elsewhere.

The failure to zone to meet housing needs hinders the economic viability of community. Communities that do not contain an adequate stock of affordable housing risk excluding workers that are necessary for the region's economic development. A community may find it difficult to encourage various types of workers to take jobs in the area and consequently suffer from a depleted hiring pool simply because housing prices are too high. Businesses can suffer from a lack of workers or be required to pay higher salaries to subsidize commuting costs. Talented and qualified teachers, policemen, firemen, and other blue collar workers are forced to look elsewhere for employment or housing if too great a disparity exists between salaries earned and cost of housing.

Employees Whose Households Cannot Afford Housing in Westchester	
Personnel Manager	\$63,920
Municipal Engineer	\$63,000
Computer Technician	\$62,500
Firefighter	\$53,506
Teacher	\$45,000
Police Officer	\$40,398
Paralegal	\$39,989
Librarian	\$38,000
Court Clerk	\$31,200
Data Processor	\$29,900
Bank Teller	\$19,000
Pharmacy Technician	\$16,800
<i>Remarkably, because of Westchester's extraordinary affluence, a family of four with a total household income equal to the above salaries would qualify as "low income" (80% of median) and be eligible for federally subsidized affordable housing.</i>	

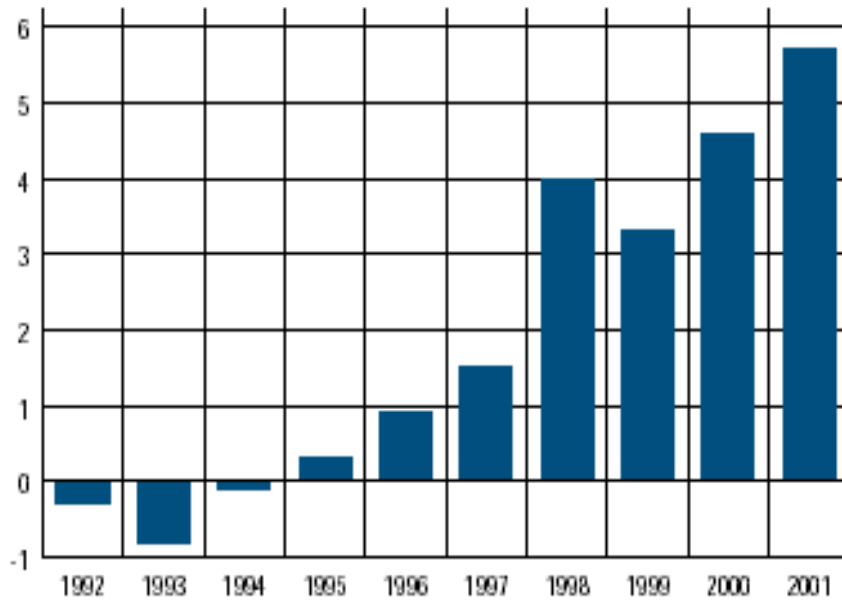
When communities zone for commercial, retail or industrial development but not for housing, workers seek homes in outlying areas where housing demand is less and prices lower. This is the principal cause of the long and costly commutes by car that so many New York workers make each day. Also workers forced to commute long distances may suffer from increased stress resulting from extended hours away from their families and time spent in traffic gridlock with others similarly situated. Obviously such pressures affect worker productivity.

When workers are forced to commute long distances to their workplaces, traffic congestion dramatically increases. Scarce tax revenues must be used to pay for highway maintenance and the construction of new roads. Commuters are forced to purchase more gasoline, pay more tolls, and spend more money to maintain their automobiles due to the additional wear and tear they incur.

In air pollution terms, longer commutes mean more vehicle miles traveled; auto emissions are the principal cause of air quality degradation. Where air pollution exceeds federal standards, larger businesses are again penalized; they are required by the Clean Air Act to subsidize car-pooling arrangements and other means of reducing the number of job-related car trips.

Home Prices Continue to Rise Despite the Economic Downturn

Inflation-adjusted Annual Percent Change



Source: Freddie Mac Conventional Mortgage Home Price Index adjusted by CPI-UR.

- "State of the Nation's Housing 2002" Joint Center of Housing Studies at Harvard.
www.jchs.harvard.edu

Using Traditional Land Use Powers to Meet Housing Needs

Once local leaders understand that there is a need to meet unfilled housing needs, it is sometimes hard for them to understand that local governments can take effective action using their delegated land use authority to respond. There are a number of land use tools that can be used to meet local housing needs. These include traditional techniques such as amending the comprehensive plan and adopting zoning provisions that encourage or require developers to include housing that meets local needs. In a later chapter, this book discusses overlay zoning, floating zoning, cluster development, ECHO housing, accessory apartments, and other more innovative techniques.

To illustrate how familiar tools are being used by New York local governments to meet housing needs, the remainder of this chapter sets forth examples of comprehensive plan language that sets the stage for zoning changes that create affordable housing and a set of zoning provisions from other communities that actually require developers to provide affordable housing.

Sample Zoning Technique to Create Affordable Housing

Incentive Zoning

New York law allows local legislatures to provide a system of zoning incentives to land developers in exchange for community benefits provided by those developers. By adopting incentive zoning, the legislature leaves existing zoning provisions in place but permits more intensive development of the land in exchange for certain community benefits. Affordable housing is considered a community benefit, and incentive zoning can be used to encourage such development.

The purpose of incentive zoning is to advance the locality's physical, cultural, and social objectives, in accordance with the comprehensive plan, by having developers provide affordable housing or other community benefits in exchange for zoning incentives. The incentives that may be offered to developers include an increase in the allowed density of development, adjustments to the height, open space, use, or other requirements of the underlying zoning law. Because economic incentives are used to encourage developers to provide needed housing and because such systems are voluntary, they tend not to be opposed by developers who often challenge impact fees and mitigation requirements where no benefits are offered to them.

Incentive zoning has been used to induce land developers to provide housing for senior citizens, local workers, or low- and moderate-income citizens. The developer may be allowed to build a greater number of homes than is otherwise permitted by the zoning law and to sell or rent some of these "bonus units" at market value. In return, the developer is required to use some of that profit to reduce the cost of the affordably constructed residential units. These units must then be rented or sold to persons or families of low or modest income, or to senior citizens.

If the desired housing cannot feasibly or practically be provided directly by an individual developer, the system can provide for developers to make cash payments to the locality. If an in lieu of fee is paid, the sums must be held in a trust fund to be used exclusively for the provision of affordable housing.

Implementing Incentive Zoning

The system of zoning incentives must be adopted by the local legislative body: the town board, village board of trustees, or the city council. Incentive zoning provisions are adopted in the same manner as other zoning ordinances, laws, or amendments. There must be public notice and hearings, conformance with the comprehensive plan, and compliance with environmental review. A number of additional requirements must be met:

- Each existing zoning district in which incentives can be awarded must be designated and incorporated in any zoning map adopted in conjunction with the system.
- The legislature must find that each of these districts has the capacity to absorb the additional development authorized by the incentives. Fire, transportation, water, sewer, waste disposal, and community facilities and services must be found to be adequate.
- The legislature must find that the development allowed by the zoning incentives will have no significant environmentally damaging consequences, that each affected district contains adequate environmental quality, and that the additional development provided for is compatible with the development otherwise permitted under the underlying zoning ordinance.
- Where the legislature finds that the development allowed by the zoning incentives may have a significant effect on the environment, it may prepare a generic environmental impact statement (GEIS) and provide that a proportionate share of the cost of the GEIS shall be paid by each applicant for incentives under the system. This may allow significant streamlining of projects that receive incentives, if they conform with the GEIS and raise no significant environmental impacts not adequately covered by it. In such a case, projects may not be required to go through the time-consuming process of preparing a full environmental impact statement.
- A procedure for applying the zoning incentives to specific parcels must be established by the local legislature, including:
 - The specific incentives that may be granted to an applicant.
 - The community benefits that must be provided by an applicant, such as the type, number, and cost of affordable housing.
 - The standards for approving an application for incentives, including how to assess that the benefits received are adequate given the incentives granted.
 - The requirements for submitting an application for incentives, and the process for reviewing, approving, and imposing conditions on applications for incentives.
 - Provisions for public notice and hearing prior to the award of incentives, where a hearing is required by the law or ordinance under which the zoning incentive system was adopted.

