New York Municipal Insurance Reciprocal
Land Use Training Program for Local Officials

NEW YORK MUNICIPAL INSURANCE RECIPROCAL
LAND USE LAW CENTER - PACE UNIVERSITY SCHOOL OF LAW
NEW YORK PLANNING FEDERATION

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Land Use Learning Program

Tutorial I - *Zoning – The Basics*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL

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ORANGETOWN'S IMPROPER PERMIT REVOCATION TO COST TOWN $5.1 MILLION IN DAMAGES

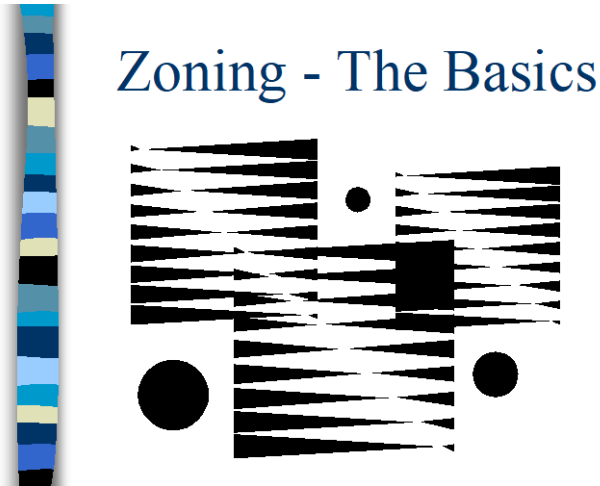
Revocation of building permit and amendment to Zoning Code. The town brought an action to compel a developer to remove a temporary building, after developer's building permit to construct industrial building was revoked by town's building inspector.

Bradley Industrial Park, Inc., owner of 34 acres of land located in the Town of Orangetown, acquired the property to construct a 184,000 square foot industrial building. Their site plan was approved and the Building Inspector issued a permit in 1980. They began developing the site shortly thereafter and spent over four million dollars before the town halted the work. Soon after it began, the community began to voice its strong and intense opposition to the construction. Ultimately, the Town Supervisor directed the Building Inspector to revoke the defendants' permit. In addition, the Town amended its Zoning code to preclude construction of commercial buildings on defendants' land. The court found that the inspector's revocation of permit was arbitrary and capricious because it was without legal justification and motivated entirely by political concerns. The court awarded $5,137,126 for costs and attorney's fees to the developer.

Local governments must be sure to provide property owners with the proper process for addressing concerns associated with their project. The proper time to address community concerns about design, effect on surrounding community and infrastructure, and other aspects of site development specifically identified in the local site plan law, was during the site plan approval process.

INTRODUCTION

The local zoning law regulates the use of property according to 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. Each "zone" or district will have a set of restrictions designed to accomplish any number of goals including, the separation of conflicting uses, facilitating fire fighting, or creating livable arrangements of space. The use and dimensional restrictions will ensure that development conforms to standards that accomplish the legislature's goals.

STATUTORY AUTHORITY TO ADOPT ZONING AND LAND USE REGULATIONS:



1. Village Law § 7-700, Town Law § 261, and General City Law § 20(24) grant basic land use authority to local governments and allow them to regulate the details of land development and building construction and alteration. This may be done for "the purpose of promoting the health, safety, morals or the general welfare of the community."
2. Village Law § 7-702, Town Law § 262, and General City Law § 20(25) authorize local governments to divide the community into zoning districts and to regulate the use, construction, and alteration of buildings and land within those districts.
3. Village Law § 7-704, Town Law § 263, and General City Law § 20(24) & (25) provide that zoning and land use regulations must be in conformance with the locality's comprehensive plan. The purposes that such zoning regulations are to achieve are to lessen congestion, secure safety from fire and flood, prevent overcrowding, facilitate the provision of infrastructure, and to encourage "the most appropriate use of land throughout such municipality."
4. Section 10(1)(ii)(a)(11) of the Municipal Home Rule Law states that a municipality may adopt local laws for the "protection and enhancement of its physical and visual environment."
5. Section 10(1)(ii)(a)(14) of the Municipal Home Rule Law states that a municipality may adopt local laws as provided in the Statute of Local Governments. § 10(6) of the Statute of Local Governments authorizes cities, towns, and villages to adopt zoning regulations.

Notes:

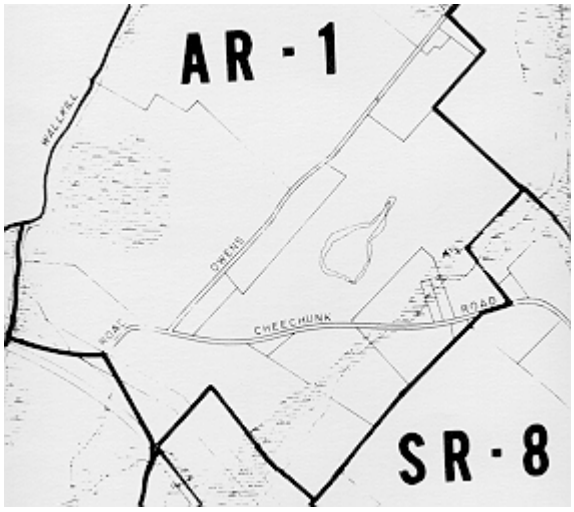
1. The term zoning law is used in these tutorials to refer to the zoning provisions of the municipal code, whether they are adopted formally by local law or local ordinance. Villages are not authorized by state law to adopt ordinances so, technically, there is no such thing as a village zoning ordinance, cities and towns may adopt their zoning provisions either by law or ordinance.
2. The zoning law or chapter of the municipal code will provide for the administration of zoning matters. Spelling out, for example, the duties of the zoning board of appeals and planning board. It will also contain provisions for the approval of development projects that require special use permits. The zoning chapter may or may not contain the locality's subdivision and site plan regulations, which some communities choose to place in separate laws or chapters of their municipal code. This tutorial discusses zoning, special permits, and subdivision and site plan regulation as the basic components of local land use regulation. Where subdivision and site plan regulations are contained in separate code chapters they are not technically "zoning" provisions.

The local legislature is empowered to regulate the erection, alteration, and use of buildings and improvements for each district it creates. Within districts "all such regulations shall be uniform for each class or kind of buildings throughout. The regulations in one district may differ from those in other districts." Although single-family homes in different districts can have different use and dimensional requirements, two single-family homes located in the same district must be governed by the same restrictions. Regulations can restrict the height and size of buildings, the percentage of building lots that may 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.

At the time that the local legislature adopts a zoning law, it approves a zoning map. On this map the zoning district lines are overlaid on a street map of the community. This map divides the community into districts. Each district will carry a designation that refers to the zoning law's regulations for that district. 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.

The zoning map, implemented through the text of the law, constitutes a blueprint for the development of the community over time. It is a tool for fulfilling the vision or plan for the community's future.

☞ The image below is taken from the zoning map from the Town of Goshen. If a landowner with property wanted to know if he could build a single-family home [on the corner of the Owens Road and Cheechunk Road], he should first look at the zoning map. You can see below that his property is in the "AR-1" district, the map tells us is an "Agricultural-Residential" zone. The next step is to refer to the section in the text of the Goshen zoning code for that district. There, he will find several numbered sections listing permitted uses, conditional uses, and accessory uses for the "AR-1" zone.



The landowner may build the house because it is listed among the uses permitted by the code. There he will find dimensional requirements. The regulations state that the single-family house is "not to exceed one dwelling on each lot."

The Goshen zoning regulations, which form a chapter of their municipal code, are organized so that both use and dimensional requirements for

each district are found in the same article or section of the zoning chapter. Depending on how the code is organized, the above procedure may vary. One common method of organization is to put use and dimensional requirements in their own, separate sections. In that case, the use restrictions will be found in an article or section addressing permitted and prohibited uses. Another article, commonly titled "bulk and area requirements" contains all the dimensional restrictions that apply in each district. Both sections must be consulted to find out how the property is regulated.

Finally, there may be restrictions that apply to all districts, or special regulations to which the landowner must conform. These are found in their respective sections. In determining the zoning restrictions of a property, the entire set of local laws and regulations should be scanned for all possible regulations. This is the same process that a zoning enforcement officer or a code enforcement officer will use to identify standards for approving or denying a landowner's application.

PURPOSE

When originally conceived, zoning was designed to protect private investment in land, development in cities from unpredictable nearby land uses, and the public 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, and the loss of farmland 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 during rapidly changing times. 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.

In the first half of this century, zoning was challenged as an unwarranted infringement of property rights. The courts, however, singled out two purposes as particularly appropriate reasons to uphold zoning. 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. Comprehensive zoning was first upheld by the Supreme Court in 1926 in the case of *Ambler Realty Co. v. Euclid* and is sometimes referred to as "Euclidean zoning."

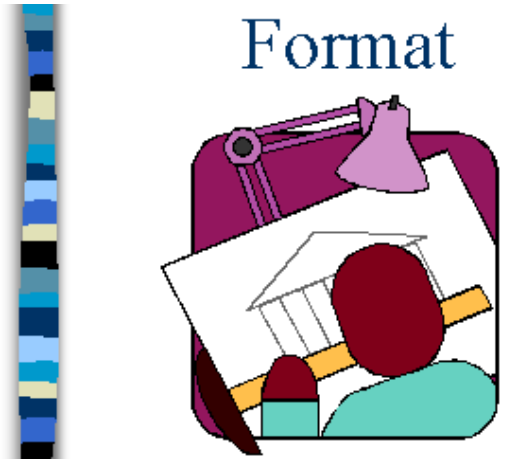


In *Berman v. Parker* (1954), the United States Supreme Court stated that the police power, on which local land use regulation rests, is for the protection of the public welfare, which is broad and inclusive. "The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

The state statutes make it clear that zoning regulations are to be adopted in accordance with a comprehensive plan. The purposes of these regulations are to accomplish a number of specific objectives 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.

Village Law § 7-704, Town Law § 263, and General City Law §§20(24) & (25) articulate the purposes that land use regulations are to accomplish.

FORMAT OF THE ZONING LAW



There is no required format for a zoning law in New York State. As a result, local codes are organized in a variety of ways and range from relatively simple to extremely complex. Most zoning laws contain several articles covering many basic topics.

NEED TO KNOW

While there is no required form for a zoning law, looking at other zoning laws and considering their similarities and dissimilarities can be a helpful way to determine the best way to organize a zoning law. The following outline is a composite of a number of zoning laws adopted by municipalities throughout the state.

GENERAL OUTLINE OF A TYPICAL ZONING CHAPTER

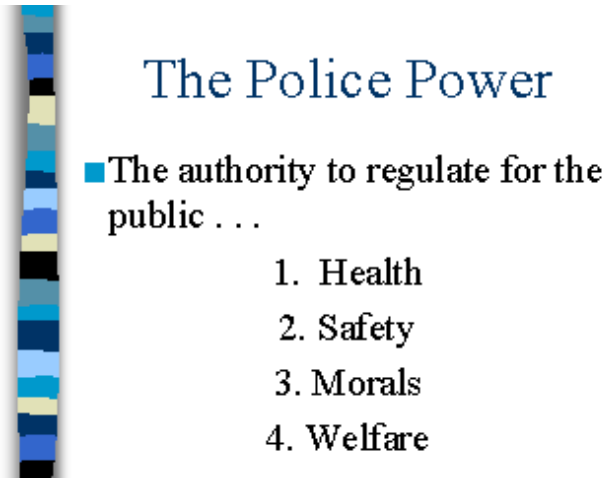
Article	Explanation
I. Title and Purpose	This section identifies the title of the chapter within the municipal code and sets out the intent, purpose, scope, and general policies of the legislature in enacting the laws found within this chapter. This section may also identify the state authority under which the legislature enacts the chapter.

II. Definitions	This section lists and defines the specific words and phrases of substantial importance that are used throughout the zoning chapter. This article may also explain that words and terms used in the present tense include the future, that the singular includes the plural and vice versa, that "shall" is mandatory, and address other issues of word usage.
III. General Regulations	This section contains regulations that are applicable to all districts including such topics as the application of regulations to irregularly shaped lots, general height regulations, standards for minimum lot area per principal dwelling unit, prohibited uses of yards, frontage and driveway requirements, roof structures, and easements.
IV. Use Regulations	This section of the zoning law lists the types of uses permitted in particular districts. In many cases, the zoning law is accompanied by a schedule or table of uses that summarizes the uses permitted in a residential district as single family homes, multi-family dwellings, and accessory uses. Typical permitted uses in a business district include retail stores, banks, barbershops, governmental offices, and theaters. These restrictions are sometimes summarized in a use schedule or chart at the end of the chapter.
V. Dimensional Requirements	Dimensional restrictions control the size and placement of structures on the land. These restrictions ensure that buildings are appropriate in size, remain sufficiently set back from streets and lot lines, and leave adequate open space.
VI. Special Use Permits	Special regulations can be adopted by the local legislature to supplement the district regulations. For example, the local zoning law can provide for religious institutions, educational facilities, or day care centers to be permitted in designated zoning districts upon the issuance of a special permit.
VII. Site Plan Regulations	Site plan regulations set forth the standards applicable to the development of certain types of individual parcels. These regulations may be contained in the zoning chapter or their own chapter of the code.

VIII. Subdivision Regulations	Regulation of the division of land into parcels may be found in the zoning chapter. Local legislatures sometimes enact subdivision regulations as their own chapter in the municipal code.
IX. Nonconforming Uses	When a zoning law is enacted, existing structures and uses sometimes do not conform to the new regulations. By referring to this section, landowners can find out how their nonconforming properties and structures are to be treated.
X. Administration	This section contains the procedures for administering the zoning law, the role of the zoning enforcement officer or building inspector, and the delegation of review power to local boards including the mandatory authority of the zoning board of appeals to grant variances.

A host of additional topics may also be included in the zoning chapter. Zoning laws can contain articles 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, among other topics.

Zoning regulations are sometimes contained in a municipal code, which contains all the laws passed by the local legislature. The code may deal with a host of subjects, from alcohol regulation to vehicle and traffic control. Each topic or area is a chapter in the code, so zoning is treated in its own chapter. Each chapter has a number of articles, making up the sections of each chapter that contain the actual regulations. For instance, almost every chapter will contain an article for "definitions," which defines words of significance or terms of art used throughout the chapter.



POWER TO ENACT A ZONING LAW

Land use regulations are enacted under the "police power" delegated by the state to the local legislature. The

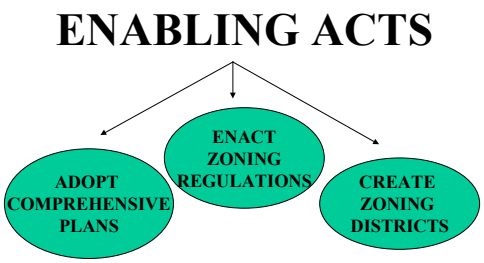
United States Supreme Court has called police power regulation "one of the most essential powers of government."

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 for these purposes that such authority is conveyed to local governments. Local legislatures determine the substance of zoning statutes in order to accomplish these purposes.



In *Euclid v. Ambler Realty* (1926), the United States Supreme Court first held that the enactment of zoning use districts is a permissible use of a local government's police power. Ambler Realty challenged the validity of an ordinance that divided the Village of Euclid into various use districts. The court found that the plaintiff did not carry its burden of proving "that such provisions are clearly arbitrary and capricious and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare."

Broad authority to regulate land use is delegated to local governments through enabling acts that empower them to adopt comprehensive plans, enact zoning regulations, and create zoning districts. 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 also been granted to local government to regulate a variety of aspects of land use including historic districts, aesthetic impacts, architectural design, wetlands, and environmental impacts of land development. This separate authority is found within the other state enabling acts.

Prior to zoning, there were two principal methods for controlling land use and avoiding conflict between incompatible land uses such as industrial and residential buildings. Private individuals could put restrictive covenants in the deed as part of the sale of their property, thereby regulating its future use. This device is often used in subdivisions. A private citizen could also bring a common law suit for nuisance against obnoxious uses of adjacent land. Zoning provides a more cohesive approach to controlling the appropriate use of the land.

Specific provisions of the Municipal Home Rule Law, Town, Village, and General City Law grant authority to local governments in New York State to divide the community into use districts and regulate building construction within those districts for purposes set forth in the enabling acts. Understanding these specific statutes is important in making land use decisions. The attorney assigned to advise local officials can answer specific questions based on these laws.



Village Law § 7-700, Town Law § 261 and General City Law § 20(24) grant basic land use authority to local governments and allow them to regulate the details of land development and building construction and alteration "for the purpose of promoting the health, safety, morals, or general welfare of the community."

Legislative acts are presumed to be constitutional and valid. Not only do the aggrieved landowners have the burden of proving the invalidity of the law but it is rare that such a burden can be sustained on papers alone without a trial. There are, however, circumstances where zoning laws are held to be invalid. When zoning is enacted for arbitrary reasons that cannot be justified as protecting the public, the laws are more likely

to be challenged by aggrieved parties. Laws enacted to address public needs or concerns, and that logically accomplish those objectives are less likely to be challenged, and if they are challenged, they are more likely to be upheld by the courts. Laws supported by legislative inquiries or based on studies are even more resistant to challenge. This, in combination with a general presumption of validity afforded legislative actions, means that zoning laws, as a general rule, will be upheld.

Comprehensive Plan

Zoning provisions and their amendments must be adopted in conformance with the comprehensive plan of the locality or exhibit comprehensiveness of planning. If not, they may be found to be beyond the municipality's power to adopt the provisions. This legal requirement is found in the enabling acts granting local governments the power to regulate land.



The court in *Udell v. Haas* (1968), determined that zoning amendments must be in accordance with a comprehensive plan and must consider the needs of the entire community.



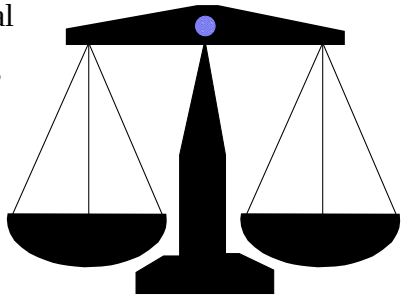
If zoning provisions or amendments are inconsistent with the comprehensive plan the vulnerability of the zoning law to legal challenges is increased significantly. The result of a judicial finding that the zoning provision is inconsistent with the comprehensive plan is a declaration that the provision is invalid.

The requirement in New York State that zoning provisions must conform to the comprehensive plan has led to much confusion at the local level and in the courts. This results from the fact that local governments are encouraged, but not required to adopt a comprehensive plan. Local governments in New York are not required to adopt a comprehensive plan but zoning is required to be consistent with "comprehensive planning." How is this accomplished in a community with no adopted comprehensive plan? If the community has not adopted a comprehensive plan, the court will look at the

policies of the zoning law and all other evidence of land use planning available and determine whether the zoning is consistent with the land use goals and policies of the community. For further discussion refer to the tutorial on "Comprehensive Planning."

LEGAL CHALLENGES

Several types of legal challenges can be brought against local governments if they do not follow the proper legal standards and honor constitutional protections. Four of these are of particular concern to local governments. Each is discussed below, but treated in detail in a later tutorial entitled "Legal Challenges."



First, the regulation of land, under certain circumstances, can so affect property rights as to constitute a "taking" of property. Second, the division and classification of land by discriminating among types of properties can violate equal protection guarantees. Third, regulations must substantially advance a legitimate public purpose, and fourth, procedural due process guarantees must be met.

Takings

Clearly local governments have the authority to regulate property, even if the value of the property is affected. 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. Although regulations that affect property values are legitimate, under certain circumstances, when the value of the property is diminished to virtually nothing, the municipality must pay the owner "just compensation" for the loss in value. When zoning provisions are challenged as regulatory takings, challengers must carry a heavy burden of proof that the regulations violate the constitutional guarantee. 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.

Equal Protection

Equal protection claims assert that a land use classification or decision treats one parcel, or a few parcels of land, differently than similarly situated parcels with no apparent justification for being treated differently.

Substantive Due Process

Substantive due process challenges allege that the local regulation does not advance a legitimate public purpose. Sometimes this challenge asserts that the regulation is arbitrary and capricious, such as a regulation that is adopted simply in reaction to citizen opposition.

Procedural Due Process

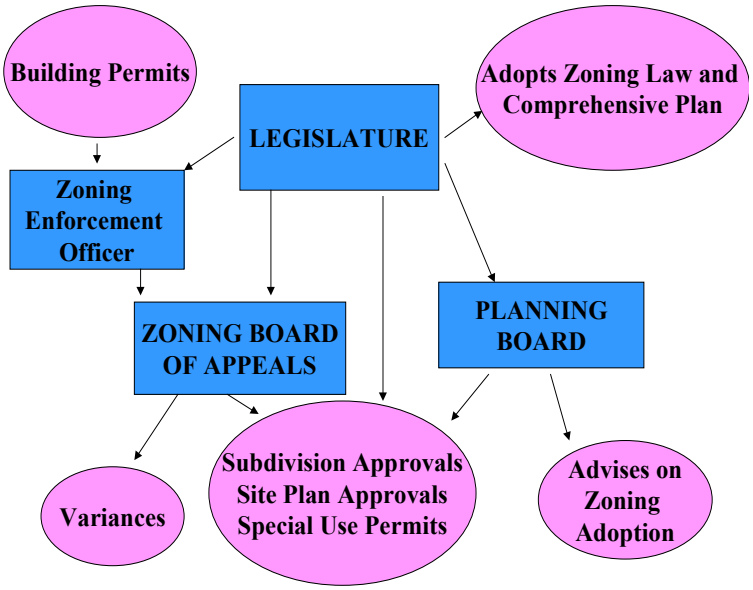
Procedural due process challenges are brought when a community fails to follow a statutorily prescribed process or rushes to judgment on a land use decision, thereby violating the rights of involved parties to receive notice, be given an opportunity to be heard, or enjoy the benefits of a deliberate and thoughtful process on the part of the decision-maker.

When presented with a challenge to a land use regulation, courts generally exercise judicial restraint and defer to the legislature's discretion, rather than substitute its judgment for that of the legislature - an equal branch of government. The regulation is presumed valid and the challenger bears a heavy burden of proof.



Where the courts set local regulations aside, their invalidation can be traced to several common errors. These errors and how to avoid them are discussed thoroughly in the tutorial on "Legal Challenges."

LOCAL BOARDS AND PROCEDURES



Within local government, there are several key officials and boards that play distinct and important roles within the land use system. Their roles and responsibilities are summarized here and discussed in detail in the "Local Boards and Procedures" tutorial.

Local Legislature

Local legislatures are authorized by the New York State legislature to create a local land use regulatory structure and to give local boards and officials specific duties and powers. State statutes give local legislatures great discretion in establishing this system. For instance, the local legislature may directly review applications for special permits or delegate this responsibility to the planning board or other administrative body such as the zoning board of appeals.

Zoning Board of Appeals

NEED TO KNOW

Every local government that adopts a zoning chapter of its local code must create a zoning board of appeals.

One indispensable role of the zoning board of appeals is to hear appeals from and to review determinations made by the zoning enforcement officer or building inspector. Zoning boards of appeals also have the power to grant variances from the strict application of zoning provisions. Variances may be granted only where a property owner faces particular difficulties or hardships because of the application of particular zoning provisions to her property. In addition to these specific responsibilities, the local

legislature may, in its discretion, delegate other functions to the board, such as the review and approval of special use permits.

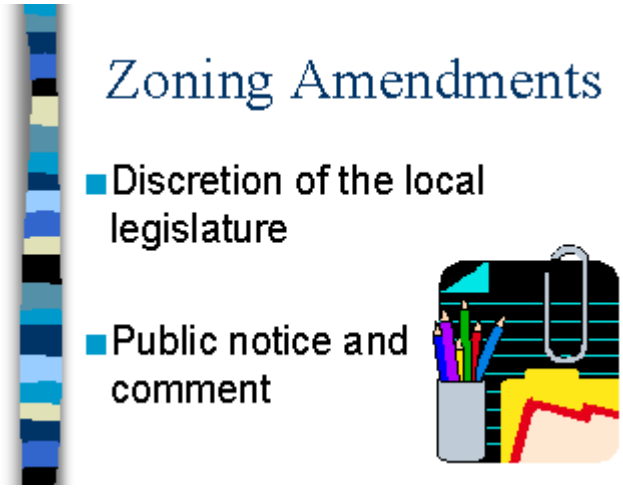
Planning Board

Local legislatures are authorized to create planning boards to advise on zoning issues and comprehensive planning and to review applications for subdivision approvals, site plan approvals, and special use permit approvals.

Zoning Enforcement Officer

Most localities employ a building inspector to enforce the Uniform Fire Prevention and Building Code. Many delegate to the building inspector or code enforcement officer the responsibility for interpreting and enforcing the zoning law as well. Others employ a separate zoning enforcement officer for this purpose. The role of the official charged with zoning enforcement is to render interpretations of the zoning law and determine its applicability to individual parcels. The interpretations and determinations of this official may be appealed to the zoning board of appeals.

AMENDING THE ZONING LAW



Zoning provisions, once adopted, may 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. For example, under their implied authority to adopt appropriate mechanisms, localities have created floating zones, planned unit development districts, and overlay zones. Property owners may apply to the local legislature to have their property rezoned.



Amendments to zoning laws may be adopted after public notice and hearing. Normally, zoning amendments may be adopted by a majority vote of the local legislature.



Village Law §§ 7-706, 7-710, Town Law §§ 264, 266, and M.H.R.L. § 20 contain the procedural requirements for adopting and amending zoning provisions. Village Law § 7-708, Town Law § 265, and General City Law § 83 contain additional requirements for amending zoning provisions.

The legislature can amend the zoning law on its own initiative, in its discretion. When a property owner requests a change in the zoning provisions applicable to his property, the legislative body usually may refuse to consider it. Only in cities, and only upon the petition of a requisite number of property owners, is the legislature required to formally consider an application for rezoning.



The Court of Appeals held that the power of a local government "to amend its basic zoning ordinance in such a way as reasonably to promote the general welfare cannot be questioned." *Rodgers v. Village of Tarrytown* (1951). The plaintiff challenged a village zoning amendment that allowed construction of multiple dwellings in a single-family zone. The court upheld the amendment noting 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, and the burden of establishing such arbitrariness is imposed upon him who asserts it." The court determined that "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 the classification if the public interest demands otherwise."



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 and ordinances may require additional procedures to be followed when zoning amendments are considered. Typical provisions may require referral to the local planning board for an advisory report, the publishing of legal notice or service of notice to nearby owners, or the posting of signs on the land subject to the proposed rezoning. Zoning amendments, like the initial zoning law and all other land use regulations, must be made in accordance with a comprehensive plan.

REGULATIONS AND APPROVALS

Regulating and approving subdivision plats and site plans are important elements of the local system of land use control. Subdivision controls ensure that adequate services and facilities exist to support potential development by creating standards for design and layout of subdivided properties. For the same purpose, communities may adopt site plan regulations for the design and location of development on individual parcels (ones that are not divided and thus not covered by subdivision regulations). Subdivision and site plan regulations may or may not be adopted as part of the zoning chapter. No matter where they are placed in the code or compilation of local laws, these regulations are intimately related to a community's zoning proposal.

Subdivision

"Subdivision" is defined in the local regulations, but essentially refers to the legal division of parcels into smaller parcels that can be sold. A subdivision plat is a drawing or sketch showing how a property is to be divided along with the placement of roads, buildings, and infrastructure on the property proposed to be divided. Subdivision regulations may be enacted as a chapter in the municipal code, or adopted as an article within the zoning chapter of the code, or as a free standing law. 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 subdivision to insure that it

meets the specifications. Where the subdivision application cannot meet the standards, it may be rejected.



Subdivision review and approval authority is often granted to the planning board. If the planning board is given this authority, it must base its decisions on the standards contained in the subdivision regulations adopted by the local legislature and follow all procedures that the regulations specify.

Conditions may be placed on subdivision approval, including the setting aside of open space, installation or location of infrastructure, and other design modifications.



The statutory provisions authorizing municipalities to adopt subdivision regulations and to provide for the review and approval of subdivisions is found in Village Law §§7-728 - 7-730, Town Law §§ 276 - 278, and General City Law §§ 32 - 34. Village Law § 7-718(13), Town Law § 271(13), and General City Law § 17(13) authorize the planning board to prepare subdivision regulations, subject to revision and approval by the legislature.



Procedures that must be followed to obtain subdivision approval are governed by the enabling acts, unless they are superseded, then they are governed by the local regulations. If the local laws are codified, check the appropriate article in the zoning chapter, or if the subdivision regulations are enacted in their own chapter, check the subdivision chapter of the municipal code.

Site Plan

The regulation of development on individual parcels is controlled through site plan review. Site plan regulations serve purposes similar to subdivision regulations and often have their own article in the zoning law. 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." The planning board, or other administrative body, may be authorized to review site plan applications and to enforce the standards contained in the site plan regulations.



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. Site plan regulations might apply only to all non-residential projects, or only to larger-scale commercial developments such as shopping malls, industrial and office parks, or certain residential developments such as condominium or town house projects. Some communities, however, subject smaller projects to site plan review.



Village Law § 7-725-a, Town Law § 274-a, General City Law § 27-a authorize local governments to adopt and administer site plan regulations. Village Law § 7-725-a (2)(a), Town Law § 274-a (2)(a), and General City Law § 27-a (2)(a) contain the specific elements that the local legislature may require to be included in site plan submissions including "any additional elements specified by the legislature."

Variances

A variance allows property to be used in a manner that does not comply with the literal requirements of the zoning chapter. 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 regulations. A property owner may seek an area or use variance from the zoning board of appeals when an application for a building permit is denied on the ground that the proposal would violate the use or dimensional requirements of the zoning law. There are two basic types of variances: use variances and area variances.

Use Variance

A use variance permits "a use of the land for a purpose that 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 on the parcel, the owner may apply to the zoning board of appeals for a use variance.

Area Variance

An area variance 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, for example, when a proposed structure does not comply with the set back, height, or area requirements of the zoning law. A landowner could apply to the zoning board of appeals for an area variance if an owner wants to build a deck on her house that encroaches slightly onto a side yard setback area.



Town Law § 267-b, Village Law § 7-712-b, and General City Law § 81-b set forth the definitions of a use and area variance, establish the authority of the zoning board of appeals to issue use and area variances, and provide the statutory criteria and procedure that must be followed before a variance may be approved.

Special Use Permits

New York statutes define a special use permit as the "authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met." An example of a special use is a home office or home occupation in a single-family residential neighborhood. The legislature may conclude that home occupation should be permitted in residential districts, subject to conditions that ensure that the size and layout, as well as parking and lighting, are carefully designed so that the neighborhood is not adversely affected. The procedures for approving special use permits may be found in a separate article of the zoning chapter

and the special uses allowed may be contained in the use district provisions of the chapter.

A variety of uses may be permitted in various zones as special uses. These include adult businesses, professional offices, group homes, swimming pools, nursing homes, or day care centers in residential zones; and drive-in establishments, video arcades, marinas, shopping centers, gas stations, and convenience stores in commercial districts.

The local legislature is empowered to authorize the planning board or other local administrative body to grant special use permits as set forth in the local zoning law. When delegating this authority to an administrative body, the legislature must adopt standards to guide the body in reviewing, conditioning, and approving special uses. These standards will include, for example, requirements that gasoline stations and drive-in establishments provide adequate traffic safety improvements, that professional home offices provide adequate parking and landscape buffering, or that a shopping center provide adequate storm drainage and lighting controls to protect surrounding areas.

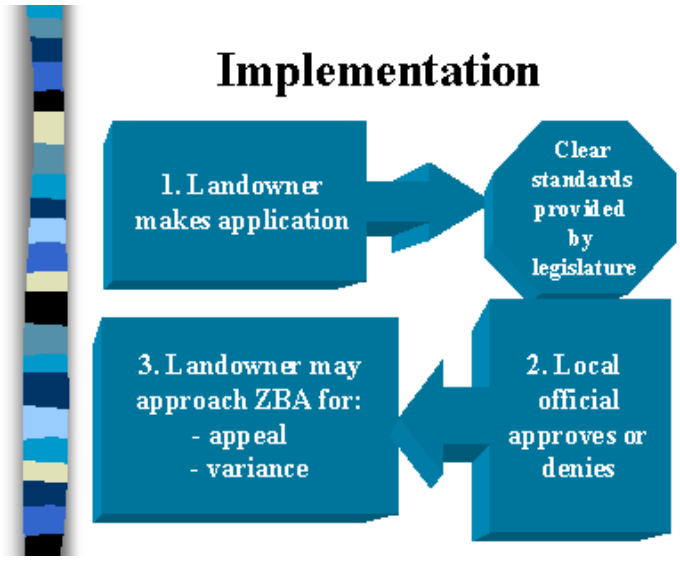
Special use permits are referred to by a variety of terms in local practice and court decisions. These terms include special exception use, special permit, conditional use permits, and special exceptions. The statutory term is special use permit.