- Provisions for the receipt of cash in lieu of the direct provision by the developer of the benefits, where the legislature determines that such benefits are not immediately feasible or otherwise practical. In such an instance, the legislature must establish a trust fund into which all cash payments are deposited which must be used exclusively for affordable housing.

Types of Incentives

Density Bonuses: Municipalities are encouraged and authorized to provide various incentives to developers in exchange for the provision of affordable housing. Density bonuses allow local governments to increase the permissible population density permitted under local zoning law. Developers may therefore construct more individual units on a given parcel with the requirement that a specific number remain affordable. The additional units provide the developer an internal subsidy: an increased return on his or her investment, while the community benefits from the provision of affordable housing.

Internal Subsidy

- Developer allowed to build greater number of homes than permitted.
- In return, developer required to use profit to reduce sale or rental costs of some residential units.
- Affordable homes must be rented or sold to families of low or moderate income, local workers, or senior citizens.

Waiver of fees/Reimbursement of fees: Municipalities can also waive or reimburse various development fees in order to encourage the provision of affordable housing. This technique offers developers some relief from the numerous fees required of any proposed project during the approval stage. This may encourage a tentative developer to engage an affordable housing project or may simply allow the project to make economic sense.

Fast track review: Similarly, municipalities can streamline affordable housing proposals to encourage such development. Many important projects become bogged down during the lengthy approval process. This often has the effect of discouraging the construction of much needed multifamily housing, and conversely, steers developers towards other, less administratively cumbersome projects. Also, a community with an urgent need for affordable housing cannot wait years for a project's completion. Fast Track Review helps to avoid these problems by saving developers valuable time and money, and by allowing localities to achieve its housing benefit more promptly. The City of Yonkers has recently used this technique successfully.

Waiver of requirements: The waiver of various requirements also serves as an incentive from the provision of affordable housing. Local governments may waive area, set back, lot line, height, open space or other regulations required

under local zoning law if the developer agrees to keep a specific number of units affordable.

SEQRA Mitigation Techniques: Even the State Environmental Quality Review Act, which was enacted to protect the environment, has features that can be used to encourage affordable housing. By preparing a generic environmental impact statement on the adoption of an incentive zoning program, for example, subsequent project proposals whose environmental impacts were included in the generic study can be exempted from further environmental review. This can streamline the review and approval of proposed development projects in such districts, providing another important incentive to developers to buy and improve land where development is favored by local policy.

Case Study

Town of Lewisboro Development Density

Local law in Lewisboro provides that the Planning Board may authorize an increase in permitted density by not more than 40% if the applicant constructs at least 1/3 of the additional density units as middle-income dwelling units. The Planning Board must base its determination of the appropriate number of additional density units upon consideration of the locational and environmental suitability of the specific site and the proposed development design to accommodate such an increased density.

Incentive Zoning for Affordable Housing

State Statutes Authorizing Localities to Adopt Incentive Zoning

Town Law § 261-b, General City Law § 81-d, Village Law § 7-703

1. Definitions.

As used in this section:

- (a) "Incentives or bonuses" shall mean adjustments to the population density, area, height, open space, use, or other provisions of a zoning ordinance or local law for a specific purpose authorized by the town board.
- (b) "Community benefits or amenities" shall mean open space, housing for persons of low or moderate income, parks, elder care, day care or other specific physical, social or cultural amenities, or cash in lieu thereof, of benefit to the residents of the community authorized by the town board.
- (c) "Incentive zoning" shall mean the system by which specific incentives or bonuses are granted, pursuant to this section, on condition that specific physical, social or cultural benefits or amenities would inure to the community.

2. Authority and Purposes.

In addition to existing powers and authorities to regulate by planning and zoning, including authorization to provide for the granting of incentives, or bonuses pursuant to other enabling law, a town board is hereby empowered, as part of a zoning ordinance or local law adopted pursuant to other enabling law, to provide for a system of zoning incentives, or bonuses, as the town board deems necessary and appropriate consistent with the purposes and conditions set forth in this section. The purpose of the system of incentive, or bonus, zoning shall be to advance the town's specific physical, cultural and social policies in accordance with the town's comprehensive plan and in coordination with other community planning mechanisms or land use techniques. The system of zoning incentives or bonuses shall be in accordance with a comprehensive plan within the meaning of section two hundred sixty-three of this article.

Additional Housing Techniques to Create Affordable Housing

- Overlay Zoning
- Cluster Development
- Floating Zones
- Planned Unit Development
- Senior Citizen Housing Zoning
- Accessory Apartments
- ECHO Housing

See [Starting Ground, A Local Leader's Guide to Meeting Housing Needs](#) for more information regarding these techniques that create affordable housing.

REGULATORY TAKINGS

Occasionally, courts will find that the impact of a regulation on private property rights is so burdensome that it violates the constitutional guarantee that property shall not be taken for a public use without just compensation. What courts do not allow is the singling out of a few property owners to bear a burden that, in the interest of fairness and justice, the public as a whole should bear. In select situations, a land use regulation can be invalidated as a “regulatory taking” and compensation can be awarded to the regulated property owner for the damages caused.

Regulatory takings are sometimes referred to as inverse condemnations or de facto takings. Both these terms reference the government’s power of eminent domain, the authority to condemn title to land needed for a public purpose. Under both the United States and New York State Constitutions, such takings are allowed but the validity of the public purpose must be demonstrated and just compensation must be paid to the owner of the condemned property. When a government regulation has the practical effect of a public condemnation, the owner may allege that the regulation is a regulatory taking, a de facto taking, or the inverse condemnation of the affected parcel.

When land use regulations, such as zoning provisions, are challenged as regulatory takings, the courts presume that they are constitutional. This means that challengers must carry a heavy burden of proof that the regulations violate the constitutional guarantee; all reasonable doubts are resolved in favor of the regulator. To carry their burden of proof, property owners must produce dollars and cents evidence that all but a bare residue of the property’s value has been destroyed by the regulation.

Two tests are applied by courts to determine whether a regulation is a taking. First, does it “substantially advance a legitimate state interest.” Second, does it “deny the owner economically viable use of his land”? If the challenger can bear the heavy burden of proving that either of these standards is violated, a regulatory takings claim may succeed.

Courts take a more aggressive approach where a condition imposed on a land use approval gives the public a right to enter the landowner’s property. In this situation, it is the public agency that must satisfy the court that there is sufficient relationship between the impact of the proposed development and the public benefit achieved by the condition imposed.

Broad authority to regulate land use is delegated to local governments through enabling acts that authorize them to enact zoning regulations, create zoning districts, adopt comprehensive plans, and pass laws to protect the physical environment. This broad grant of authority carries with it the implied authority to choose the means necessary to accomplish the purposes of conserving the

value of buildings and property and encouraging the most appropriate use of the land throughout the community. Specific authority has been granted to local governments to regulate a variety of aspects of land use, including historic districts, aesthetic impacts building design, wetlands, and environmental impacts of land development.

Land use regulations are enacted under the police power delegated by the state to the local legislature. The police power is the authority of government to regulate private affairs to protect the public health, safety, welfare, and morals. The United States Supreme Court has called police power regulation “one of the most essential powers of government, one that is least limitable. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.”

Because of the importance of police power regulations and the doctrine of separation of powers, the courts have adopted rules of self-restraint when confronted with a challenge to a land use regulation. These rules presume the constitutionality of the regulation, impose a heavy burden of proof on the challenger, resolve doubts in favor of the regulator, and, in most cases, result in a low level of judicial scrutiny.

The authority to regulate property is not without its limitations, however. The courts review regulations to determine whether a few property owners are being singled out to bear a burden that, in fairness, should be borne by the public as a whole. When regulations force landowners to allow the public access to their private lands, courts use stricter standards to review the validity of the regulations. If the effect of a regulation is to leave the owner with only a bare residue of the parcel’s value, courts require a showing that such a limit on the land’s use was inherent in its title or in the background principles of property law in the state.