Local legislatures are empowered to authorize a local administrative body to grant special permits under Village Law § 7-725-b, Town Law § 274-b, and General City Law § 27-b.

PROCEDURE

Landowners who wish to develop their parcels in conformance with applicable zoning provisions



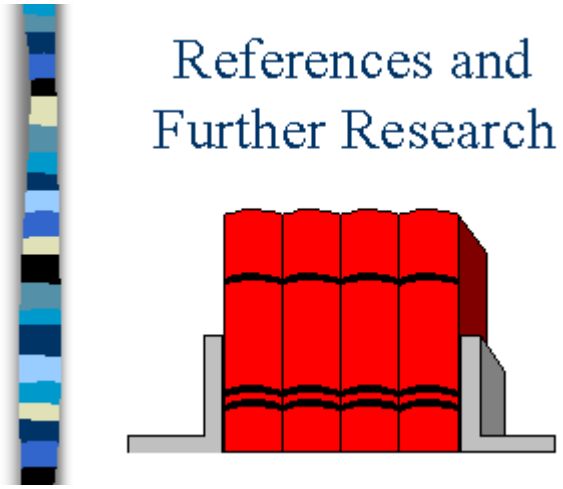
must apply to the local building inspector for a building permit. Either the building inspector or the zoning enforcement officer will review whether the proposed project and its construction conform to the use and dimensional requirements of the zoning law. Where they do not, the building permit must be denied. This review process is ministerial and the administrator has no authority to deviate from the letter of the law. Determinations of this sort by the appropriate local official are reviewable by the local zoning board of appeals, which must be created when the locality first adopts a zoning law. When a proposed development is in conformance with the use and area restrictions of the zoning chapter but requires subdivision or site plan approval or a special permit, the zoning enforcement officer or building inspector must refer the landowner to the local board authorized to perform the required review or issue the required permit.

Zoning provisions cause particular problems when they are vague. The local building inspector or zoning enforcement officer needs specificity and clarity to interpret and apply zoning provisions to particular parcels. The work of the zoning board of appeals is compounded when a law contains provisions that suffer from vagueness. The use of specific dimensions, standards, and terminology in zoning provisions greatly facilitates their implementation and usefulness.



Although zoning enactments are presumed by the courts to be constitutionally valid, their provisions are restrictively interpreted because they are deemed to be in derogation of the landowner's common law property rights. When this standard of restrictive interpretation is applied to unclear or vague zoning language, it often results in court determinations that are in the landowner's favor.

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QUIZ



1. What is the practical effect of a zoning map?
   A. Provide a blueprint for the development of a community over time.
   B. Is a vision of the community's future developed with the community's input.
   C. It has far reaching consequences for the quality and cost of life for the citizens.
   D. It is a guide to determining how particular parcels have been zoned.
   E. All of the above.

2. Which of these purposes justify the adoption of zoning?
   A. To prevent landowners from using their properties in ways that are injurious to the community.
   B. To create a balanced and efficient pattern of land development.
   C. To avoid the multiple perils of haphazard growth.
   D. All of the above.

3. Which local body has the legal responsibility for formally adopting the zoning law?
   A. The Planning Board.
   B. The Zoning Board of Appeals.
   C. The Local Legislative Body.
   D. All of the above.

4. The original zoning law must be adopted in accordance with a comprehensive plan - Is this so for amendments?
   A. Yes.
   B. No.

5. Vocabulary-Match the term with the correct definition.

1. Site Plan	A. Allows uses subject to conditions designed to protect surrounding properties and the neighborhood from any possible negative impacts of the permitted use.
2. Planning Board	B. Must be created when a local legislature adopts zoning laws. They must consist of 3 to 5 members. The essential function is to grant variances.
3. Special Permit	C. A regulation that is so intrusive that it is found to take private property for a public purpose without providing the land owner with just compensation.
4. Zoning Board of Appeals	D. Shows the proposed development and use of a single parcel of land and/or structures consisting of a map and all necessary supporting material.
5. Regulatory Taking	E. This is a form of administrative relief that allows property to be used in a way that does not comply with the literal requirements of the zoning law.
6. Subdivision	F. Usually is given responsibility to review and approve subdivision applications.
7. Variance	G. Involves the legal division of a parcel into a number of lots for the purpose of development and sale.

6. Must the public be granted a hearing before the legislature adopts zoning amendments?
   A. Yes.
   B. No.

7. When a property owner submits an application to a local legislative body for a change in zoning, the local legislature must consider the request and hold a public hearing before granting it.
   A. True for cities, towns, and villages.
   B. True for cities only.
   C. False for cities, towns, and villages.

8. State law requires that zoning laws adopted by local governments follow a specific format.
   A. True.
   B. False.

9. Land use regulations may be included in chapters of the municipal code other than the zoning chapter.
   A. True.
   B. False.

10. When zoning regulations are challenged in courts they are presumed to be valid and the challenger must prove that they are arbitrary, capricious, and unreasonable.
   A. True.
   B. False.

LAND USE LEARNING PROGRAM
FOR LOCAL OFFICIALS

Tutorial II - *Comprehensive Planning*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL

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QUIZ 21

COMPREHENSIVE PLANNING: THE BASICS

State statutes require that zoning and all land use regulations conform to the locality's comprehensive plan. Comprehensive plans have also been called a master plan, land use plan, and development plan. The statutes use the term "comprehensive plan" and define what a comprehensive plan is using these words: '"comprehensive plan' means 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 protection, enhancement, growth, and development" of the municipality.

Although localities are not required to adopt comprehensive plans or to keep them up to date, they are seriously encouraged to do so. The intent of the statute is to "encourage, but not to require, the preparation and adoption of a comprehensive plan pursuant to this section. Nothing herein shall be deemed to affect the status or validity of existing master plans, comprehensive plans, or land use plans." Village Law § 7-722(1)(h); Town Law § 272-a (1)(h); General City Law § 28-a (2)(h).

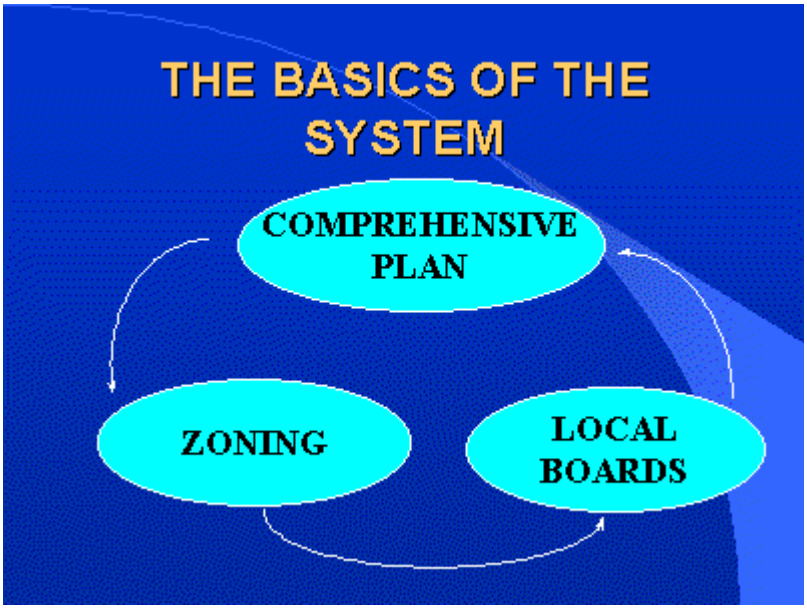


These statutes have this to say about comprehensive planning and zoning:

> Among the most important powers and duties granted by the legislature to a town or village government is the authority and responsibility to undertake town or village comprehensive planning and to regulate land use for the purpose of protecting the public health, safety, and general welfare of its citizens.
> Town Law § 272-a(1)(b); Village Law § 7-722(1)(b).

If a community has not adopted an explicit comprehensive plan, the courts will look for "all relevant evidence" to determine whether a challenged land use regulation is or is not in conformance with the requirement for comprehensive planning. The local legislature may adopt a land use regulation that does not conform to the formal comprehensive plan,

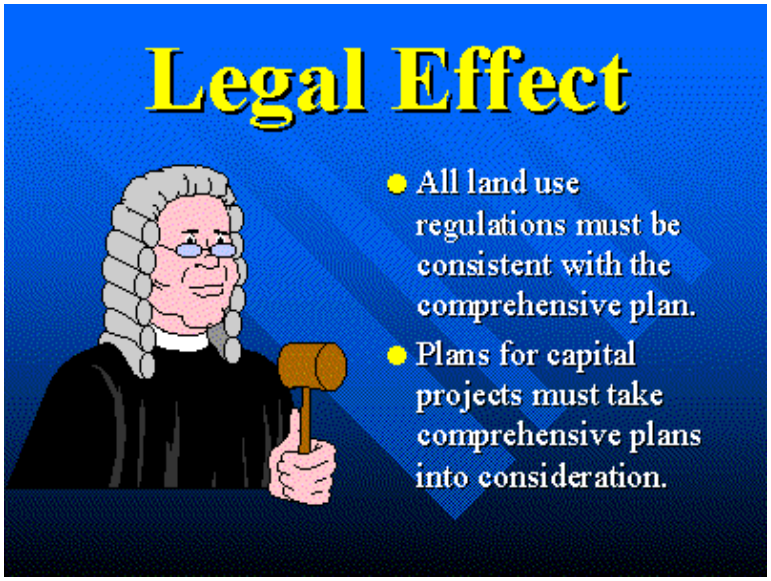
if it provides a clear planning rationale for its adoption. When a locality adopts a comprehensive plan, the statutes recommend, but do not require, that certain components be included.



The relationship between the comprehensive plan, the zoning law, and the local boards that implement the land use system is circular. The comprehensive plan establishes the objectives that the community wants to achieve. The zoning law sets forth the regulations designed to achieve the objectives of the comprehensive plan. The local boards are then responsible for implementing the zoning law and overseeing the administration of the land use system. Their decisions are to be based on the standards contained in the zoning law and designed to accomplish the objectives contained in the comprehensive plan.

LEGAL EFFECT

The legal effect of a comprehensive plan is twofold. *First*, all land use regulations of a community must be consistent with the plan. State law defines "land use regulation" to include



any ordinance or local law enacted by a community for the regulation of any aspect of land use and community resource protection. Thus, any provision of a community's municipal code concerning land use, such as site plan and subdivision regulations or wetlands ordinances, must be consistent with the goals, objectives, and strategies set forth by the comprehensive plan. *Second*, where an agency of the municipal, county, state, or federal government chooses to undertake a capital project, the agency's plans must consider the goals, objectives, and strategies of the comprehensive plan. Other governmental agencies, such as state agencies, must consider the local comprehensive plan in shaping their capital projects within the locality. If, for example, the State Department of Transportation plans to improve or build a road, bridge, or highway in community and the community has a formally adopted comprehensive plan, the department would be required to consider that plan and its transportation objectives before proceeding with the project. Without this requirement, government agencies could undermine the objectives of a community's comprehensive plan by undertaking capital projects that openly conflict with the community's comprehensive plan.

PLAN PREPARATION AND ADOPTION



General City Law § 28-a; Town Law § 272-a; and Village Law 7-722 provide communities with extensive flexibility to undertake comprehensive planning. These state statutes discuss the importance of comprehensive planning, suggest plan components, and describe the procedure for adoption.



1. The comprehensive plan may be prepared by the local legislature or they may designate the planning board, or a specially constituted board which must include one or more members of the planning board.
2. Public hearings and other open meetings may be held prior to adoption. At least one public hearing must be held by the board preparing the plan.

3. Prior to its adoption, the comprehensive plan must be subjected to environmental review under the State Environmental Quality Review Act (SEQRA), and must be found to be consistent with any agricultural district in the community.
4. Submit to county or regional agency for comment.
5. The comprehensive plan is to be adopted by the local legislature by resolution.
6. Following its adoption, the plan must be filed in accordance with the law.

PUBLIC PARTICIPATION

Importance



State law has found that an "open, responsible and flexible planning process is essential" to the preparation of the comprehensive plan. In order to achieve public consensus and support, there must be public input during all phases of the development of the comprehensive plan.

Process

State law allows for the board preparing the plan to conduct "meetings as it deems necessary to assure full opportunity for citizen participation" in the preparation of the plan or any amendment to an existing plan. At a minimum, the board preparing the comprehensive plan must hold one public hearing.

Methods

Meetings can be conducted on a community-wide basis, in neighborhoods, over long weekends, or in series. Their purpose is to gather all available ideas and secure support of the entire community. Committees and subcommittees can be formed to conduct surveys and to prepare reports on public needs and visions. Special efforts can be made to identify all groups with a stake in the community's future and to involve key representatives in the preparation of the plan. Such special representatives may even be appointed to the special board that drafts the plan or may be invited to join an advisory committee to assist the board in the preparation of the comprehensive plan.

Persons Involved

Although the board preparing the plan may consist of a relatively small group of individuals, the perspectives gathered concerning the plan should be numerous. Those persons whose perspectives may be helpful include: elected officials, members of the planning board and zoning board of appeals, planning staff and consultants, the administrative enforcement officer, the municipal assessor, the highway superintendent, the parks and recreation commissioner, members of the conservation commission, a local historian, the sewer/water superintendent, developers, representatives of local utilities, business groups, civic groups, neighborhood associations, members of the school board, and local environmental organizations.

COMPREHENSIVE PLAN CONTENTS

The contents of comprehensive plans vary from community to community. In most plans four broad substantive components commonly appear: public infrastructure, public services, resource protection, and economic development. Additionally, some communities include an introduction explaining why they chose to engage in the planning process, as well as an implementation plan that sets forth the activities to be undertaken to achieve the goals of the comprehensive plan. The implementation plan is a blueprint

to attain the community's objectives, explaining what actions are to be taken, who will undertake those actions, by what time the actions must be accomplished, and how the individual actions are interrelated. The implementation plan may contain several strategies or sets of actions to be undertaken to accomplish each objective. Within the four substantive components, each one is often broken down into background information, the goal or goals to be achieved for that substantive area, the objectives to be attained, and the strategies designed to achieve the component's objectives. Objectives are statements of attainable, quantifiable, intermediate-term achievements that help accomplish each goal. The plan will establish an approach for reaching its goals, which are broad statements of ideal future conditions that are desired by the community.

The material that follows provides a brief explanation of the components of a comprehensive plan, their importance, and their interrelationship.

Required Elements

1. The plan must specify the maximum intervals at which the adopted plan will be reviewed.
2. A newly adopted plan or amended plan must take into consideration any applicable county agricultural and farmland protection plan.

Typical Components

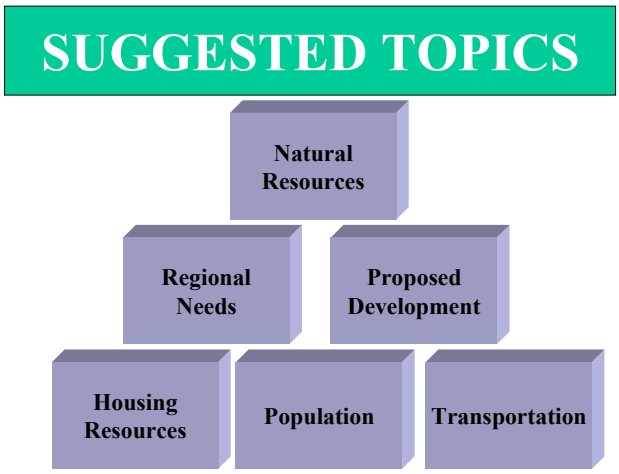
As suggested by state law, many localities organize their comprehensive plans into six major components. These components and their contents are as follows:

1. Issue Identification – sets forth data and community opinions and discusses and analyzes this information to determine the critical land use issues and unique opportunities of the community;
2. Public Infrastructure – discusses the adequacy of existing public infrastructure, such as water supply, transportation, wastewater treatment facilities, and solid waste disposal and examines the potential need for increased facilities;

3. Public Services – considers the adequacy of existing services such as schools, emergency services, and health care facilities and the potential need for increased services;
4. Resource Protection – discusses the adequacy of present efforts to preserve both the natural and man-made environments within the community and examines the need for increased protection of these resources;
5. Economic Development – explains present economic development efforts, such as the promotion of tourism or light industry, and sets forth strategies for improving the community's economy; and
6. Implementation Plan – establishes how the recommendations in each component of the plan will be implemented and coordinated with other plan components to achieve the goals of the comprehensive plan.