Broadly Applicable Regulations: The police power allows local governments to distribute the burdens and benefits of generally applicable laws, such as zoning, among the owners of property in the community for the benefit of the public. Zoning provisions, such as use restrictions, height limitations, and setback requirements, are said to benefit and burden all property owners in a roughly equal manner. While a parcel’s use is limited by these restrictions, its value is enhanced by similar restrictions on all other properties in the community.

Regulations that are broadly applicable in this way are very seldom held by the courts to be regulatory takings. If the owner can carry the heavy burden of proving that, as applied to his property, such regulations leave no economically viable use of the land, the court may declare it to be a regulatory taking. The United States Supreme Court mandated the rezoning of one plaintiff’s property when he was able to prove through reliable experts that there was no market for the residential use of his land that had been zoned exclusively for residential use

in a developed industrial area. As a matter of practice in most localities, owners who find themselves in this situation would be granted a use variance by the zoning board of appeals, if the problem is somewhat unique to the owner.

Particularized Regulations: Sometimes the burden of police power regulations falls on the owners of a relatively few parcels of land in the community. This happens, for example, when the land use regulation applies only to historic properties or to land that contains freshwater or tidal wetlands, steep slopes, or artifacts. While relatively few landowners in the community are burdened, the public as a whole is benefited by the regulation.

Although the general rules of judicial restraint apply with respect to these regulations, the judicial analysis of such regulations may be more elaborate. In these instances, the court will examine the character of the regulation, the public purpose it serves, the legitimate investment-backed expectations of the property owner, and the extent to which the regulation distributes its burdens as evenly and fairly as possible. The judicial tests, and the deference shown by the court to the regulator, are the same as with generally applicable regulations. Applying these standards, New York courts routinely uphold complex, special purpose regulations like wetland controls and historic district restrictions as long as they permit some economically viable use of the land.

Forced Conveyances: When the regulation requires a property owner to allow public access to his land, the courts apply a heightened degree of judicial scrutiny. Such regulations often require the property owner to convey an easement to the community allowing public access to the land as a condition of receiving the approval of a local agency.

The right to exclude others from one's property is considered a fundamental right of land ownership. When a land use condition implicates that right, it is not necessarily a taking, but the court senses that the basic guarantee of the Constitution may be violated and applies tougher judicial tests of validity. In these instances, the regulator must show that there is an essential nexus between the condition imposed and the public purpose that is to be achieved by the condition. Courts also look for specialized studies showing that public benefits obtained by the condition imposed on the property are roughly proportional to the adverse impacts of the development on the community.

Where a property owner was required to grant an easement to the community for a bicycle path as a condition for the approval of a site plan application, the court set aside the condition because the city had made no individualized determination – conducted no separate study – to determine the extent to which the condition would mitigate the specific project's contribution to traffic congestion.

Total Takings: Courts also apply a heightened degree of scrutiny when reviewing a regulation that allows an owner no viable use of his property. Such regulations may be said to constitute a “total taking” and to implicate the constitutional guarantee that property will not be confiscated for public use without just compensation. The United States Supreme Court has said that in the “extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life.” In such cases, there is a “heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”

Unless the regulator can show that the use prohibited by the regulation would not be allowed under nuisance law or “background principles of property law,” or is inherent in the title to the land, a regulation that prohibits all beneficial use will be considered a regulatory taking.

Preexisting Regulations: New York courts have held that when an individual purchases property that is subject to land use regulations that affect its value, the purchaser may not challenge the regulation as a taking of its property rights. Such a regulation, the courts say, forms part of the title to the property as a preexisting rule of state law. While the title to the regulated parcel may be conveyed by the landowner, the purchaser’s title is necessarily limited to the rights to use the property under the law at the time of the purchase. This rule does not, of course, affect a purchaser’s right to challenge the constitutionality of a preexisting regulation on some other ground, such as equal protection or ultra vires.

AVOIDING THE REGULATORY TAKINGS CHALLENGE

There are a number of precautions that local governments can take to avoid successful regulatory takings challenges:

- Adopt a comprehensive plan, keep it up to date, and back it up by studies. Be sure that local land use regulations conform to the plan. A regulation that is adopted specifically to further an objective of a comprehensive plan is likely to be found by a court to substantially advance a legitimate public interest.
- When adopting land use regulations, be sure that all similarly situated properties are similarly regulated. A regulation that limits the use of all properties that are historic or that contain wetlands of a certain type will likely be found to distribute the benefits and burdens of the regulation as fairly and broadly as possible. Such regulations conform to the “principle of generality,” which puts courts at ease and tends to reduce fears that individual owners are being singled out.

- Where land use regulations might prevent all economically beneficial use of land owned by a particular individual, be sure that there is a readily available mechanism for the owner to prove that no reasonable use of the land is allowed and to obtain a hardship exemption from the strict application of the regulations. If the local government awards an exemption that allows some reasonable use of the property, an owner will not be able to claim that the regulatory regime destroys all but a bare residue of value.
- When government imposes conditions on the approval of development projects which require owners to allow public access to their properties, individual studies must be conducted to show that the condition is both necessary to mitigate the project's impact on the community and roughly proportionate to that impact.
- In New York, projects that are likely to have a substantial adverse impact on the environment are subjected to the requirement that an environmental impact statement be filed. When such studies are done carefully and conditions are later imposed by a local agency to mitigate demonstrated adverse impacts, judicial standards applicable to the review of regulatory takings challenges are likely to be met. This is particularly so if the environmental review process is conducted correctly, because conditions imposed to mitigate environmental impacts are to be consistent with social, economic, and other essential considerations. Properly conducted environmental review studies are likely to meet the essential nexus and rough proportionality tests applied in certain types of regulatory takings challenges.
- Instead of greatly limiting land uses through regulations, the community should explore the many innovative tools and techniques that local governments are encouraged to use under statutes adopted by the state legislature. Where the public objective can be accomplished, for example, by clustering development, by transferring development rights, by incentive zoning, or by purchasing conservation easements, burdens on landowners can be minimized and the chances of facing regulatory takings challenges reduced.

Courts have held that property owners who win regulatory takings suits may be awarded monetary damages for the injury done to them from the time the regulation was imposed until it is invalidated by the court. The risk of suffering a damage claim has made regulators more cautious in imposing restraints and conditions on the use of property.

The justices of the United States Supreme Court have warned against generalizing about when a regulatory taking occurs. They have stated that there is no "set formula" for determining when a regulation has gone so far as to constitute a taking and that they prefer to engage in ad hoc, factual inquiries to make such determinations. It is incorrect to say, as a general matter, for

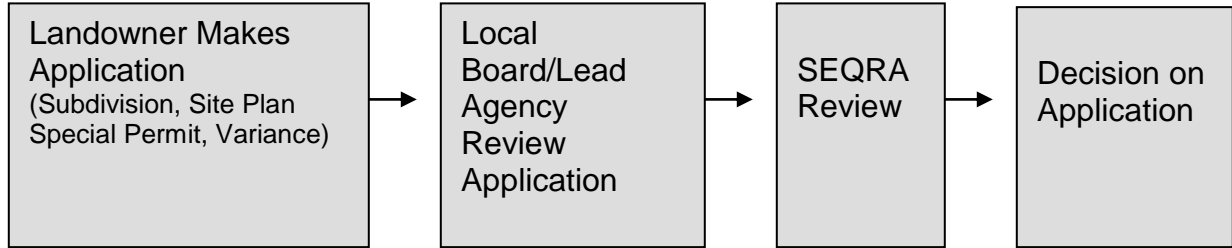
example, that a land use condition that imposes a public access easement on the subject land is a regulatory taking. The principal United States Supreme Court case striking down a challenged public access easement held that a different public access easement – one that bore an essential nexus to the public objective to be achieved – would have been approved.

Similarly, it is incorrect to state that a regulation prohibiting all beneficial uses of the land is always a taking. If the regulator can show that background principles of property law, such as nuisance principles, would prohibit the use, then the regulation will not be held to be a taking. In New York, if the court finds that the regulation existed prior to the plaintiff's purchase of the affected property, no taking will be found.

For most land use regulations, the courts defer greatly to local determinations and seldom find regulations to be takings. It is where individual property owners are forced to allow the public on the land, where all uses are prohibited, or where single property owners are forced to bear particular public burdens that the courts will take a more careful look at the regulation. They inquire whether the regulation truly accomplishes a legitimate public purpose or whether the total prohibition of use is justified, and they shift the burden of proving the matter to the regulator.

SEQRA

The State Environmental Quality Review Act (SEQRA) applies to all agencies and instrumentalities of the state, including local agencies such as legislatures, planning boards, and zoning boards of appeal. Local agency decisions on applications for site plan or subdivision approval or the issuance of variances and special permits must be preceded by an assessment of the environmental impact of the proposed project. The following chart illustrates the application process.



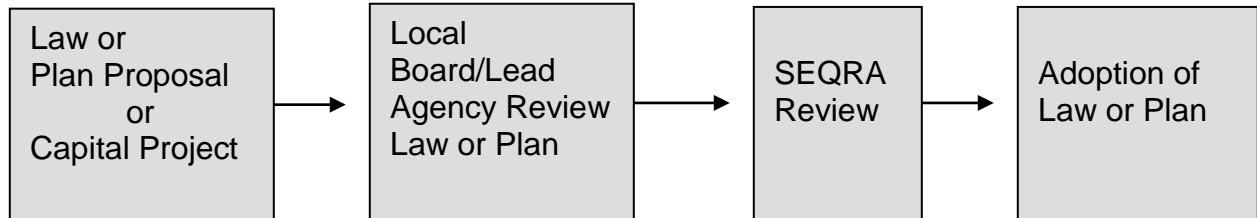
What Is the Lead Agency?

When a project application is submitted to a local land use agency, such as a planning board, that agency will often be designated the lead agency for the purpose of SEQRA. The SEQRA regulations define lead agency as the agency “principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required.” SEQRA Regulations §617.2(u).

What Are the SEQRA Regulations?

SEQRA is a New York statute (law) that became effective in 1975. The text of SEQRA is found in Article 8 of the New York Environmental Conservation Law. The SEQRA statute gives the Commissioner of the New York State Department of Environmental Conservation (DEC) authority to create regulations implementing the provisions of the statute. The SEQRA regulations provide local officials with guidelines to ensure compliance with SEQRA. The regulations are found in Part 617 of the New York Code of Rules and Regulations (6 N.Y.C.R.R. Part 617). Refer to Appendix C for the text of the SEQRA regulations. The regulations are referred to throughout this guidebook.

Similarly, the adoption of comprehensive plans and zoning ordinances, and their amendment, must be accompanied by a review of their impact on the environment. SEQRA also applies to proposed plans of local governments to build capital projects or to provide funding for projects of any kind.



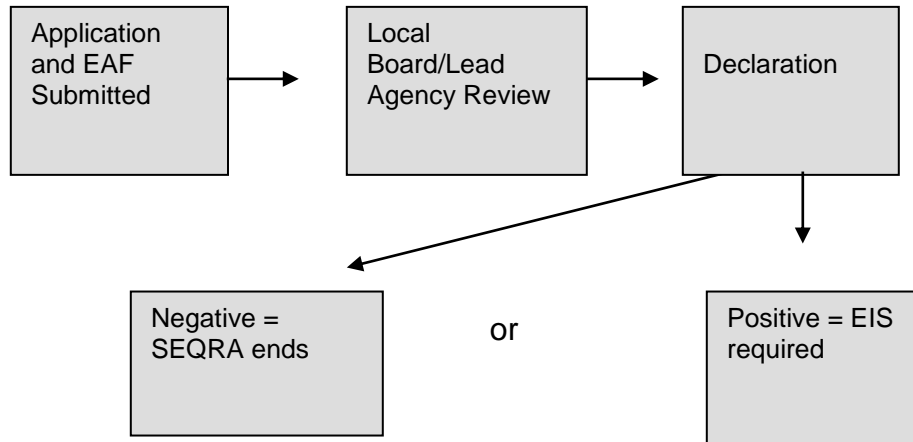
The essence of SEQRA is the requirement that the impact of all such local actions on the environment be considered at the earliest possible stage of the planning process and that local agencies act effectively to avoid any possible adverse environmental impacts.

What Actions Are Subject to Environmental Review?

The Regulations state that “actions” include:

- Projects or physical activities that may affect the environment by changing the use, appearance, or condition of any natural resource or structure that are directly undertaken by an agency, involve agency funding, or require new or modified approvals from an agency
- Agency planning and policy activities that may affect the environment and commit the agency to a definite course of future decisions
- The adoption of rules, regulations, and procedures, including local laws, codes, ordinances, executive orders, and resolutions, that may affect the environment
- Any combination of the above.

Because “action” is broadly defined, nearly all applications submitted by property owners for local land use approvals are subject to environmental review under SEQRA and must be accompanied by a completed Environmental Assessment Form (EAF). This form is used by the local board to determine whether the project will or will not have a substantial adverse impact on the environment. A positive declaration is issued when the lead agency determines that an action may have a significant adverse impact. A negative declaration is issued when the action will not have significant adverse impacts. If the board makes a negative declaration, no further environmental review is required.



Where it has been determined that a proposed project may have a significant adverse impact on the environment, the applicant must submit an Environmental Impact Statement (EIS) as part of an application for a local land use approval.

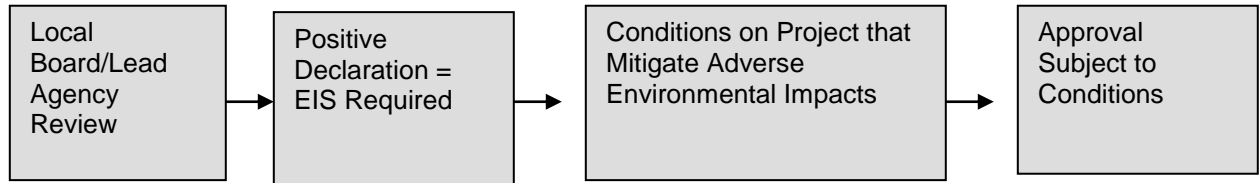
What Is an EIS?

The SEQRA regulations state that an EIS is a written “draft” or “final” document prepared in accordance with § 617.9 and § 617.10 of the regulations. An EIS provides a means for agencies, project sponsors, and the public to systematically consider significant adverse environmental impacts, alternatives, and mitigation. An EIS facilitates the weighing of social, economic, and environmental factors early in the planning and decision-making process. A draft EIS is the initial statement prepared by either the project sponsor or the lead agency and circulated for review and comment. An EIS may also be “generic,” in accordance with § 617.10 of the regulations; “supplemental,” in accordance with § 617.9(a)(7) of the regulations; or a “federal” document, in accordance with § 617.15 of the regulations.

The local reviewing agency must then take a number of prescribed steps to review the statement under SEQRA’s environmental standards. Until the Draft Environmental Impact Statement (DEIS) submitted by the applicant is deemed to be complete by the lead agency, the underlying land use application is not complete and the time periods applying to that approval process do not begin to run.

Once the DEIS is deemed complete, the public has an opportunity to comment on the proposed project. Then a Final Environmental Impact Statement (FEIS) is created, incorporating the public comments. The involved agencies review the FEIS to determine whether conditions must be imposed on the project. SEQRA

gives local land use agencies independent authority to impose conditions on land use approvals to mitigate the potential negative impacts of proposed projects on the environment. Approval of the project is subject to fulfillment of the imposed conditions.



How Far Must a Local Board Go in Imposing Conditions?