SUGGESTED TOPICS





State law suggests a number of topics to be included in a comprehensive plan to aid communities in the creation of their comprehensive plans. Village Law § 7-722(3), Town Law § 272-a (3), and General City Law § 28-a (4) state that a comprehensive plan may include the following topics at the level of detail adapted to the special requirements of the municipality:

(a) General statements of goals, objectives, principles, policies, and standards upon which proposals for the immediate and long-range enhancement, growth, and development of the town are based;

(b) Consideration of regional needs and the official plans of other government units and agencies within the region;

(c) The existing and proposed location and intensity of land uses.

(d) Consideration of agricultural uses, historic and cultural resources, coastal and natural resources, and sensitive environmental areas;

(e) Consideration of population, demographic, and socio-economic trends and future projections;

(f) The location and types of transportation facilities;

(g) Existing and proposed general location of public and private utilities and infrastructure;

(h) Existing housing resources and future housing needs, including affordable housing;

(i) The present and future general location of educational and cultural facilities, historic sites, health facilities, and emergency services facilities;

(j) Existing and proposed recreation facilities and parkland;

(k) The present and potential future general location of commercial and industrial facilities;

(l) Specific policies and strategies for improving the local economy in coordination with other plan topics;

(m) Proposed measures, programs, devices, and instruments to implement the goals and objectives of the various topics within the comprehensive plan;

(n) All or part of the plan of another public agency;

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

THE PLANNING PROCESS

Although state law does not require a particular planning process for developing and amending the



comprehensive plan, a general method may be gleaned from the statutes and local practice. The following material describes one planning process that many communities have followed in New York State.

CRITICAL ISSUES AND UNIQUE OPPORTUNITIES

Identifying Critical Issues

It is helpful for the board charged with preparation of the plan to consider and evaluate both community opinion and reliable data to assess the critical issues and unique opportunities of the community.

Surveys

Community opinion may be gathered by conducting surveys or holding public meetings where the public presents its views regarding critical issues and unique opportunities.

Data and Studies

Readily available data may be collected from information sources such as the U.S. Bureau of Census, state agencies, and the county government. Studies may be conducted on important local conditions, such as existing land uses, threatened natural resources, and the need for jobs and housing. Important data that may help to prepare the plan include:

1. History of the community;
2. Population trends and demographics;
3. Land use and development trends, including housing, commercial, industrial and agricultural development;
4. Adequacy of existing public facilities, utilities and infrastructure;
5. Adequacy of existing public services;

6. Present economic trends, including sales tax information, property tax rates, and employment rates;
7. Existing natural resource conditions such as steep slopes, soil types, wetlands, watercourses, floodplains, aquifers, forests, and rare plant and animal habitats;
8. Historic, cultural, and scenic resources; and
9. Identification of the community's unique strengths and opportunities.

Goals, Objectives, and Strategies

The purpose of gathering and analyzing community opinion, collecting data, and conducting studies is to identify the critical issues that the community faces and its unique opportunities. This information may reveal, for example, that the cost of housing is escalating, the tax base is not expanding, agricultural land is disappearing, or important natural resources are threatened. It will also indicate the unique characteristics, strengths, and opportunities that the community possesses, such as a marked increase in tourism or the demand for housing. From this list, the board preparing the comprehensive plan should determine which issues and strategies must be addressed in detail in the plan.

Setting Goals

The board, with community input, should set goals that address each critical issue selected in the prior stage of planning and that build upon the community's unique strengths, characteristics, and opportunities. The goal in each case is to eliminate the problem identified while strengthening the community's positive attributes. For example, such a goal might be to provide an adequate supply and variety of housing types with prices that meet the housing needs of the present and future population of the community. Other examples of goals are to retain existing wetlands and protect them from all sources of pollution, or to preserve and protect the unique scenic and historic resources of the community and to base its economic development strategy on those resources.

Establishing Objectives

The board should consider identifying one or more intermediate-term objectives to be achieved that will enable the community to reach its goals in time. An example is to produce fifty units of housing affordable for families with incomes under $30,000. Other objectives are to establish standards to protect wetlands of a certain size and character, and to adopt an historic district and landmarks preservation laws.

Setting realistic objectives requires the board to carefully assess what resources the community has to expend in addressing its most critical issues. Including the entire community in the planning process and consulting with outside agencies are important methods of identifying such resources so that critical issues may be dealt with effectively.

Developing Strategies

Strategies are actions that are recommended by the board to accomplish an objective. In each case, one or more actions may be suggested to attain the objective. For example, the board can recommend that zoning incentives be given to private developers in exchange for affordable rental and ownership housing for families keyed to the community's average family income. Similarly, where the community desires to reduce polluted runoff into an aquifer, the board can recommend that the local legislature adopt a law to protect certain aquifers that local permits be obtained before allowing development that affects aquifers, and that buffer zones of 150 feet be established to protect critical aquifers identified by the board. The board could also recommend that new housing and commercial development be actively encouraged in specified districts using architectural and site designs that are compatible with the community's historic character in order to maintain the existing historic character of the community.

Devising an Implementation Plan

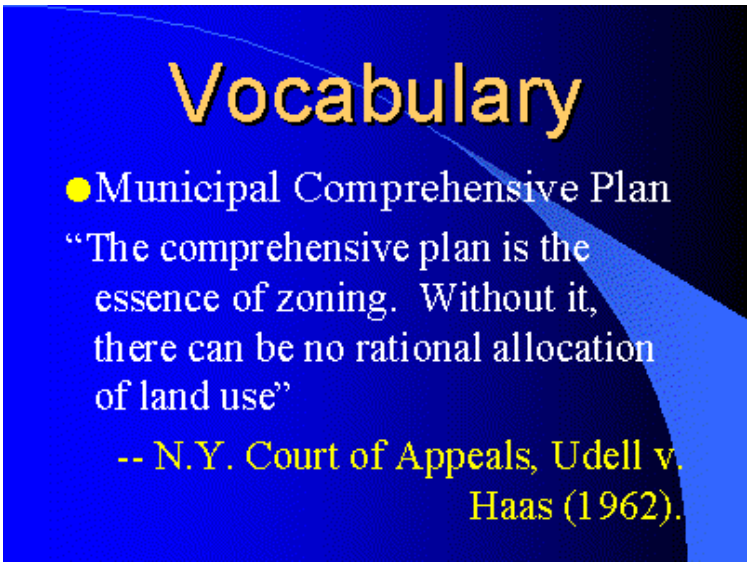
At the end of the comprehensive plan, the board may want to recommend how its strategies can be implemented. An implementation plan designates the agencies or officials responsible for each action, identifies resources necessary for these actions, and

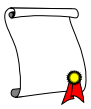
establishes deadlines for the completion of each action. For example, the planning board might be assigned the task of developing an incentive zoning provision for affordable housing within eight months from the effective date of the comprehensive plan. Similarly, the plan could recommend that the municipal legislature adopt a local law creating a Landmarks Commission with the authority to review development permits in proximity to identify historic features. The recommendation could include the wetlands protection standards by which the Commission should review individual applications. Drafting of the local law could be assigned to the municipal attorney with the aid of the New York State Office of Parks and Historic Preservation, interested members of the community, knowledgeable about historic sites and their functions, and developers and landowners who will be affected by the regulations. The implementation plan could then state that the proposed law be circulated by the municipal clerk to the local planning board and county planning agency for their review and recommendations, with adoption of the local law to occur within twelve months of the effective date of the comprehensive plan.

By assigning responsibilities, identifying necessary resources and adopting a time frame to accomplish specific actions, the board will discover whether the strategies developed are realistic. If during the development of the implementation plan the strategies seem unrealistic, the board has the opportunity to recommend alternative strategies to achieve the established objectives.

THE "IN ACCORDANCE WITH" REQUIREMENT

In New York, all local land use regulations must be adopted in accordance with the community's comprehensive plan. Subdivision, site plan, special use permits and wetlands regulations, as well as the zoning law itself, are included in this requirement. Municipalities are not required to adopt a comprehensive plan, but courts have confirmed that comprehensive planning is the "essence" of "rational allocation of land use." *Udell v. Haas* (1968).





Village Law § 7-7722(11), Town Law § 272-a (11) 63, and General City Law § 28-a (12) state that all land use regulations "must be in accordance with a comprehensive plan."



The case of *Udell v. Haas* (1968), provides an interpretation of the "in accordance with requirement." In this case the court was faced with a challenge to a land use regulation where no formal comprehensive plan for the community had been adopted. The court in *Udell* struck down a village zoning amendment because it failed to conform to the comprehensive plan.

In 1951, when the landowner bought the property, it was zoned Business "A," allowing for retail, office, and laboratory uses. Nine years later, the landowner's representative presented building plans to the village for a business development. That same night, the planning board recommended that the zoning for the area

where the landowner's property was located be "changed from business to residential." The local legislature, when it changed the zoning as recommended, did not articulate the comprehensive planning objectives to be achieved by the rezoning. The court concluded that the "vague desires of a segment of the public were not a proper reason to interfere with the landowner's right to use his property in a manner which for some twenty odd years was considered perfectly proper. If there is to be any justification for this interference with the landowner's use of his property, it must be found in the needs and goals of the community as articulated in a rational statement of land use control policies known as the 'comprehensive plan.'" The court examined "all relevant evidence" including the zoning map and law for evidence of comprehensive planning. The court also reviewed a 1958 zoning amendment entitled "development policy" for the village. This amendment envisioned the village as a low-density, single-family community with commercial development limited to outlying areas. The court found that the landowner's parcel was located in areas such as these and that the previous zoning was in conformance with this development policy. The court reasoned that a "comprehensive plan requires that the rezoning should not conflict with the fundamental land use policies and development plans of the community" and invalidated the rezoning.

COMPREHENSIVE PLANNING RATIONALE

All land use regulations must be consistent with the comprehensive plan or evince comprehensive planning. An example of a comprehensive planning rationale might be to achieve the phased growth of development to insure the provision of adequate infrastructure for that development. Regulations and local laws are more likely to withstand challenge when they are supported by some rationale of this type that provides for the appropriate use of land in the public interest.



The decision in *Golden v. Planning Board of Town of Ramapo* (1972), recognized the ability of local governments to influence the pace of land development within their boundaries, provided that the goal was to control but not exclude development. In this case, several developers challenged the Town's right to adopt a comprehensive plan and zoning law that worked to slow subdivision of property allowing it time to build and pay for supportive infrastructure, like water and sewer utilities, at a pace that the Town could manage. "The Town has utilized its comprehensive plan to implement its timing controls. Considered as a whole, it represents both in its inception and implementation a reasonable attempt to provide for the sequential, orderly development of land in conjunction with the needs of the community, as well as individual parcels of land."



Even where a municipality has not adopted a comprehensive plan, land use regulations must evidence a comprehensive planning rationale. In the absence of a comprehensive plan, if a land use regulation is adopted without any comprehensive planning rationale, the regulation may be defeated for failure to meet the statutory requirement that all land use regulations be in conformance with a comprehensive plan.

DEVIATING FROM THE COMPREHENSIVE PLAN



Land use regulations must not conflict with the goals, objectives, and strategies set forth by the comprehensive plan. If regulations conflict with the comprehensive plan, they may be challenged by landowners as failing to meet the statutory requirement that regulations conform to a comprehensive plan. A court may invalidate such regulations.



In *Osiecki v. Town of Huntington* (1991), "the Town maintained that it is not obliged to slavish servitude" to the comprehensive plan and

that it was free, in 1989, to determine that the comprehensive plan should not be followed with regard to the property in question. The court determined that the Town had failed to articulate a specific rationale for departing from its comprehensive plan in adopting a zoning amendment. The court held that the Town's reasons for abandoning the comprehensive plan "would invite the kind of ad hoc and arbitrary application of zoning power that the comprehensive planning requirement was designed to avoid." The rezoning of the plaintiff's parcel of land was void since it did not "comport with the Town's comprehensive plan."

LEGAL BENEFITS OF CONFORMING TO THE COMPREHENSIVE PLAN

Although state law does not require localities to adopt comprehensive plans, when they do, and when they conform their land use regulations to their plan, they tend to prevail when their land use regulations are challenged in court.

1. Regulatory takings: Property owners attack some land use regulations alleging that they effect a taking of their property for a public purpose without just compensation. They may prevail on this claim if they can demonstrate that the regulation does not substantially advance a legitimate public interest. When the locality can show that the regulation was adopted to accomplish an objective of the comprehensive plan and is a part of its integrated implementation plan, it is very difficult for the landowner to prevail on this part of a regulatory taking claim.

2. Equal protection: Land use regulations must not discriminate between similarly situated properties unless there is a clear public objective that is achieved by that different treatment. Where a regulation is challenged as a violation of the equal protection rights of a landowner, the fact that it was designed to achieve an objective of the comprehensive plan helps to insulate it from such an attack by demonstrating the rationale for the difference in treatment.

3. Substantive due process: Landowners may challenge land use regulations as arbitrary, capricious, or unreasonable; that is, a violation of their rights to substantive due process. Where it can be demonstrated by the community that a regulation so challenged is designed to accomplish an objective of the comprehensive plan, it cannot be said to be arbitrary, capricious, or unreasonable. Being in accordance with the comprehensive plan is positive proof of its legal reasonableness.

4. Ultra Vires: Land use regulations can be attacked because they are not adopted pursuant to the authority delegated to the local government to regulate private property. This is called an "ultra vires" challenge, a Latin term standing for "beyond the power of." If challengers can show that the regulation is not in conformance with the comprehensive plan, they may prevail on this claim. This is because the state law requires that all land use regulations must be "in accordance with the comprehensive plan." If they are not, they exceed the authority delegated to local governments to adopt land use regulations.

SUMMARY AND REFERENCES



State law provides a flexible framework to adopt comprehensive plans so that communities may include components and organize their plans to best meet the varied circumstances they face. The comprehensive plan components and organization provided in this tutorial are illustrative and not offered as the "best" or

"only" method for preparing and organizing a comprehensive plan. Most local comprehensive plans are unique in certain ways because no two communities are identical.

The enabling acts strongly encourage local governments to adopt comprehensive plans and provide clear guidance for doing so. The statues also require that the provisions of zoning laws and other land use regulations must be in accordance with a comprehensive plan. Where a locality does not adopt a formal plan, the courts will look to all the relevant evidence of comprehensive planning to determine if a challenged land use regulation meets the "in conformance with" requirement.



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3. John R. Nolon, Comprehensive Land Use Planning: Learning Where and How to Grow (1993) www.law.pace.edu/landuse/nolona.html
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QUIZ



1. Which local body is designated by state law as the local body that is authorized to formally adopt a comprehensive plan:
   A. the planning board
   B. the zoning board of appeals
   C. a special board established by the local legislature
   D. the local legislature

2. Every town, city and village in New York State must adopt a formal comprehensive plan.
   A. True
   B. False

3. Which of the following types of regulations must conform to the locality's comprehensive plan:
   A. the zoning law
   B. the subdivision regulations
   C. the site plan regulations
   D. local wetlands regulations
   E. historic district regulations;
   F. all of the above

4. If a local land use regulation is not in conformance with the locality's comprehensive plan it may be invalidated by the courts because:
   A. it fails to conform to the plan
   B. it is arbitrary or capricious
   C. it is unreasonable
   D. it fails to advance a legitimate public interest
   E. all of the above

5. Under New York law, when local governments adopt comprehensive plans, they must include in those plans certain components that are defined by the state.
   A. True
   B. False

6. Which of the following methods of involving the public in the preparation and adoption of a comprehensive plan are required by state law?
   A. Periodic meetings with interested groups and organizations
   B. A public hearing, open to all interested parties
   C. The formation of a representative advisory body
   D. Meetings in neighborhoods that will be affected by the plan
   E. Reports and surveys from those with useful information and technical knowledge

7. What are the benefits of involving citizens in the preparation of a comprehensive plan?
   A. They may provide information and views that will make the plan more effective.
   B. Such involvement will educate citizens regarding the land use issues in the community.
   C. Citizen participation in the comprehensive plan will help engender their support for the plan.
   D. All of the above.

8. When a community has a formally adopted comprehensive plan, the State Department of Transportation must consider the goals and objectives of the local plan before it may build a road or highway in the community.
   A. True
   B. False

9. If the local legislature adopts a land use regulation that does not conform to the comprehensive plan, that regulation may survive legal challenge if the local legislature explains the comprehensive planning rationale for the new regulation and why it is now necessary to deviate from the adopted comprehensive plan.
   A. True
   B. False

10. Since comprehensive plans do not have any direct regulatory effect on land development, the local legislature does not have to consider or study the possible environmental impact of the proposed plan before it is adopted.
   A. True
   B. False

NEW YORK MUNICIPAL INSURANCE RECIPROCAL
LAND USE TRAINING PROGRAM

Tutorial Component III – *Subdivision Approval*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL

LAND USE LAW CENTER – PACE UNIVERSITY SCHOOL OF LAW

NEW YORK PLANNING FEDERATION

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SUBDIVISION REGULATION

Why regulate subdivisions? "Subdivision" refers to the legal division of parcels into smaller parcels that can be sold. A subdivision plat is a drawing or sketch showing the placement of roads, buildings, and infrastructure on the property proposed to be divided. By requiring local approval and requiring that certain standards be met, local governments can ensure thoughtful, well-balanced development.

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, waive requirements where they are not needed to protect the public, require the reservation of parkland on a residential site, or require the payment of a sum of money in lieu thereof, require the posting of a performance bond to secure the development of improvements on the site, approve the clustering of permitted density on portions of the parcel to preserve open space, and require the compliance with environmental review provisions when approving site plans.



The statutory provisions authorizing municipalities to adopt subdivision regulations and to provide for the review and approval of subdivisions are found in Village Law §§7-728 - 7-730, Town Law §§ 276 - 278, and General City Law §§ 32 - 34. Village Law § 7-718(13), Town Law § 271(13), and General City Law § 17(13) authorize the planning board to prepare subdivision regulations, subject to final approval and adoption by the legislature by local law.



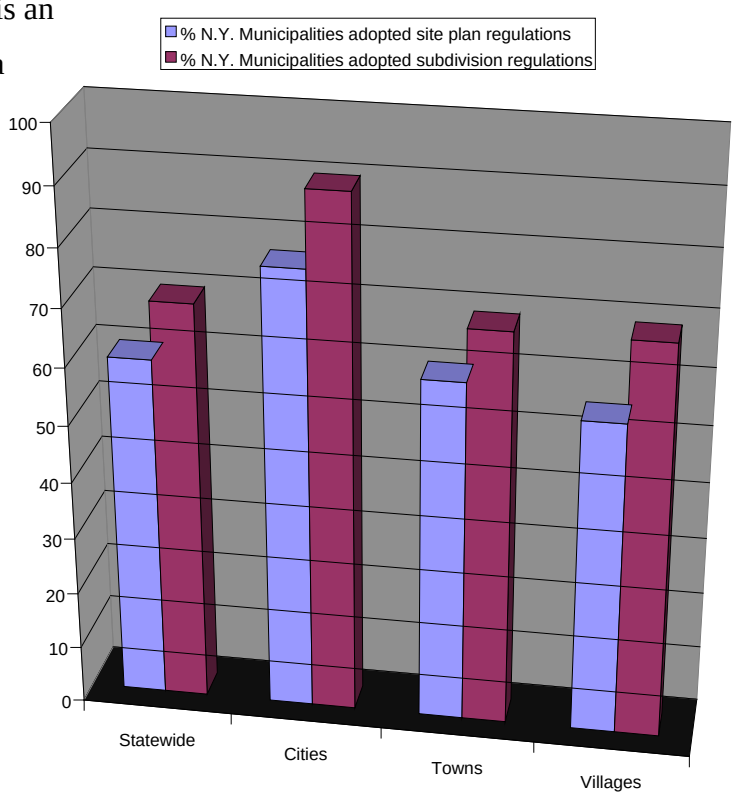
The state enabling acts define subdivision as follows: "the division of any parcel of land into a number of lots, blocks or sites as specified in a local ordinance, law, rule, or regulation, with or without streets or highways, for the purpose of sale, transfer of ownership, or development. The term "subdivision may include any alteration of

lot lines or dimensions of any lots or sites shown on a plat previously approved and filed in the office of the county clerk or register of the county in which such plat is located. Subdivisions may be defined and delineated by local regulation as either "major" or minor," with the review procedures and criteria for each set forth in such local regulations." Village Law § 7-728(4)(a), Town Law § 726(4)(a), General City Law § 32(4)(a).



The Court of Appeals has affirmed that a village board of trustees or a planning board may define the term 'subdivision' to include the division of land into two or more lots. *Delaware Midland Corp. v. Incorporated Village of Westhampton Beach* (1976).

Regulating and approving subdivision plats is an important element of land use regulation in a community. Subdivision controls ensure that adequate services and facilities exist to support potential development by reviewing the design and layout of divided properties. About 70% of the municipalities in the state have adopted subdivision regulations: 90% of cities, 69% of towns and sixty-five percent of villages. Although subdivision and site plan 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.



Subdivision regulations may be enacted as their own chapter of the municipal code or as their own article within the zoning chapter of the code. 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 can 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.

Local Legislature

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.

The local legislature, in adopting subdivision regulations, can exempt lot line alterations or 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. For example, in the definition given in the Town of Clinton's regulations quoted above, the division of land into parcels of more than ten acres, not involving any new street or easement of access, is not subject to subdivision regulation. The locality can also specify how detailed subdivision applications must be and how many elements or factors the submitted subdivision map must contain.



Review authority for subdivision approval varies from locality to locality. The process is governed by local regulation, which must be consulted to determine how subdivision regulation works in any given community.

Reviewing Board

State law authorizes the local legislature to adopt subdivision regulations and delegate subdivision review and approval authority to the local planning board.



Village Law § 7-718(13), Town Law § 271(13), and General City Law § 17(13) authorize the planning board to recommend subdivision regulations to the local legislature for adoption.



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. This is critical to the administration and effectiveness of subdivision regulations – creating county awareness of compliance prior to a deed filing



Real Property Law § 334 prohibits the sale of subdivided lots to the public until a map of the subdivision has been filed with the county clerk or register of deeds. Village Law § 7-732, Town Law § 279, and General City Law § 34 prohibit the filing of subdivision maps with the county land records office where the planning board has been authorized to approve subdivisions unless the approval of the board is endorsed on the map.



The power of the local legislature to delegate subdivision authority is outlined in the enabling acts. The legislature must follow the statutory requirements. In the case of a particular subdivision, a village board of trustees' attempted to reserve final authority to approve the subdivision plat. This was declared invalid since it had already granted final subdivision authority to the village planning board.

Decisions

A board reviewing a subdivision application has the power to decide whether the application is to be approved, approved upon conditions, or disapproved. Decisions of the reviewing board must be based on the standards contained in the subdivision or site plan laws and regulations. The applicant must demonstrate that it has met all standards contained in the regulations to be entitled to an approval. Generalized complaints by local residents are insufficient to justify the denial of an application. Similarly, approval cannot be withheld based solely on conclusory allegations that the subdivision or site plan is not consistent with the character of the neighborhood if the plans meet all the applicable requirements. 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 to insure that it meets the specifications or it can be rejected.

When the planning board approves a subdivision application, state statutes do not require that the record contain, or that the planning board's decision be based on, evidence supporting its approval. These are decisions based on whether the proposal meets the regulations - no "interpretation" is required. 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.

Within 30 days of the filing of the reviewing board's decision with the municipal clerk, any aggrieved person may apply to the Supreme Court to review the decision under Article 78 of the Civil Practice Law and Rules. The Supreme Court will consider the record of the local reviewing board, and, if necessary, take additional evidence, directly or through a referee, for the proper resolution of the matter.



The provisions governing judicial review of the planning board's decisions are found at Village Law § 7-740, Town Law § 282, and General City Law § 38.



The grounds for modification or disapproval of a subdivision plat must be stated in the record of the planning board. A copy of the planning board's final plat approval must be filed in the office of the municipal clerk within five days of its adoption.

INFRASTRUCTURE & GROWTH MANAGEMENT

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.



In *Golden v. Planning Board of the Town of Ramapo,* (1972), the Court of Appeals upheld the authority of local governments to regulate and approve the subdivision of land. The court held that this authority was central to the municipality's ability to control and manage growth.

Statutes delegating subdivision authority indicate that it is to be used "[f]or the purpose of providing for the future growth and development of the [municipality] and affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health and welfare of the population." Localities adopt subdivision regulations to assure that land proposed for development "can be used safely for building purposes without danger to health or peril from fire, flood, drainage or other menace to neighboring properties or the public health, safety or welfare." The Court of Appeals wrote that the adoption of subdivision regulations "reflects, in essence, a legislative judgment that the development of unimproved areas be accompanied by provision of essential facilities."

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.

Subdivision standards complement zoning regulations and help protect neighborhoods from flooding and erosion, traffic congestion and accidents, unsightly design, noise pollution, and the erosion of neighborhood character.



"'[W]here subdivision of land is unregulated, lots are sold without paving, water, drainage, or sanitary facilities, and then later the community feels forced to protect the residents and take over the streets and provide for the facilities.' Thus, [subdivision] regulations benefit both the consumer, who is protected 'in purchasing a building site with assurance of its usability for a suitable home,' and the community at large, which naturally gains greatly from the use of 'sound practices in land use and development.'" *Brous v. Smith* (1952).

PRELIMINARY AND FINAL PLAT APPROVAL

Procedures for subdivision approval may vary from locality to locality. Many communities 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. Having a preliminary plat submission promotes efficiency and communication because the reviewing board can be involved early in the process. At the same time, there is flexibility in such a two-step process because the final plat may be adjusted to provide for the best subdivision design.



State statutes define "preliminary plat approval" to mean "the approval of the layout of a proposed subdivision as set forth in a preliminary plat but subject to the

approval of the plat in final form." Village Law § 7-728(4)(c), Town Law § 276(4)(c), General City Law § 32(4)(c).

Section 21.1 of the Town of Clinton subdivision regulations states that "prior to filing an application for the approval of a Plat, the applicant shall file an application for the approval of a Preliminary Plat. Section 21.2 states that the planning board shall carefully study the Preliminary Plat taking into consideration the requirements of the community and the best use of the land being subdivided. The regulations direct particular attention to the proposed arrangement, location and width of streets; the relation of proposed streets to the topography of the land; sewage disposal; drainage; proposed lot sizes, shape and layout; future development of adjoining lands as yet unsubdivided; and the requirements of the town plan and the official map.



The Town Law requires that the board must take action on a preliminary subdivision application within forty-five days, or the application will be deemed approved. Of course, if environmental review, subject to SEQRA is required, all time-tables may be significantly altered. If an EIS is required, the planning board has 62 days to take action on the subdivision application.



"In the even a planning board fails to take action on a preliminary plat or a final plat within the time prescribed, … after completion of all requirements under the state environmental quality review act, … **such preliminary or final plat shall be deemed granted approval**." Village Law § 7-728(8), Town Law § 276(8), General City Law § 32(8).

Section 22.1 of the Town of Clinton subdivision regulations states that "within six months after tentative Preliminary Plat Approval is granted, the applicant shall file with the Planning Board an application for approval of a Plat. This second approval step is sometimes referred to as "Final Plat Approval."



The planning board must hold a public 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. This may be extended if SEQRA review is required.



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 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.



In *Twin Lakes Farms Associates v. Town of Bedford* (1995), the court determined that the plaintiff was entitled to preliminary subdivision plat approval since the application for preliminary approval was complete. The Planning Board had accepted a draft environmental impact statement on the proposal and had conducted a public hearing on the statement pursuant to the State Environmental Quality Review Act (SEQRA). The court held that "the Board's refusal to issue a decision on the application on the ground that the owner had not yet complied with the entire SEQRA process was in violation of the Town Law § 276(3) in effect at the time." As a result, the preliminary subdivision application was deemed approved by default. The court found, however, that "the owner was not yet entitled to final subdivision plat approval because complete compliance with SEQRA was required before such approval."

Within six months after an approval of a preliminary subdivision plat, the applicant must submit his final map for review. This time may be extended upon mutual agreement. If he fails to do so, the preliminary approval may be revoked. If the plat is submitted within the six-month period and meets the requirements of the subdivision regulations, the plat must be approved. An additional public hearing is be required if the final plat is substantially different than the preliminary plat, or

when no preliminary plat is required to be submitted. If the plat is in substantial agreement with the approved preliminary plat, a hearing may not be necessary.



State statutes define "final plat approval as "the signing of a plat in final form by a duly authorized officer of a planning board pursuant to a planning board resolution granting final approval to the plat or after conditions specified in a resolution granting conditional approval of the plat are completed. Such final approval qualifies the plat for recording in the office of the county clerk or register in the county in which such plat is located." Village Law § 7-728(4)(f), Town Law § 276(4)(f), General City Law § 32(4)(f).



Where the final plat is in substantial agreement with the approved preliminary plat, the planning board must approve or disapprove 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.



Generally, a public hearing with notice in advance is required when the submitted final plat is not in substantial agreement with the approved preliminary plat. However, in *Hickey v. Planning Board of the Town of Kent*, (1991), the court held that no additional public hearing was necessary since the developer modified its plat as the result of suggestions made by the Planning Board at the first hearing. The court found that the Planning Board was authorized to waive the second public hearing.

The failure of the planning board to take action within the established time periods is deemed an approval by default (see discussion above). The approval of the planning board expires sixty-two days after the date of approval, or the date certified, if such approved final plat is 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, on notice, may also be 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.

CONDITIONS

Conditions may be placed on the approval of subdivision applications, including the set aside of recreational land, installing infrastructure, and other design modifications. Site improvements required on approved plats are to be provided directly by the subdivider. The provision of required infrastructure can be guaranteed by requiring a performance bond or sum of money to be posted by the subdivider.

State statutes limit the reviewing board to imposing conditions on subdivision applications that 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. Conditions imposed on subdivision approvals must bear a reasonable relationship with the impact on the community of the subdivision itself and be imposed to meet standards contained in local subdivision regulations.

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 for recreation. Such a condition may be imposed where a municipal study shows that there is 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, a suitable park or parks of adequate size to meet identified needs cannot be properly located on such a plat.



One of the few statutory provisions that specifically allows a municipality to require the setting aside of private land for a specific purpose or to exact money in lieu thereof is in the law governing subdivisions that allows the planning board to require the dedication of land to recreation or to require a contribution in lieu thereof to a local recreational trust fund. Village Law § 7-730(4), Town Law § 277(4), and General City Law § 33(4).

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.



In *Kamhi v. Planning Board of the Town of Yorktown* (1983), the Court of Appeals held that title to land reserved for parks and recreation on a subdivision map cannot be required to be transferred to the municipality for the use of the public.

The courts and 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 situation, a two step process must be followed. *First*, the planning board must make a <u>determination</u> 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 it finds that such space does not exist, may the planning board 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.

Other Conditions

Before approving an owner's application for a permit to develop land, local agencies are authorized to impose conditions that are "directly related to and incidental to the proposed" use of the property. Most applications for local land use approvals are discretionary in nature and conditions can be attached to any development permit to harmonize the proposed land use with surrounding properties and the community. State law specifically authorizes planning boards to conditionally approve final subdivision plats. The local agency uses the permit condition to balance the benefit to the owner of the approval against the potential adverse impact of that development on the surrounding area.

Once a condition is imposed on a local land use approval, it must be complied with before a building permit is issued by the local building inspector or department. If the condition is one that is to be met during construction, then its terms must be complied with before the construction is complete and before a certificate of occupancy can be granted by local authorities.