In *Jackson v. New York State Urban Development Corporation*, the petitioners challenged the approval of a Times Square development project, claiming that the FEIS failed to give sufficient attention to the impact of the project on the elderly citizens of the area or to adopt effective measures to mitigate the anticipated displacement of the elderly. The court held that the review was adequate and stated that dissatisfaction with an agency's proposed mitigation measures is not redressable by the courts so long as the measures selected have a rational basis in the record. SEQRA does not require an agency to impose every conceivable mitigation measure, or any particular one. Rather, SEQRA only requires mitigation to the maximum extent practicable consistent with social, economic, and other essential considerations without reliance on mitigation measures that the agency cannot itself guarantee in the future. The court stated that when reviewing a SEQRA determination, courts may review the agency procedures to determine whether they were lawful. Then the court may review the record to determine whether the agency took a "hard look" and made a "reasoned elaboration" of the basis for its decision. It is not the court's job to weigh the desirability of a mitigation measure or to second-guess an agency's decision.

Since the environment is defined very broadly, SEQRA extends local agency authority to impose conditions on land use approvals for the protection of any aspect of the environment. With regard both to these substantive conditions and to the procedures that proposals must follow, SEQRA amounts to a regulatory overlay on the process of reviewing and approving all other applications for land use approvals.

What Is the Environment?

The SEQRA regulations define the environment as: “The physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health.” SEQRA Regulations §. 617.2(l)

SEQRA gives local governments additional authority to study and adopt plans for areas of environmental significance. In certain instances, localities may designate critical environmental areas, conduct cumulative impact analyses, and prepare generic environmental impact statements. These tools for environmental review expand the techniques available to villages, towns, and cities to anticipate and review future land use impacts in a more comprehensive manner.

How Does SEQRA Enhance the Authority of Localities to Conduct More Comprehensive Reviews?

SEQRA authorizes local governments to:

- Designate Critical Environmental Areas
- Conduct Cumulative Environmental Impact Reviews of Related Projects
- Prepare Generic Environmental Impact Reviews

In enacting SEQRA, it was the intent of the legislature that “all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.” The statute also requires that “all agencies which regulate activities of individuals, corporations, and public agencies which are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage.” SEQRA contains both procedural and substantive requirements for these agencies to follow when discharging this function.

SEQRA's Statement of Purpose

The legislature enacted SEQRA "to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state." Environmental Conservation Law, § 8-0101

SEQRA attempts to "strike a balance between social and economic goals and concerns about the environment." SEQRA does not place protection of the environment above all else. Rather, SEQRA requires a "suitable balance" between environmental considerations and social and economic considerations.

Environmental Review

The statutory purposes of the State Environmental Quality Review Act are several. They include:

- To declare a state policy which will encourage productive and enjoyable harmony between man and his environment;
- To promote efforts that will prevent or eliminate damage to the environment and enhance human and community resources; and
- To enrich the understanding of the ecological systems, natural, human, and community resources important to the people of the state.

SEQRA declares that all state, county, and local agencies "are stewards of the air, water, land, and living resources" and "have an obligation to protect the environment for the use and enjoyment of this and all future generations." It contains both procedural and substantive requirements for these agencies to follow when discharging this function.

SEQRA CHECKLIST

The following is a checklist of the matters that a local lead agency must consider in complying with the provisions of SEQRA:

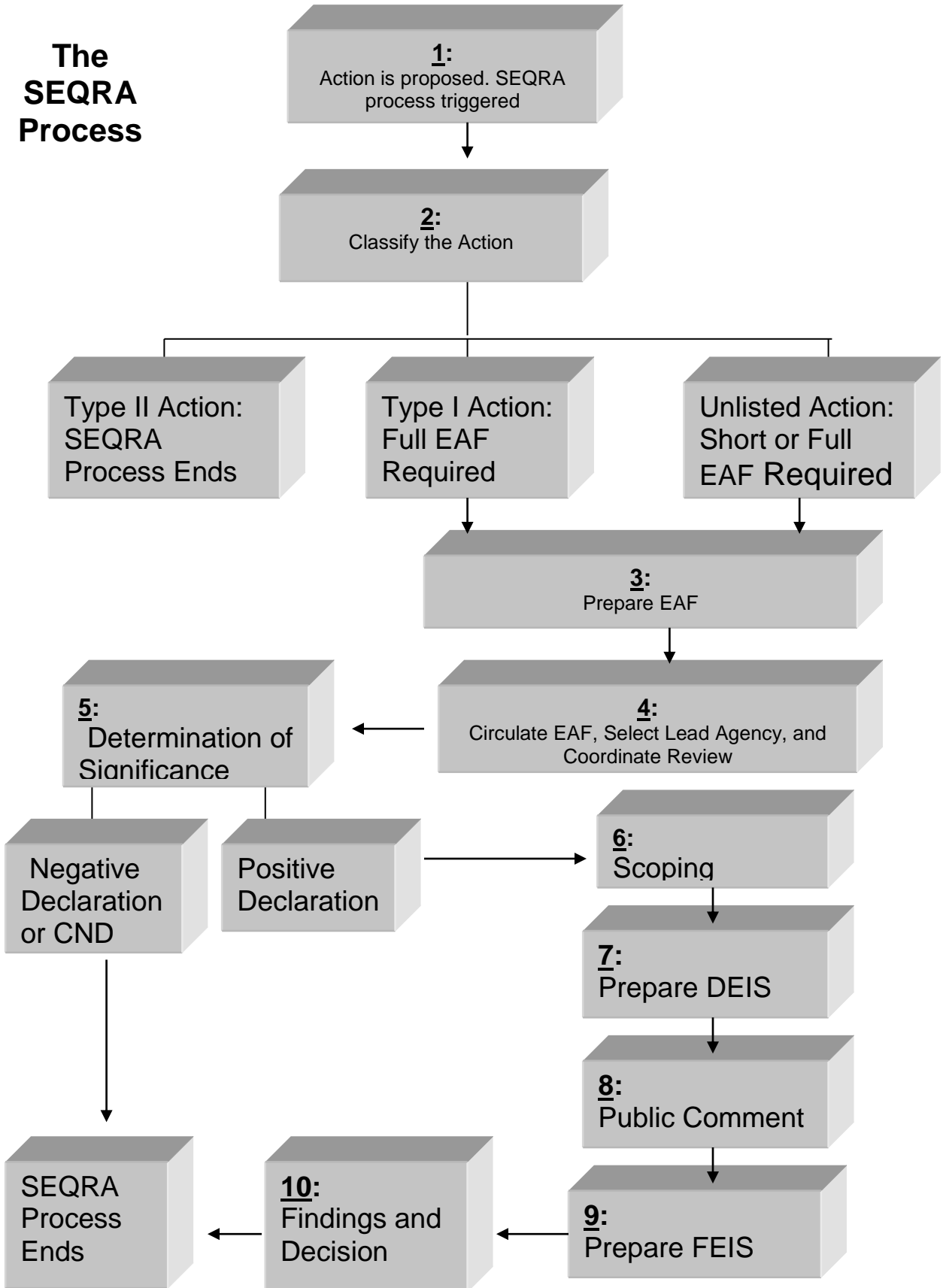
1. Is the land use project or proposal an “action” as defined by the law and the regulations?
2. Which agency is principally responsible for approving the action? (That agency is the lead agency and has the responsibilities listed here.)
3. What type of an action is it? The choices are Type I, Type II, or Unlisted.
4. If the action is a Type II action, no further environmental review is required.
5. If the action is a Type I or Unlisted Action, an assessment of the environmental impact of the action must be conducted.
6. Applicants for Type I and Unlisted Actions must submit an Environmental Assessment Form listing the potential environmental impacts of their projects or proposals.
7. If the project or proposal will not have a significant adverse environmental impact, then a negative declaration is issued and no further environmental review need be conducted. The lead agency, however, must take a “hard look” at the possible environmental impacts and set forth in writing a “reasoned elaboration” for its negative declaration.
8. If the project or proposal may have a significant adverse environmental impact, then a positive declaration must be issued and a Draft Environmental Impact Statement prepared.
9. The lead agency may require the preparation of a scope of the contents of the Environmental Impact Statement and may provide for public participation in its preparation.
10. The Environmental Impact Statement must consider and examine all relevant environmental impacts, identify possible conditions that can be imposed on the action to mitigate any adverse environmental impacts found and discuss any alternatives to the proposed action that would mitigate or avoid those impacts.

11. The applicant must submit a Draft Environmental Impact Statement and, when deemed complete, it is filed, along with a Notice of Completion that the lead agency issues.
12. If a public hearing on the Draft Environmental Impact Statement is to be held, a Notice of Hearing must be filed and published fourteen days prior to the hearing, which must be held within sixty days from the filing of the Notice of Completion. The regulations give the public a right to comment on the Draft and the lead agency a right to respond.
13. The lead agency must complete a Final Environmental Impact Statement within forty-five days of the close of the public hearing, if one is held, or within sixty days of the filing of the Draft Environmental Impact Statement, whichever occurs last.
14. The lead agency's findings statement, which is based on the Final Environmental Impact Statement, is adopted. This statement considers the impacts contained in the Environmental Impact Statement and balances them with social, economic, and other essential considerations, selects mitigation conditions or alternatives to minimize any negative impacts, and determines whether the action, so mitigated, should be approved.
15. A positive findings statement demonstrates that the project should be approved and that the action will avoid or minimize environmental impacts to the maximum extent possible. A negative findings statement documents the reasons why the action cannot be approved.

The chart on the next page illustrates the ten parts of the SEQRA process.

See Starting Ground, A Local Land Use Leader's Guide to Environmental Review of Land Use Projects for more information regarding SEQRA.

The SEQRA Process



CHAPTER SEVEN: CASE STUDIES

AQUIFER PROTECTION IN DOVER

Dover is located to the north of the vast New York City watershed which was subject to prohibitive regulations imposed by the city's Department of Environmental Protection, operating as the delegate of the State Department of Health under New York law. These regulations were designed to protect the city's water and to avoid an EPA order to filter its water at a cost of billions of dollars. One unintended consequence of these regulations was to drive heavy industries, mining, and deposition businesses to seek facilities just beyond the city's watershed. The inadvertent result was a spate of applications to the town of Dover for such activities. This all took place during the period between the adoption of the comprehensive plan and of the implementing regulations discussed here.

In April of 1999, an eight-year effort ended with amendments of Dover's traditional zoning ordinance to create four overlay districts. They were:

- 1) a Floodplain Overlay District covering FEMA-defined 100-year floodplains in streams and rivers;
- 2) a Stream Corridor Overlay District covering land within 150 feet of the mean high-water line of the Ten Mile River, Swamp River, and other streams;
- 3) an Aquifer Overlay District covering Dover's valley bottom aquifer system as well as the upland aquifer system; and
- 4) a Mixed Use Institutional Conversion Overlay District covering the former Harlem Valley Psychiatric Center.

The amendments also prohibited a variety of nuisance-type activities, several of which were specifically permitted by state regulations and endorsed by the DEC. These include heavy industry, soil mining, underground mining, asphalt plants, blasting and rock crushing facilities, hazardous waste and radioactive material disposal facilities, all classes of solid waste management facilities not owned or operated by the Town of Dover, and the use of certain reclamation material. The adoption of this highly sophisticated suite of provisions is significant because it was done by local officials in a relatively remote part of the metropolitan area.

Dover's effort began in 1991 with the formation of its master plan committee, a broadly representative group including members of local boards and citizen interest groups. Studies for the plan, which was adopted in 1993, documented the need to protect defined natural resources and detailed the dangers created by mining, quarrying, and heavy industries, particularly over the town's sole-source drinking water aquifer. The plan called for the use of thoughtful and innovative planning strategies including clustering, performance standards,

stormwater infiltration policies, aquifer protection zones, conservation easements, erosion control plans and development density limits based on groundwater features. Shortly after the plan's adoption, a developer proposed using a 100-acre existing mine for the deposition of up to 27,000 tons of construction and demolition (C&D) debris. The parcel, located in a medium-density residential district, contained an existing mine which was a preexisting nonconforming use under local zoning.

In May of 1998, the town began preparation of a new zoning code to implement the proposals in the master plan. It also determined that the C&D operation needed several local approvals under existing regulations. When the DEC determined in 1998 that the project required a new permit under its own regulations, the operator initiated applications for town and DEC approvals. While required hearings on these matters were being held, the town adopted its new zoning, which prohibited the proposed uses. In *Danny Fortune Co. v. Town of Dover*, No.99/4052 (N.Y.Sup.Ct.2000). Dover's zoning amendments were upheld against the applicant's claim that they were adopted in violation of state environmental review requirements and that, because of representations made by the ZBA and others, the town was prevented from denying its use under the doctrine of equitable estoppel.

PAWLING, NEW YORK

Local zoning can combat sprawl and foster development patterns that limit the land consumed by the housing and commercial development demanded by population growth and shifts. This is evident in reviewing the conventional techniques used in the Village of Pawling, New York, which are fairly typical of techniques used on the urban fringe, and an optional set of regulations adopted by the same village to encourage a "smarter" pattern of land use.

The Village of Pawling is located in the southeastern corner of Dutchess County on the Connecticut border about two hours north of New York City by train. Its 2,000 residents live in a community that is located in a vast watershed area known as the Great Swamp. The community is intersected by the north-south Route 22 transportation corridor and the Appalachian Trail which runs east and west along its northern border. In 1990, the village began a planning process that led to the adoption of a new comprehensive plan and a zoning ordinance that contains conventional zoning provisions, as well as incentives and other provisions enacted to concentrate future development in carefully designed, more compact neighborhoods. The differences between these conventional and innovative mechanisms represent two competing paradigms of local land use regulation. The village's conventional approach induces sprawl and illustrates the blueprint for development that the National Association of Home Builders says home builders typically are required to follow. Its innovative devices demonstrate how local governments can regulate land use in line with smart growth principles.

Use of Conventional Techniques to Encourage a “Smarter” Pattern of Land Use

Pawling’s village board of trustees enacted a zoning ordinance and map that separates the community into seven zoning districts: four residential, two business, and one industrial. Over 70% of the community is zoned R1, which allows single-family residences to be built on lots at least one acre in size. The central business district is zoned B1, which allows mixed-use commercial and residential development including multi-family housing. This district is surrounded by relatively small areas that are zoned for single-family residences on lots ranging in size from one-quarter acre to three-quarters of an acre. In B2 zones along the Route 22 corridor, warehouse, manufacturing, and other high-intensity uses are allowed along with more traditional commercial, office, and retail activities. There is one industrial zone, I1, located in the northern part of the village along the railroad tracks.

This conventional zoning pattern is supplemented by a conventional approach to regulating the subdivision of land for residential development. The village board has adopted a standard set of subdivision regulations that regulates subdivisions of more than three lots. Authority to review and approve residential subdivisions is delegated to the village planning board, as it is in most suburban and semi-rural towns and villages. The primary purposes of such subdivision regulations are to insure adequate provisions for vehicular circulation and adequate provision of utilities and other services, and to prevent damage or peril to surrounding properties.

The zoning provisions in the 70% of the village zoned R1 require minimum lot sizes of 40,000 square feet, minimum front lot widths of 150 feet, front yard depths of at least 50 feet, rear yards of 60 feet or more, and side yards totaling at least 70 feet in the aggregate. The subdivision regulations add further “design” standards for residential developments in the village. Collector roads must have 60 foot wide rights of way and 32 feet of pavement, and minor roads must have 50 foot rights of way and 20 feet of pavement. These regulations add that the side lines of each lot must be at right angles to the street lines.

These physical requirements give the planning board, the village board, and land developers very little leeway in subdivision design, lot layouts, or the placement of buildings on the lot. They create a pattern of land development remarkable in its sameness, leading many to call such developments “cookie cutter” subdivisions. Such regulations:

- Separate retail and commercial uses from homes so that distances are not walkable;
- Provide wide thoroughfares for the rapid movement of cars, which discourages pedestrian and bicycle movement;

- Create relatively high cost homes on expensive tracts of land; and
- Spread the development allowed over the entire terrain contained in a proposed subdivision.