Among the types of conditions that have been sustained by the courts in the proper circumstances are fences, safety devices, landscaping, screening, access roads, soil erosion prevention, drainage facilities, outdoor lighting, the enclosure of buildings, restrictive covenants preventing development of land in a floodplain, archeological site or viewshed, and a variety of measures to contain the emission of odors, dust, smoke, noise, and vibrations.



The purpose of imposing conditions on an owner's application for a land use permit is to balance the owner's interest in developing the land and the community's interest in being protected from any adverse impacts of development. Conditions are imposed to minimize any adverse impact of the proposed use on the neighborhood or community. Conditions on land use approvals add an element of flexibility in decision-making for the purpose

of responding to the concerns of applicants as well as those affected by the decisions of local land use agencies.

When the agency fears that a project or proposal will negatively impact the community, it may deny the application or approve it subject to reasonable conditions that lessen or contain the negative impacts of that development.



Conditions placed on subdivisions are limited to those which "seek to ameliorate any demonstrable adverse effects attributable to the petitioners' proposed use of the land." *Brous v. Planning Bd. of the Village of Southampton* (1993).



"A planning board is within its power in imposing conditions related to fences, safety devices, landscaping, access roads, and other factors incidental to comfort, peace, enjoyment, health, or safety of the surrounding area." *Koncelik v. Planning Board of the Town of East Hampton* (1992). The court held that the Planning Board had the authority to require an adequate means of access for emergency vehicles, as well as the authority to impose conditions to protect the site's extensive area of undisturbed forest and numerous important plant species.



In *Black v. Summers* (1989), the court annulled conditions imposed on a subdivision approval that required the applicant to agree not to develop another piece of property they owned. Because the board did not indicate any reason why development of the property would be in any way problematic, the court held that "the subject condition is not reasonably designed to mitigate any demonstrable defects" in the proposed subdivision.



In *Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro* (1990), it was decided that the municipality cannot adopt a general recreational fee schedule and arbitrarily require every subdivider to pay the

established fee. The court held that a planning board must make two findings before it may exercise its authority to require a payment in lieu of setting aside park or recreation lands under the Town Law § 277(1). First, the planning board must determine whether a "proper case" exists for imposing the requirement by evaluating the present and future needs for park and recreational facilities in the town. Second, the planning board must determine whether the proposed plat contains adequate and suitable space for recreational facilities. Only if it determines that a "proper case" exists and that the plat does not contain such space may the planning board require the subdivider to pay money as a substitute.

Before granting its approval of the application, the reviewing board must insure that the standards contained in the law or other regulations are complied with by the proposed development. Frequently, approval is conditioned on the developer agreeing to modify the design of the development or to the addition of site features to meet the underlying standards adopted by the legislature. Local subdivision regulations may contain detailed standards and govern more specifically matters such as how and for what purposes conditions may be imposed.

LIMITATIONS ON CONDITIONS

Although the imposition of conditions is clearly within the authority of local governments, the conditions must comply with several standards or they can be declared invalid. Courts invalidate a condition when there is no rational basis in the record for its imposition, when the condition is unreasonable, or when it is not related to the impacts of the proposed development.



Rational Basis: Courts invalidate conditions which are not supported by evidence on the record of the proceedings that justifies their imposition. Such evidence shows that the planning board carefully deliberated the matter, complied with basic due process requirements, and obtained specific evidence of the need for the condition. In several instances, courts have invalidated conditions which were justified only by the neighbors opposition to the project. Some courts have stated that the administrative

agency has a "burden of proving" the need for the condition. This burden requires, at least, that the agency consider evidence that justifies the imposition of the condition.



Reasonableness: The statutes and cases authorizing the imposition of conditions state that they must be "reasonable." Conditions may be invalidated when, under the circumstances, they impose an undue burden on the landowner. In these instances, it may be that the cost, inconvenience, or other impact on the landowner is too onerous, given the benefit to the public of the condition. This is particularly so when there is a less burdensome alternative to the condition or no indication that the agency considered less burdensome conditions that are adequate to protect the public.



Relatedness: The authority to impose most conditions makes it clear that they must be "directly related to and incidental to the proposed land use." This is sometimes described as requiring a nexus between the condition imposed and the impacts of the proposed development. When the condition does not relate to, or lessen, the particular impacts of the development, it is not related or incidental to the proposed land use as required by law. Conditions dealing with who uses the land and the details of business operations are quite often not incidental to or related to the use of the land itself.



Vagueness: Conditions can be struck for vagueness. Agencies imposing conditions must take care to articulate them clearly and definitely so they can be implemented without confusion by the landowner and local building official. The property owner should not be left in any doubt as to the extent of use that is permitted.

Conditions must be:

1. Reasonable;
2. Directly related to the proposed use of the property;
3. Consistent with the local zoning ordinance and other local laws; and
4. Imposed for the purpose of minimizing the impact on the surrounding community.

ENVIRONMENTAL REVIEW



The provisions of the State Environmental Quality Review Act (SEQRA) which require public agencies to consider the impacts of their land use decisions on the environment must be complied with by a planning board that receives a subdivision application. Where the approval of a subdivision may have a significant adverse impact on the environment, the extensive procedural requirements and the extended timetable of SEQRA must be followed and coordinated with other requirements for subdivision approval.

Regulations adopted under the State Environmental Quality Review Act (SEQRA) make it clear that subdivision applications are "actions" by a local agency that are 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 a draft environmental impact statement has been prepared. The time periods contained in the subdivision statutes do not begin to run until one of these two events has occurred. Further procedural adjustments 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, if 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, 14 days advance notice of the public hearing is required. SEQRA hearings are optional, not mandatory.



The applicant for subdivision approval is required to submit an environmental assessment form for the planning board to consider in

determining whether the subdivision will have a significant adverse impact on the environment.



The provisions of law that require the coordination of environmental and subdivision review processes are found at Village Law § 7-728(5) & (6), Town Law § 276(5) & (6), and General City Law § 32(5) & (6).

Subdivision 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 subdivision 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. Any public hearing held during the environmental review process can be used to satisfy any public hearing requirement for the subdivision itself.

AREA VARIANCE REQUEST

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. (*See* tutorial entitled "Variances" for more information.)

COUNTY/REGIONAL PLANNING AGENCY

In certain instances, subdivision plats must be submitted by the planning board to a county or regional planning agency. General Municipal Law § 239-m requires certain applications for subdivision review be submitted to the county or regional planning agency for review and comment.



Village Law § 7-728(10), Town Law § 276(10), and General City Law § 32(10) require the planning board clerk to submit all applicable plats to the county, if the county has authority to review the matter under § 239-m of the General Municipal Law.

If there is no county agency, referral is made the regional or metropolitan agency. Actions must be referred when they affect property within 500 feet of (a) a city, town, or village boundary; (b) the boundary of an existing or proposed county or state park or recreation area; (c) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; (d) the right-of-way of any stream or drainage owned by the county; (e) boundary of any county or state owned land on which a public building or institution is situated; or (f) the boundary of a farm operating under an agricultural zoning district governed by the Agriculture and Markets Law. Actions requiring referral include authorization issued under the provisions of any zoning ordinance or local law, which would include subdivision approvals.



Where such referral is required, it must be submitted ten days prior to the public hearing held on the matter. The time period for the planning board's 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, whichever is sooner.

The county board must make a recommendation within 30 days of receipt of the referral. If the board recommends modification or disapproval, the planning board may accept and implement the recommendation, or it may vote to override the county board. In order to override the county recommendation, the planning board must vote by a majority plus one, or an "extraordinary vote," to do so.

SUMMARY

The subdivision approval process is begun when a property owner applies to divide a piece of property into multiple parcels. The process is often a two-stage process which can involve preliminary and final subdivision plat review.

Preliminary Subdivision Plat Review

- The preliminary plat is submitted to the planning board.
- A public hearing must be held within sixty-two days of preliminary plat submission.
- Hearing may be open for up to 120 days and the planning board has sixty-two days from the close of the public hearing to make a decision on the preliminary plat. Failure to decide within sixty-two days results in default approval.
- The planning board's decision must be filed with the clerk within five days.

Final Subdivision Plat Review

- Applicant has six months after a determination on the preliminary plat to submit a final subdivision plat for review by the planning board.
- The planning board has sixty-two days to make a decision on the final subdivision plat, assuming that the final plat is in substantial agreement with the preliminary plat. If they are not in agreement, the time may be extended by additional public hearings or environmental review under SEQRA. Failure to decide within sixty-two days results in default approval.
- The planning board's decision must be filed with the clerk within five days.
- Following approval, the applicant must file the final plat with the county within sixty-two days.

All these time periods may be extended as needed to comply with state statutory requirements regarding environmental review and county or regional board review.

REFERENCES

1. John R. Nolon, Well Grounded, Shaping the Destiny of the Empire State, Local Land Use Law and Practice, Chapter -- www.law.pace.edu/landuse.
2. Herbert H. Smith, The Citizen's Guide to Zoning, (1983), The American Planning Association, pp. 144-58.
3. Herbert H. Smith, The Citizen's Guide to Planning, (1993), The American Planning Association, pp. 129-40.

QUIZ



1. Local legislatures may choose not to adopt subdivision regulations.
   A. True
   B. False

2. Local legislatures may choose to adopt subdivision regulations even if they have not adopted a zoning law.
   A. True
   B. False

3. Where local legislatures adopt subdivision regulations, they may choose exempt minor land subdivisions from them.
   A. True
   B. False

4. Where local legislatures adopt subdivision regulations they may choose either to require subdivision applications to go through a separate preliminary and final approval processes or just a final approval process.
   A. True
   B. False

5. Public hearings must be held regarding all subdivision applications governed by local subdivision regulations.
   A. True
   B. False

6. The planning board may approve a subdivision application subject to conditions that must be met, but such conditions must be:
   A. Reasonable
   B. Directly related to impacts of the proposed use

C. Consistent with standards contained in the subdivision regulations
D. Supported by facts on the record not just citizen opposition
E. All of the above

7. The local board that has authority to formally adopt subdivision regulations is the:
   A. local legislature
   B. planning board
   C. zoning board of appeals

8. The approval of a subdivision application is subject to the environmental review requirements of state law.
   A. True
   B. False

9. A landowner applying for subdivision approval may be required to set aside some land on the site for open space and recreation or required to pay money to the locality in lieu of that set aside in certain circumstances.
   A. True
   B. False

10. The planning board can require a landowner to agree not to develop land he owns in a different part of the community in exchange for the approval of a subdivision application that he has requested.
    A. True
    B. False

NEW YORK MUNICIPAL INSURANCE RECIPROCAL
LAND USE TRAINING PROGRAM

Tutorial IV - *Site Plan Regulation and Approvals*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL

LAND USE LAW CENTER - PACE UNIVERSITY SCHOOL OF LAW

NEW YORK PLANNING FEDERATION

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ORANGETOWN'S IMPROPER PERMIT REVOCATION TO COST TOWN $5.1 MILLION IN DAMAGES

The town brought an action to compel a developer to remove a temporary building, after developer's building permit to construct industrial building was revoked by town's building inspector.

Bradley Industrial Park, Inc., owner of 34 acres of land located in the Town of Orangetown, acquired the property to construct a 184,000 square foot industrial building. Their site plan was approved and the Building Inspector issued a permit in 1980. They began developing the site shortly thereafter and spent over four million dollars before the town halted the work. Soon after it began, the community began to voice its strong and intense opposition to the construction. Ultimately, the Town Supervisor directed the Building Inspector to revoke the defendants' permit. In addition, the Town amended its Zoning code to preclude construction of commercial buildings on defendants' land. The court found that the inspector's revocation of permit was arbitrary and capricious because it was without legal justification and motivated entirely by political concerns. The court awarded $5,137,126 for costs and attorney's fees to the developer.

Local governments must be sure to provide property owners with the proper process for addressing concerns associated with their project. The proper time to address community concerns about design, effect on surrounding community and infrastructure, and other aspects of site development specifically identified in the local site plan law, was during the site plan approval process.

SITE PLAN REGULATION

The regulation of development on individual parcels of land is controlled through site plan review. 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." This is distinguished from subdivision regulation, which governs the division of land into multiple parcels. Site plan regulations are adopted by the local legislature as part of the zoning ordinance or as a separate set of regulations and contain the specifications that the site plan drawing must include and the standards it must meet. For example, site plan applications may be required to show infrastructure, like electricity and sewer lines, on the diagram of the proposal.

Site plan regulation can be adopted with or without zoning. When it accompanies zoning, the development of individual parcels must conform to the provisions of local zoning law, which will contain use and dimensional requirements for site development. If in a residential zone, only residential properties may be constructed; site plan approval cannot change the use requirements of the zoning. Zoning laws, however, do not contain specifications regulating the details of a site's development that protect, like 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 may go beyond the particular parcel 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 its distinct purpose. By reviewing and requiring drainage, architectural design, and placement of buildings to minimize impact on surrounding neighborhood, the community as a whole is benefited.

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 site plan 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 site plan drawing that is to be included in the owner's application for approval. The drawing may be required to include 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.

AUTHORITY AND SCOPE

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 by a particular local government is permitted but not required, by state law. These statutes authorize localities to impose conditions on site plan approval; waive requirements where they are not needed to protect the public; require the reservation of parkland on the site if it is to be developed residentially, or require the payment of a sum of money in lieu thereof; require the posting of a performance bond to secure the development of improvements on the site; and require compliance with environmental review provisions when approving site plans.



Village Law § 7-725-a, Town Law § 274-a, and General City Law § 27-a authorize local governments to adopt and administer site plan regulations.

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 with certain exceptions, such as one and two family residential projects, accessory buildings, or specified low impact uses. Routinely, the development of an individual lot contained in an approved subdivision is exempt from site plan review.



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.



The example below is taken from the Town of Rhinebeck Zoning Chapter.

- Title of drawing, including name and address of applicant and persons responsible for preparation of the drawing.
- North arrow, scale, and date.
- An area map keyed to the real property tax maps, showing the parcel under consideration for site plan review, and all properties, subdivisions, streets, and easements within two hundred feet of the boundaries thereof.
- Accurate boundaries of the property plotted to scale , including reference to specific data source.
- Existing watercourses, wetlands, and floodplains, including reference to specific data source.
- Grading and drainage plan, show existing and proposed contours at two foot intervals and soils data generally required on that portion of any site proposed for development or where general site grades exceed five percent.
- Location, proposed use, and height of all buildings, both existing and proposed.
- Location, design, and construction materials of all parking and truck-loading areas, including their access and egress drives and clear indication of all traffic patterns on site.
- Location, design, and construction materials of all existing or proposed site improvements, including drains, culverts, retaining walls, and fences.
- Description of the method of securing water supply and location, design, and construction materials of such facilities.
- Location of fire and other emergency zones.
- Location, design, and construction materials of all energy distribution facilities, including electrical, gas, and solar energy.
- Location, size, design, and construction.

Often, site plan regulations are limited in their application 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.

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

REVIEW OF PLAN ELEMENTS

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. 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.



The local legislature adopts site plan regulations. The legislature retains review and approval authority or delegates the authority to a local administrative body.



When delegating site plan authority to the planning board or other administrative agency, the reviewing board must be guided by some specific standards so that its decisions are not wholly discretionary. If adequate standards are not provided to guide the planning board or other board, their actions taken pursuant to deficient regulations could be invalidated if too much discretion is involved. This is avoided by providing clear and adequate standards.

Site plan regulations must contain standards to guide the determinations of the reviewing board and the specific elements that are to be included on the drawings submitted by the applicant.

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



Village Law § 7-725-a(2)(a), Town Law § 274-a(2)(a), and General City Law § 27-a(2)(a) contain the specific elements that the local legislature may require to be included in site plan submissions. The local legislature can require that site plans include the arrangement, layout, and design of the proposed use and "any additional elements specified by the legislature."

Site plan review criteria 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. These are 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.

 The legislature may regulate many aspects of design and layout on a site. The legislature in the Town of Rhinebeck delegated site plan review authority to the Planning Board. Some of the requirements that must be met before the Planning Board is authorized to approve are listed below.

- Landscape, buffering, and site treatment.
- Lighting.
- Building design.
- Signs.
- Ecological considerations.
- Drainage.
- Vehicular traffic.
- Pedestrian circulation.
- Relationship of buildings to site.