In these conventional zoning and subdivision regulations can be seen the blueprint for sprawl. Smart growth advocates say that sprawl can be curtailed by concentrating needed new development into designated development districts. Obviously, the low density type of land development created by conventional zoning and subdivision regulations will not satisfy much of the new demand for housing and places to work and shop. A denser blueprint is needed, one that is more cost-effective and environmentally conserving, and that creates a favorable quality of life.

Use of Overlay Zone and Neo-Traditional Neighborhood Design (TND)

Neo-traditionalists and many smart growth advocates argue that a new type of land development pattern is needed, one that is more concentrated and that creates a quality of neighborhood in which consumers feel comfortable living. One such approach is to create mixed-use neighborhoods where housing types are varied, retail and commercial services are available within walking distance of residences, public green space is provided, visual and recreational amenities exist nearby, and pedestrian and bicycle travel is actively encouraged. Houses in such a neighborhood district can be allowed on smaller lots, retail and commercial uses can be mixed with residential uses, a variety of housing types can be allowed, and accessible open space created and dedicated to the use of all the neighbors.

The Village of Pawling has adopted a set of “urban regulations” and a number of other mechanisms that encourage some of these aspects of neo-traditional neighborhood design. The village has used statutory authority delegated to it and all other local governments in New York in doing so. It began by amending its comprehensive plan to call for more concentrated land patterns with dedicated open space, a network of trails, a regional green space network, and residential developments that are fitted around a revitalized central business district. The plan also identifies four large tracts of property located in R1 zones and contains conceptual development plans for those tracts, an unusual device to be found in a comprehensive plan. These site-specific conceptual plans increase the number of residential units allowed on each tract, place this greater number of houses allowed on smaller lots, require the dedication of significant amounts of open space to the public, link this open space to trails and other open spaces and parks, and avoid development of the wetlands and steep slopes on the sites. The plans also call for through streets rather than the dead-end cul de sacs typical of new subdivision development in the area. The specific purpose of interconnected streets is to encourage pedestrian and bicycle traffic in the

residential neighborhoods created. Only one of the four conceptual plans, with frontage on Route 22, contains any commercial land uses.

For these conceptual plans to be meaningful, the zoning law of the village had to be amended. This was accomplished in 1995 with the adoption of a new zoning code. It contains a schedule of “urban regulations” which provide for six building types that are now allowed in designated zoning districts. (Pawling Zoning Law § 98-13 and Schedule B). The urban regulations differ fundamentally from conventional zoning in that they use detailed illustrations to provide for alternative lot layouts, building designs, setbacks, and the location of parking; these give the planning board the type of control over the design of development that is missing in conventional zoning, subdivision, and site plan laws.

“Infill houses” are allowed under these urban regulations, for example, in all four residential districts. Occupancy is limited to residential use, parking is provided on the rear of the lots, space for alleys is provided, front and side yard setbacks are reduced, and balconies, stoops, chimneys, porches, and bay windows are allowed to encroach on the smaller front and side yards adjacent to the street. “Small houses” are allowed under similar provisions in all four residential zones. “Townhouses” are allowed in all residential districts. They are permitted to be built to the lot lines on lots not adjacent to streets and to share party walls, with parking in the rear. Alleyways and stoops are required, and porches and breezeways are allowed.

These provisions allow great flexibility on the part of land developers and the planning board in the village as new development is proposed and reviewed in residential districts. Force is given to the urban regulations by a provision in the zoning law that gives them precedence, when they apply, over the conventional standards of the bulk schedule of the zoning code. (Pawling Zoning Law § 98-13). They apply, according to the code, to all subdivisions of more than three lots.

With regard to the four large tracts that are conceptually designed in the revised comprehensive plan, the zoning code also implements the objectives of the comprehensive plan. The new zoning provides a density bonus of 30% for any new subdivision proposed on the subject parcels that meets the design guidelines for the tract contained in the comprehensive plan, that conforms to the open space configuration and trail system in the comprehensive plan, that guarantees the affordability of 15% of the dwelling units, and that is connected to the village water and sewer system.

It is the obvious intent of the village board to induce developers of residential property on these four critical sites to follow the detailed design guidelines of the comprehensive plan by providing a significant amount of additional housing by the means of incentive zoning, now allowed under Village Law § 7-703, Town Law § 261-b, and General City Law § 81- d.

Streamlining of development proposals that conform with the urban regulations and the conceptual drawings found in the comprehensive plan is offered as an additional incentive to land developers. Since generic environmental impact statements were completed on the adoption of the plan and the zoning law, it is only necessary for an applicant to prepare and submit a supplemental environmental impact statement. (Pawling Zoning Law § 98-84.) Development proposals that do not follow these regulations and plans will be subject to a more intensive and lengthy review process, which developers are particularly keen to avoid.

In these novel provisions, the Village of Pawling has taken an important step toward smart growth and away from sprawl. The comprehensive plan was developed with significant input from all interest groups in the village. It is obvious from the results that greater control of the details of the design of development, more intelligent layouts of subdivisions, more affordability and diversity of housing, and greater coordination of the interconnections of developments in the village were endorsed by the citizenry and their elected leaders. These mechanisms stop short of the creation of growth and conservation boundaries, do not mix land uses to any significant degree, and, of course, have nothing to do with what happens in the critically situated adjacent communities. As an incremental move forward, however, they bear further study and watching.

GROWTH CONTROL IN WARWICK

In the 1990s, continuing metropolitan area population pressures made Orange County, where the town of Warwick is located, the fastest growing county in New York. Until then, Warwick had been beyond the pale of sprawl, and spared the task of reworking its traditional zoning ordinance. The town of Warwick is characterized by significant open space: highly productive farming on rich black dirt in its lowland areas, associated dairy and other agricultural activity on its adjacent uplands, and significant biodiversity along the Walkill River watershed that it occupies and regulates. A decade ago, this landscape began to be dotted by large lot subdivisions, threatening the town's rural character and the vitality of its agricultural economy.

In a process that is still ongoing, the town and its centrally located village, also called Warwick, are taking the following steps: adopting compatible amendments of their comprehensive plans; approving a town bond issue in the amount of \$9.5 million for the purchase of development rights on open land; adopting smart growth zoning amendments that arrange development on the land in a graduated and balanced fashion; and entering into an intermunicipal agreement implementing a joint annexation and zoning policy. This compact between the municipalities is designed to incorporate town lands into the village of Warwick through annexation. It provides for preliminary site plan review prior to

annexation, the use of floating zoning, incentive zoning, and annexation credits to govern the award of higher densities to town land that is incorporated into the village and its water and sewer districts. The agreement also establishes a trust fund into which developers of annexed land will deposit payments for the additional density afforded their lands. These funds will be shared by the village and the town to carry out their comprehensive planning objectives. Here is how each of these techniques work:

Comprehensive Plans

Although encouraged by state law to do so, local governments seldom refer to neighboring communities' comprehensive plans or land use policies in drafting their own. In August of 1999, the town adopted *The Town of Warwick Comprehensive Plan* establishing a goal of protecting agriculture and open space and adopting a strategic principle of steering new development toward the Village of Warwick through a "density transfer program." The plan notes that this program accommodates both preservation and development interests and is designed to maintain value in lands designated for protection while promoting development that is compact, orderly, and efficient. This policy is guided, in other words, by smart growth principles. The village, in turn, has prepared a draft comprehensive plan which supports the town's policy of open space and agricultural land preservation and pledges its cooperation with the town's density transfer program. An interesting fact contained in the town's plan is that operating farms in Warwick require from 25 to 61 cents in municipal services for each dollar of taxes they pay; in contrast residential subdivisions require from \$1.05 to \$1.08 in services for each tax dollar they generate.

N.Y. Town Law § 272-a states that the "town comprehensive plan may include ... consideration of regional needs and the official plans of other government units and agencies within the region."; See also N.Y. Village Law § 7-722 (b).

Purchase of Development Rights

The town's comprehensive plan also recommends that a Purchase of Development Rights (PDR) program be instituted in the town as soon as possible. Based on a study prepared by the Land Use Law Center, the town board began a campaign to float a bond issue in the amount of \$9.5 million for the purchase of development rights on open land, principally agricultural parcels. In November, 2000, the voters of the town and its three constituent villages narrowly approved the issuance of bonds in this amount for the purpose of purchasing development rights on agricultural lands in the town and the acquisition of open space resources in the villages. A dispute which erupted over this referendum and the importance of its resolution is discussed below.

Smart Growth Zoning Amendments

In January, 2002, the town board unanimously adopted a sweeping change of local zoning to achieve the objectives of its comprehensive plan. These zoning amendments create several zoning districts, including floating and overlay zones, and adopt other techniques that provide for the arrangement of development on the land in a graduated and balanced fashion. The amendments include a traditional neighborhood overlay district designed to promote higher density; mixed use development in the town's hamlets; very low density and clustering in a rural district; medium density in a suburban residential district; a senior housing floating district; and several discrete environmental protection provisions, including a conservation district to protect designated environmentally sensitive areas, a ridgeline overlay district, a land conservation district, and two agricultural land protection districts.

Intermunicipal Agreement Regarding Annexation and Zoning Policy

The town and the village have drafted an intermunicipal agreement designed to incorporate town lands into the Village of Warwick and its water and sewer districts in a way that provides financial resources to the village and town to accomplish their comprehensive plan objectives. In recent years, the village has annexed lands under General Municipal Law, Article 17.

Section 703 of the General Municipal Law states the intention of the legislature to allow annexation of territory from one local government to another and establishes as prerequisites to annexation the consent of the people in the land annexed and the consent of the local government whose land is to be annexed upon the basis of its determination that the annexation is in the over-all public interest. This section provides, where this consent is withheld, for adjudication in the Supreme Court of the issue of whether the annexation is in the overall public interest.

Each time it did, the village automatically provided that the annexed lands would be zoned to permit three units of housing per annexed acre, increasing allowable density nine-fold over the three-acre minimum lot size provided under town zoning. This provided annexed landowners and developers a windfall density increase. Under the intermunicipal agreement, the village will annex land in cooperation with the town and zone annexed land at the same density provided under the applicable town zoning. In much of the area around the village, town zoning allows the construction of single-family homes on three-acre lots.

Using a combination of floating and incentive zoning, the village created an Annexation District Zone that allows its planning board to approve up to three units per annexed acre - a significant density bonus. To qualify, the annexed

owner must submit a preliminary proposal for the higher density development to the village's planning board, prior to annexation, and have it approved conceptually. The agreement provides for both the town board and the village council to approve the annexation before it occurs. Following annexation, the floating incentive zone can be affixed to the annexed land by an amendment of the zoning map, allowing the landowner to develop up to three units per acre.

Using average figures, under the town's zoning as adopted by the village, a 100-acre parcel annexed by the village might yield 25 building lots, with deductions for roads and infrastructure and environmental mitigation conditions. After the application of the village's floating incentive zone to the land, the same 100-acre parcel might yield 150 lots, accounting for the same deductions and a planning board decision to allow half-acre, rather than one-third acre, lots to protect the adjacent areas. This new zoning increases the parcel's yield by 125 lots [150-25]. Under New York's incentive zoning law, the developer can be required to pay a fee for this density bonus with the funds deposited into a trust fund for specific public benefits that will be secured by the incentive awarded. If this fee is established at \$50,000 per unit, a fairly modest cost for land in the area, the trust fund contribution by the developer of this 100-acre parcel would be \$6,250,000. The agreement provides that 30 percent of this amount, nearly \$2,000,000, will be dedicated to the purchase of development rights on lands in the town. Over \$4,000,000 would be deposited in the trust fund for village watershed protection, urban parks and recreation, and infrastructure improvements.

Mediation of Land Use Disputes

This creative compact between the village and town and the town's Purchase of Development Rights (PDR) program were threatened by a dispute that occurred shortly after the voters approved the bond issue to raise \$9.5 million for open space development rights acquisition. The Town of Warwick has three villages within its borders: Greenwood Lake, Florida, and Warwick. Citizens of the villages campaigned actively against the PDR bond proposition and threatened litigation to stop it after the referendum passed. The Anti-PDR Coalition was formed prior to the November referendum and led a vigorous assault against the proposition.

Before the November, 2000, election, the town stressed that the PDR program would prevent sprawling development and reduce taxes in the long run. Its campaign literature explained that every time a new home is built within the town, the addition of students into the school system causes a deficit in the school budget. By reducing the number of new homes through the PDR program, the town argued that PDR would prevent an increase in school taxes. The campaign material also explained the virtues of retaining the town's rural character and sense of openness.

The villages responded with their concerns. Greenwood Lake, for example, observed that it is not in the Town of Warwick's school district and would not benefit from the purported school tax savings achieved by PDR. In addition, since it is physically separated from the town by Tuxedo Mountain, its citizens reap few of the scenic and character enhancing rewards of preserving open lands in the town. All of the villages complained that the amount of funds to be spent in the villages themselves was significantly less than the sums to be derived from village taxpayers. The villages also claimed that the PDR program would cause a shift in development to the villages, which would stress their budgets and cause more traffic congestion. The local newspaper in the Village of Greenwood Lake published lead editorials urging the public to vote against the bond resolution; a local web site was established as a clearinghouse for those opposed.

After the passage of the bond act, the villages of Greenwood Lake and Florida consulted with the State Attorney General and State Comptroller to see if they could opt out of the PDR program. In addition, the villages began campaigning against the entire agricultural preservation effort. They encouraged opposition to town preservation plans, voiced objections at town meetings, and urged county and state officials not to support the town's efforts. After the unsuccessful attempt by the town to negotiate a deal with Greenwood Lake for the purchase of village property, a regional mediation program was invited to help resolve the dispute.

For five months, the mediators worked with a group of 17 representatives from the town and the three villages to seek a mutually acceptable outcome. An agreement was reached which met the interests of the villages through a formula that returns a pro-rata portion of the land acquisition funds to those jurisdictions. In return for this agreement, the villages pledged to support fully the town's agricultural preservation initiative and to assist efforts to raise funds from county, state, and federal sources. The settlement also contained an agreement to work toward the consolidation of school districts.

One of Warwick's critical objectives was to build widespread community support for the novel approach to smart growth by taking time to involve the public, hear all sides, flesh out all interests, and incorporate them in the final ordinance. This approach to citizen participation and stakeholder involvement in land use decision-making has also been endorsed by New York's highest court. The New York Court of Appeals sanctioned informal multi-party negotiations during the early stages of the local development review and approval process in *Merson v. McNally*, 688 N.E.2d 479 (1997). The issue in that case was whether a project that, as originally proposed, involved several potentially large environmental impacts could be mitigated through project changes negotiated in the early environmental review process mandated by the State Environmental Quality Review Act (SEQRA) process.

The agency involved in the *Merson* case was the planning board in the Town of Philipstown. The owner of a mining site submitted a full environmental assessment form as required by SEQRA along with its application to the board for a special permit to conduct expanded mining operations. In an unusual move, the planning board conducted a series of open meetings with the project sponsor, other involved agencies, and the public. As a direct result of the input received at these meetings, the applicant revised the project to avoid any significant negative impacts. The planning board then issued a negative declaration, finding that the project, as now configured, would not negatively affect the environment. This avoided months of delay and many thousands of dollars in further project reviews for the applicant.

The Court of Appeals found that the planning board had conducted an “open and deliberative process” characterized by significant “give and take.” It described the planning board’s actions as “an open process that also involved other interested agencies and the public” rather than “a bilateral negotiation between a developer and lead agency.” It found that the changes made in the proposal were not the result of conditions imposed by the planning board but were, instead, “adjustments incorporated by the project sponsor to mitigate the concerns identified by the public and the reviewing agencies....” In short, the planning board had created an effective multi-party negotiating process that met due process requirements.