As mentioned above, the regulations also provide standards for each site plan element. The Town of Rhinebeck's site plan regulations provide the following criteria for the "Relationship of building to site" elements listed above:

- The plan shall have a relationship of buildings to site.
- The plan shall have a desirable transition with the streetscape and provide for adequate planting, safe pedestrian movement, and parking access.
- Parking shall, wherever possible, be located to the rear or sides of buildings so as not to interfere with the landscape treatment.
- The height and scale of buildings shall be compatible with existing or anticipated adjoining buildings.

- Newly installed utility services, and service revisions necessitated by exterior alterations, shall be underground.

In addition to these specific criteria, the Town of Rhinebeck includes general standards for consideration by the Planning Board in all cases. These considerations include:

- Adequacy and arrangement of vehicular traffic;
- Location, arrangement, size, design, and general site compatibility of principal and accessory buildings, lighting, and signage;
- Adequacy of stormwater and drainage facilities; and adequacy of water supply and sewage disposal facilities.

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.

LIMITATIONS ON REVIEW AUTHORITY

The reviewing board or authority has three options after reviewing a site plan. It may approve the application, approve it subject to conditions or modifications, or it may deny the application. If an applicant for site plan approval demonstrates that the application meets local site plan standards, the application must be approved. If that burden is not met, the application must be denied. If the standards can be met with modifications, the application may be approved, upon conditions.



A town board may reject a site plan where substantial evidence shows that the proposed project would have an adverse impact on public health, safety, and welfare. *Pittsford Plaza Associates v. Spiegel* (1985). The landowner submitted a site plan for the construction of a seven-

screen movie theatre to the Town Board for its approval. The Town Board found that the additional traffic would have an adverse impact on public health, safety and welfare, notwithstanding the Zoning Board of Appeals' conditional approval of a special use permit for the same project. The court held that the Town Board did not exceed its powers in overruling the Zoning Board of Appeals since it denied the application "under its independent powers expressly provided in the local ordinance, namely the 'adequacy and arrangement of vehicular traffic access and circulation.'"



If an applicant meets all the standards in the regulations, the board must approve the application. If an application that meets the criteria in the ordinance is denied, that decision is subject to reversal.



The case of *North Shore Equities, Inc. v. Fritts* (1981) held that when an applicant for site plan approval demonstrates that the application meets local site plan standards, the application must be approved. If that burden is not met, the application must be denied. At the public hearing, three experts testified. They explained that the buildings met setback and lot restrictions, that the development was in harmony with neighboring properties, and that traffic patterns would not be significantly affected. The development met all standards set out in the ordinance. The board, however, denied the application stating that traffic was a problem, the value of adjoining properties would be affected, and the development was not in harmony with the neighborhood. The board had no facts to support their position and their determination was annulled by the court.



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. A denial cannot be based on

the board's determination that a use is not permitted by zoning provisions; that function is within the authority of the official charged with the zoning enforcement officer and the zoning board of appeals.



In *Gershowitz v. Planning Board of the Town of Brookhaven* (1980), the Court of Appeals held that site plan denial cannot be based on the planning board's determination that a use is not permitted by zoning provisions since that function (zoning enforcement) is within the authority of the official charged with the enforcement of the zoning code and the zoning board of appeals. The Brookhaven Zoning Board of Appeals issued the plaintiff a special use permit to operate an automobile shredder plant after determining that the proposed use was in compliance with the Brookhaven Town Code. The plaintiff then submitted a site plan to the Brookhaven Planning Board, which subsequently denied the application on the ground that the proposed use violated the Brookhaven Town Code. The court held that since the Zoning Board had approved the use, the Planning Board was without power to disapprove the site plan on the ground that the use violated the town code.

DECISIONS AND HEARINGS

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 transcript form. The findings of the board and its decision must be based on reliable evidence contained in the record. The record may be the minutes of the board, if prepared in enough detail to satisfy these requirements. The record may include any records, documents, or studies submitted for the board's review.



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.

The reviewing board's 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.

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 has the discretion to conduct a public hearing on particular site plan submissions. Where public hearings are held, they must be conducted within 62 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 62 days of the close of the public hearing, but this deadline can be extended by mutual consent.



Village Law § 7-725-a(7), Town Law § 274-a(8), and General City Law § 27-a(8) grant to local legislatures the authority to require public hearings be held before action is taken on site plan applications.



If required, hearings must be held within 62 days after a site plan application is received. Notice by mail must be given to the applicant 10 days in advance and public notice must be given 5 days in advance.

CONDITIONS

State statutes limit the reviewing board to imposing conditions on site plan approval when such conditions are "directly related to and incidental to" the impact of the proposed plan on the community. Conditions on land use approvals add an element of flexibility in decision-making for the purpose of responding to the concerns of applicants as well as those affected by the decisions of local land use agencies. The use of conditions balances the benefit to the owner of the approval against the potential adverse impact of that development on the surrounding area. The applicant must show that these conditions have been met before the local building inspector can issue a building permit or certificate of occupancy. Conditions imposed must bear a reasonable relationship with the impact of the proposed project on the community to meet standards contained in the local site plan regulations.



The statutory provisions that authorize conditions to be imposed on local site plan approvals are found at Village Law § 7-725-a(4), Town Law § 274-a(4), and Gen. City Law § 27-a(4): "The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan."

The standards governing the granting of approval of site plan applications are contained in the zoning ordinance or other regulations adopted by the local legislature. Before granting its approval of the application, the reviewing board must insure that the standards contained in the ordinance or other regulations are complied with by the proposed development. Frequently, approval is conditioned on the developer agreeing to modify the design of the development or adding site features to meet the underlying standards adopted by the legislature.

Once a condition is imposed on a local land use approval, it must be complied with before a building permit can be issued by the local building inspector or department. If the condition is one that is to be met during construction, then its terms must be complied

with before the construction is complete. Then local authorities grant a certificate of occupancy.

Among the types of conditions that have been sustained by the courts are requirements for fences, safety devices, landscaping, screening, access roads, soil erosion prevention, drainage facilities, outdoor lighting, the enclosure of buildings, restrictive covenants preventing development of land in a floodplain, an archeological site or a viewshed, and a variety of measures to contain the emission of odors, dust, smoke, noise, and vibrations.

Parkland 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 may require the development to contain a park, suitably located on the site. Where one cannot be accommodated, the board may require the applicant to pay a sum of money into a trust fund administered exclusively for recreational purposes.

LIMITATIONS ON CONDITIONS

Although the imposition of conditions is clearly within the authority of local governments, the conditions must comply with several standards or they can be declared invalid. Courts may invalidate a condition when there is no rational basis in the record for its imposition, when the condition is unreasonable, or when it is not related to the impacts of the proposed development.



Rational Basis: Courts invalidate conditions which are not supported by evidence on the record of the proceedings that justifies their imposition. Such evidence shows that the reviewing board carefully deliberated the matter, complied with basic due process requirements, and obtained specific evidence of the need for the condition. In several instances, courts have invalidated conditions which were justified only by the neighbors' opposition to

the project. Some courts have stated that the administrative agency has a "burden of proving" the need for the condition; this burden requires, at least, that the agency consider evidence that justifies the imposition of the condition.



Reasonableness: The statutes and cases authorizing the imposition of conditions state that they must be "reasonable." Conditions may be invalidated when, under the circumstances, they impose an undue burden on the landowner. In these instances, it may be that the cost, inconvenience, or other impact on the landowner is too onerous, given the benefit to the public of the condition. This is particularly so when there is a less burdensome alternative to the condition or no indication that the agency considered less burdensome conditions that are adequate to protect the public.



Relatedness: The authority to impose most conditions makes it clear that they must be "directly related to and incidental to the proposed land use." This is sometimes described as requiring a close relationship between the condition imposed and the impacts of the proposed development. When the condition does not relate to, or lessen, the particular impacts of the development, it is not related or incidental to the proposed land use as required by law.



Vagueness: Conditions can be struck for vagueness. Agencies imposing conditions must take care to articulate them clearly and definitely so they can be implemented without confusion by the landowner and local building official. The property owner should not be left in any doubt as to the extent of use that is permitted.

Conditions must be:

1. Reasonable;
2. Directly related to the proposed use of the property;
3. Consistent with the local zoning ordinance and other local laws; and

4. Imposed for the purpose of minimizing the impact on the surrounding community.

COORDINATION WITH OTHER LAWS

Environmental Review



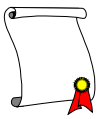
The provisions of the State Environmental Quality Review Act (SEQRA) require public agencies to consider the impacts of their land use decisions on the environment. These provisions must be complied with by the board reviewing any site plan application. Where the approval of a site plan may have a significant adverse impact on the environment, the extensive procedural requirements and the extended timetable of SEQRA must be followed and coordinated with other requirements for site plan approval.

Regulations adopted under the State Environmental Quality Review Act (SEQRA) make it clear that site plan approvals are "actions" by a local agency that are subject to environmental review. The law states that a site plan 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 reviewing board has completed preparation of a draft environmental impact statement. The time periods contained in the site plan 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.

County/Regional Planning Agency

In certain instances, site plans must be submitted by the reviewing board to a county or regional planning agency. If there is no county agency, referral is made to the regional or metropolitan agency. Such referral must be sent at least ten days before the public

hearing on the site plan, accompanied by a full statement of the matter under consideration.



General Municipal Law § 239-m requires certain site plans to be submitted to the county or regional planning agency for review and comment. Failure to provide the notice and referral required by General Municipal Law § 239-m amounts to a jurisdictional defect in the responsible agency's ultimate action on the permit application. *Old Dock Associates v. Sullivan* (1989).

- Certain situations must be referred to the county planning agency. Actions must be referred when they affect property within 500 feet of (a) a city, town, or village boundary; (b) the boundary of an existing or proposed county or state park or recreation area; (c) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road, or highway; (d) the right-of-way of any stream or drainage owned by the county; (e) boundary of any county or state owned land on which a public building or institution is situated; or (e) the boundary of a farm operating under an agricultural zoning district governed by the Agriculture and Markets Law. Actions regarding referral include any authorization issued under the provisions of any zoning ordinance or local law, which includes site plan approvals.



Referral to the county or regional planning agency must be made 10 days before the public hearing is held.

The county must make a recommendation within 30 days. If the county board recommends modification or disapproval, the board may accept and implement the recommendation, or it may hold a vote to override the county. In order to override the county recommendation, the board must vote by a majority plus one, or an "extraordinary vote," to do so.

Some local laws and regulations require a preliminary site plan procedure to coordinate the process with local authorities as soon as possible, making the final approval more of a formality. In some instances, however, the final approval takes place many months after the preliminary approval and the project may go through significant modifications. If this is so, additional hearings and other procedures may be necessary before final approval may be granted.



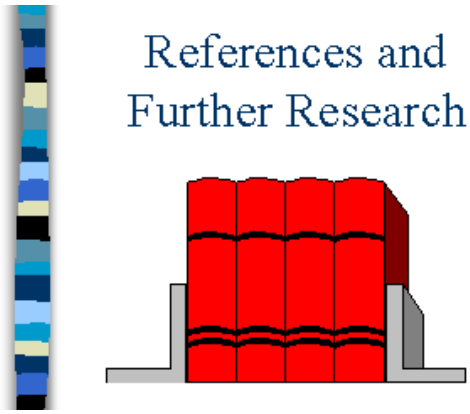
In *Ferrari v. Town of Penfield Planning Board* (1992), neighboring landowners successfully challenged the decision of a planning board. The court agreed to nullify the board's decision. State law requires that certain approvals must be submitted to the county or regional planning agency. The Penfield Planning Board made this referral and sought the agency's input when it received the preliminary site plan from the developer. When the project got to the final stage, it had changed substantially. In fact, the board even held a second hearing for final plan approval. The board, however, did not make the recommendation to the county agency. The court held that "where…the revisions are so substantially different from the original proposal, the county or regional board should have the opportunity to review and make recommendations on the new and revised plans."

SUMMARY

- The local legislature adopts site plan regulations.
- Site plan may be imposed in addition to zoning regulations.
- The local legislature retains review and approval authority or delegates the authority to a local administrative body.
- 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.
- The local legislature may authorize the responsible body to waive requirements that are inappropriate.

- The local legislature or the reviewing body may require a public hearing on a site plan application.
- If required, hearings must be held within 62 days after a site plan application is received. Notice by mail must be given to the applicant 10 days in advance and public notice must be given 5 days in advance.
- The reviewing body must comply with SEQRA and referral requirements to regional, metropolitan, or county planning agencies.
- Reviewing authority may approve, approve with modifications or disapprove the site plan application.
- The decision must be filed with the clerk of the municipality within 5 days of the determination.

REFERENCES



1. Local Planning and Zoning Survey: New York State Cities, Towns and Villages, Second Edition (April, 1995); New York State Legislative Commission on Rural Resources, Legislative Office Building, Albany, N.Y. 12247; (518) 426-6960.
2. John R. Nolon, Well Grounded, Shaping the Destiny of the Empire State, Local Land Use Law and Practice, Chapter -- http://www.law.pace.edu/landuse

QUIZ



1. Site plan regulations guide and control:
   A. All development within the municipality.
   B. On parcels that are divided into multiple parcels.
   C. On a single parcel.

2. A site plan is defined by state law as a drawing, prepared in accordance with local specifications, that shows the:
   A. Arrangement of the proposed use of a single parcel of land.
   B. Layout of the proposed use of a single parcel of land.
   C. Design of the proposed use of a single parcel of land.
   D. All of the above.

3. The adoption of site plan regulations is required by state law.
   A. True.
   B. False.

4. What authority does the local legislature have in regards to site plan approval and review?
   A. To adopt site plan regulations.
   B. To decide what standards and site plan elements must be included.
   C. To determine what sites are subject to approval.
   D. To appoint a local site plan review body.
   E. All of the above.

5. When the legislature grants another local board authority to review site plan applications:
   A. They can still review any decision made by that board.
   B. They may not change or adopt new site plan regulations.
   C. The have no authority to review the site plan application or to review the decision made by the reviewing board.

6. What are the reviewing board's options after reviewing a site plan?
   A. Approve it.
   B. Approve it subject to conditions or modifications.
   C. Deny it.
   D. All of the above.

7. A site plan application must be approved when the applicant shows that all the standards in the regulations are met.
   A. True
   B. False

8. A site plan application must be denied if the applicant does not show that all the standards in the regulations have been met.
   A. True
   B. False

9. If an application for a site plan is denied, the applicant cannot resubmit a new application with a different site plan for the parcel.
   A. True.
   B. False.

10. What is the purpose of imposing a condition on site plan approval?
    A. To balance the owner's interest in developing the land and the community's interest in being protected from any adverse impacts of development.
    B. To minimize any adverse impact of the proposed use on the neighborhood or community.
    C. To add an element of flexibility in decision-making for the purpose of responding to the concerns of applicants as well as those affected by the decisions of the local land use agencies.
    D. All of the above.

NEW YORK MUNICIPAL INSURANCE RECIPROCAL
LAND USE TRAINING PROGRAM

Tutorial Component V - *Variances*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL

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INTRODUCTION

A variance allows a landowner to use the landowner's property in a manner that does not comply with the literal requirements of the zoning law. There are two basic types of variances: use variances and area variances.

Use variances permit "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 parcel of land is zoned for single-family residential use and the owner wishes to operate a retail business, the owner can 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." When a proposed structure does not comply with the setback, height, or area requirements of the zoning law, a landowner must get an area variance. If an owner wants to build a deck on his house that encroaches slightly into a side-yard setback area, he may apply to the zoning board of appeals for an area variance.

PURPOSE & AUTHORITY

Variances provide flexibility in the application of the zoning law and give landowners an opportunity to apply for administrative relief from certain provisions of the law. A property owner may seek a use or area variance when the zoning enforcement officer or building inspector denies an application for a building permit because the proposed development violates the use or dimensional requirements of the zoning law.



Town Law § 267-b, Village Law § 7-712-b, and General City Law § 81-b set forth the definitions of a use and area variance, establish the authority of the zoning board of appeals to issue use and area variances,

and provide the statutory criteria that must be met before variances may be awarded.

If an application for permission to build is made to the zoning enforcement officer or local building inspector that 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 proposed development violates the use or area provisions of the zoning law, the applicant may then apply to the zoning board of appeals for a use or area variance of the literal provisions as applied to the particular parcel.



A property owner must first be denied a building permit because the request violates use or dimensional requirements of the zoning law. The property owner may apply for a variance to the zoning board of appeals.

VARIANCES AND THE ZONING BOARD OF APPEALS



The zoning board of appeals has been delegated the authority to issue use and area variances. No other board or authority, not even the local legislature, may hear and grant variance requests. The zoning board of appeals has appellate jurisdiction only, which means that the board is limited to reviewing the decisions of, or hearing appeals from, the determinations of the administrative official charged with zoning enforcement. This means that an applicant must first receive a denial from the building inspector or zoning enforcement officer confirming that the proposal is not permitted under the provisions of the zoning law. After such a denial is received, the property owner may apply to the zoning board of appeals for a variance. The board is limited to granting the minimum variance necessary

to address the need for the variance while preserving the character, health, safety, and welfare of the community.

Where a proposed special permit, site plan, or subdivision contains building features that do not conform to the zoning law, an area variance can be requested from the zoning board of appeals without first obtaining an initial denial by the official charged with the enforcement of the zoning law. This exception to the general rule stated above permits efficient administration of the land use system.



A vote of the majority of the board in favor of the variance is necessary in order to grant a use or area variance.

The legislative body can separate one land use from another, which is the essential purpose of dividing the community into zoning districts. When a quasi-judicial body, such as the zoning board of appeals, is allowed to vary the uses allowed in a district, that body's power must be limited in order to avoid the usurpation of the local legislature's duties. At the same time, the legislature does not want property owners to be denied a reasonable return on their property because of use restrictions. The zoning board of appeals may grant a use variance where it can give the landowner some relief from these restrictions without altering the essential character of the zoning district. Use variances must meet the requirements of the statute, which impose a burden on the petitioner of proving several factors. New York State statutes impose a heavy burden on an applicant because that applicant is requesting that the zoning board of appeals alter the local legislature's determination that a specific use is not appropriate in the zoning district.

Area variances involve similar tensions, but to a lesser degree. Area variances are appropriate when an odd configuration or unique circumstance prevents the development of a property precisely as prescribed by the dimensional requirement of the zoning law. In such a case, a variance in the dimensional requirements might permit the owner to develop in a way that avoids practical difficulties without substantially affecting

neighboring properties. In this situation, the zoning board of appeals has the task of balancing the benefit of the variance against its impact on the area.

Decisions

State statutes spell out the precise factors that the zoning board must consider in deciding whether to grant an area variance, but has not provided guidance as to how to weigh those factors.



When an area variance is granted, the zoning board's record should reveal that the board considered all required factors and the record should include the findings of the board with respect to each.

AREA VARIANCES

The zoning board may grant area variances to provide relief to the landowner of a parcel that has an unusual configuration or a unique circumstance that prevents development of the property in compliance with the dimensional provisions of the law. A common example is an area variance that is needed to relax the setback requirement on a parcel where some site condition, like a rock outcropping, prevents the proper location of a building on the site.



For a zoning board of appeals to grant a variance from the dimensional and area requirements, it must find that the benefits of the requested variance to the applicant outweigh the detriment it will cause to the health, safety, and welfare of the neighborhood. The board's job is to determine, based on the facts presented by the applicant, how significant the impact on the community will be and how beneficial the variance will be to the owner. The board must weigh the benefits of the requested variance to the applicant against the potential negative impact on the neighborhood using the following five factors as 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, 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 for the applicant 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* (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 found that the construction of the boathouse would not cause a change in the character of the neighborhood as adjacent properties had similar structures. In addition, no alternatives other than an area variance existed because the subject parcel was smaller than required and there was no available adjacent land that could be acquired 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. Although the owner had knowledge that

the lot was substandard when purchased, the statute specifically provides that this is just one factor for the board to consider 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 record amply supported the board's findings.

Minimum Variance Necessary

When the statutory balancing comes out in favor of the landowner, the board may only authorize the minimum variance necessary to relieve the landowner. The board may not simply eliminate the area requirement, rather it may relax the requirement only to the extent necessary to provide relief to the owner. Thus, the impact on the character of the community is minimized.



Village Law § 7-712-b (3)(c), Town Law § 267-b (3)(c), and General City Law § 81-b (4)(c) state that when granting area variances, the board "shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community."

USE VARIANCE

A use variance allows landowners to use their land in a way not permitted under the zoning law. Use variances generally are more difficult to obtain than area variances.

To obtain a use variance, the applicant must demonstrate that the applicable use provisions of the zoning laws 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.

2. The hardship must be unique to the owner's property and not applicable to a substantial portion of the zoning district.
3. Granting the variance will not alter the essential character of the neighborhood.
4. The hardship is not self-created.

1. *The owner cannot realize a reasonable return on the property as zoned.* The lack of return must be substantial and proven by competent financial evidence. It is insufficient for the applicant to show that the desired use would be more profitable than the use permitted under the zoning law.



In *Everhart v. Johnston* (1968), the owner of residentially zoned property sought a use variance to allow him 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 the owner could charge a greater rent to a commercial rather than residential tenant. The court held that a showing that "the permitted use may not be the most profitable use is immaterial." The applicant must establish 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 portion of the zoning district.* If the hardship is common to the whole neighborhood, the remedy is to seek a change in the zoning from the local legislature, not to apply for a use variance from the zoning board of appeals.



In *Collins v. Carusone* (1987), the court held that the applicant had failed to establish that the hardship, being located near a city landfill, was unique to her property. Rather, the court held that the hardship was common to all properties in the area. The court upheld the zoning board of appeals' rejection of a use variance based on the applicant's failure to satisfy the

uniqueness requirement of the statute. Similarly, in *Citizens for Ghent v. Zoning Board of Appeals of the Town of Ghent* (1991), the landowner argued that the proximity of the property to an industrial park and highway caused an unnecessary hardship to use the property because it was zoned as residential/agricultural. The court held that because neighboring properties shared the same hardships, the use variance was properly denied.



In *Douglaston Civic Association v. Klein* (1980), the Court of Appeals 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." Such a change is the responsibility of the local legislature, not the zoning board of appeals.

3. *Granting the variance will not alter the essential character of the neighborhood.* In making this determination, the zoning board should consider the intensity of the proposed development as compared with the intensity of 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.



The court in *Holy Sepulchre Cemetery v. Board of Appeals of the Town of Greece* (1948), 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 is not self-created.*



In *Clark v. Board of Zoning Appeals of Town of Hempstead* (1950), the Court of Appeals held that anyone who "knowingly acquires land for a prohibited use, cannot thereafter receive a variance on the ground of 'special hardship.'" For example, a developer cannot acquire land zoned for residential use and then successfully petition for a variance to construct office buildings. Whether the purchaser actually knew about applicable use restrictions is not relevant. She has a duty to discover the use restrictions.



In *AMCO Development v. Zoning Board of Appeals of the Town of Perinton* (1992), *the* court held that the property owner had created the hardship complained of. The owner bought a parcel, which was two-thirds wetland. Without the approval of zoning authorities, the owner divided the property into four lots and sold three of the parcels for residential development. The owner claimed that zoning use restrictions pertaining to the remaining lot, which was covered by wetlands, constituted a hardship for which he requested a use variance. The zoning board of appeals correctly found that by creating an unapproved subdivision that left one parcel incapable of development because of significant wetlands, the hardship was self-created and the board could not grant a use variance.

VARIANCE PROCEDURE

There are several steps involved in making variance determinations. The following is a summary of those procedures, some of which may not apply in all cases. If an area variance is needed for a subdivision, special use permit, or site plan approval, the application may be made directly to the zoning board of appeals.

First, the landowner must apply to the building inspector or zoning enforcement officer, who will determine whether the proposal meets the requirements of zoning. If the building official finds the proposal conforms, no variance is needed. Before the zoning

board of appeals may consider a variance, however, the enforcement officer must deny approval to use the property as proposed because the zoning law prohibits it.



The property owner must apply to the enforcement officer and receive a denial. Then the owner has sixty days from this determination to apply to the zoning board of appeals for a use or area variance.

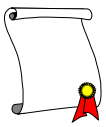


The provisions of the State Environmental Quality Review Act (SEQRA), which require public agencies to consider the impacts of their land use decisions on the environment, must be complied with by the zoning board of appeals. Where the approval of a variance may have a significant adverse impact on the environment, the extensive procedural requirements and the extended timetable of SEQRA must be followed and coordinated with other requirements for granting variances.



The landowner may be required to submit an environmental review form for the zoning board to consider along with its application for a variance.

In certain instances, the zoning board must submit variance applications to a county or regional planning agency. Such referral, accompanied by a full statement of the matter under consideration, must be sent at least ten days before the public hearing on the variance.



Under General Municipal Law § 239-m, certain variances must be submitted to the county or regional planning agency for review and comment.



The zoning board of appeals must hold a public hearing within a reasonable time after receiving the application. The zoning board of appeals' decision on the variance must be rendered within sixty-two days of the date of the public hearing. If necessary, this time may be extended for SEQRA review.



The decision, with the board's findings, must be filed in the office of the municipal clerk within five business days and a copy must be mailed to the applicant.

CONDITIONS

Once a condition is attached to a local land use approval, it must be complied with before the local building inspector or department issues a building permit. If the condition must be met during construction, then its terms must be complied with before the construction is complete and before local authorities will grant a certificate of occupancy.



Some types of conditions that have been sustained by the courts are fences, safety devices, landscaping, screening, access roads, soil erosion prevention measures, drainage facilities, outdoor lighting, enclosure of buildings, restrictive covenants that prevent development of land in a floodplain, archeological site or viewshed protections, and a variety of measures to contain the emission of odors, dust, smoke, noise, and vibrations.

The authority to impose conditions on the approval of a variance is expressly delegated to the zoning board of appeals by statute. The statutes state that the conditions must be "reasonable" and "directly related to and incidental to the proposed use of the property."



The statutory provisions that authorize the imposition of conditions on the issuance of variances are found at Village Law § 7-712-b (4), Town Law § 267-b (4), and General City Law § 81-b (5). "The board of appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of the zoning law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community."

In the case of variances, conditions must be consistent with the spirit and intent of the zoning law and imposed to minimize any adverse impact on the neighborhood.

LIMITATIONS ON CONDITIONS



In *Driesbaugh v. Gagnon* (1988), the property owners contested certain conditions attached to the granting of a use variance for one of two properties owned by them in the area. The property owners, who operated automobile repair shops at each location in the town, contested a condition that prohibited parking more than two non-employee vehicles during working hours outside the repair shop. They also contested a condition that required them to discontinue using the second property as a repair shop.

The court began its analysis by recognizing that a local board has the authority to impose "appropriate conditions and safeguards in conjunction with a change of zone or a grant of variance or special permit," but those conditions must be "reasonable and relate to the real estate without regard to the person who owns or occupies it." The court warned that local boards were particularly prone to making determinations based on the user and not the use in the case of variance

and special use permit approvals where a single owner of several properties is involved.

Any conditions imposed on a variance issued for a property must relate "solely to that property." Thus, the court determined that the condition requiring the owner to close down the other repair shop was invalid because it was completely unrelated to "the potential impact of *that* use on neighboring properties." "In seeking a variance for a specific parcel petitioner should not have been required to forfeit valuable property rights merely because he happened to own other property in the same community." However, the court upheld the parking condition attached to the variance. The court felt that the number of vehicles parked on the property could adversely affect the character of the surrounding community, a district which was classified as agricultural/residential.



A zoning board may not, however, condition a variance upon a dedication of other property, conditions may only apply to land that is under consideration.

The zoning board of appeals retains significant authority to condition a variance approval. In reviewing a decision of the zoning board of appeals on a variance application, the court will presume that the decision was correct and defer to the judgment of the zoning board of appeals. The same deference extends to any conditions attached to a variance approval. For example, conditions can include "restrictive covenants relating to the maximum area to be occupied by buildings." This is one way to ensure that granting a variance will have a minimal effect on the neighborhood.

A zoning board may grant a variance on the condition that the variance will lapse if the variance is not acted upon within a certain time. Additionally, the board may condition approval of the variance on aesthetic reasons alone.



In *Hubshman v. Henne* (1973), the court upheld a requirement that the owner create a buffer of shrubbery to protect the quiet enjoyment of the neighbors. In *Nardone v. Town of Lloyd* (1988), requirements that the owner provide a number of parking spots and remove a shed for parking to alleviate the adverse impact of off-site parking due to the proposed development of the property. The requirement that the board grant the minimum variance necessary suggests that conditions may be substantial and still be valid. Thus, in *Finger v. Levenson* (1990), the court upheld a condition on a use variance that restricted the use of a building as an antique store to no more than twenty-five percent of the total floor space in the building. As the area was zoned for single-family use, the court determined that the condition was "reasonably related to the purposes underlying the zoning code."

Conditions imposed on variances must comply with several standards or they can be declared invalid. Courts have invalidated a condition when there is no rational basis for its imposition in the record, when the condition is unreasonable, or when it is not related to the impacts of the proposed development.

The requirement that conditions relate to the impacts of a proposed development has led to several generalizations about requirements that conditions must meet. It is often said, for example, that conditions must relate to the "use, not the user," and that conditions cannot regulate the "details of the operation" of a business. Although these statements have some validity, they are not absolutes.



When conditions deal with who uses the land or the details of business operations, the zoning board has to be particularly careful to show how they are related to lessening the impacts of the development on the land or how they protect the character of the neighborhood.

SUMMARY

Summary – Use Variance

Before a use variance may be permitted by the zoning board of appeals**,** the applicant must show "unnecessary hardship." To demonstrate "unnecessary hardship" the applicant must prove (1) he cannot realize a reasonable return; (2) the hardship is unique to his property; (3) the variance will not alter the essential character of the neighborhood; and (4) the hardship is not self-created. Additionally, the statute mandates the granting of the minimum variance necessary to alleviate the hardship. Consequently, in granting the minimum variance, the board may impose conditions to protect the "essential character of the neighborhood."

Summary – Area Variance

For an area variance, the board must decide that the benefit to the applicant of permitting the variance will outweigh the detriment to the surrounding community. In balancing the benefit and burden, the board must weigh the following factors: (1) whether an undesirable change to the character of the neighborhood or a detriment to surrounding properties will result from the grant of the variance; (2) whether the benefit sought by the applicant can be achieved by alternate means; (3) whether the requested variance is substantial; (4) whether the variance will have an adverse physical or environmental impact on the surrounding community; and (5) whether the difficulty was self-created. In granting the variance the board must grant the minimum variance necessary.

Summary of Procedure - Use and Area Variance

- The landowner submits an application for variance to zoning board of appeals.
- The landowner submits an environmental review form, if required.
- The zoning board of appeals must hold a public hearing on the application for area variance.

- The zoning board of appeals must make its determination within sixty-two days of the hearing. This time may be extended if SEQRA review is necessary.
- The zoning board of appeals must file its decision within five days after making a determination.

Summary – Conditions on Variances

The Town Law, Village Law, and General City Law expressly authorize the local board of appeals to impose conditions on a variance approval. Conditions may be imposed as long as those conditions fairly relate to the impacts of the land use allowed by the variance. Conditions that address these impacts fulfill the statutory mandate to grant the minimum variance necessary to alleviate the burden on the property owner.

Conditions must be:

1. Reasonable;
2. Directly related to the granting of the variance;
3. Applicable to the use of the land and not the user as a person;
4. Imposed to minimize the impact on the surrounding community; and
5. Applicable only to the property under consideration.

REFERENCES

1. John R. Nolon, Well Grounded, Shaping the Destiny of the Empire State, Local Land Use Law and Practice, Chapter 3; http://www.law.pace.edu/landuse/homepage.html
2. Between Chaos and Constraint: The Imposition of Reasonable Conditions on Land Use Approvals, Cozata Solloway, Land Use Law Center (1996).
3. James A Coon and Sheldon W. Damsuy. All You Ever Wanted to Know About Zoning . . . (1993). New York Planning Federation.

QUIZ



1. What is the purpose of a variance?
   A. To allow property to be used in a manner that does not comply with the literal requirements of the zoning law in order to alleviate difficulties and hardships for property owners.
   B. To allow property owners to enjoy the most productive and economical use of their land and increase the community's property tax revenues.
   C. To authorize a particular land use that is permitted in a zoning law but impose certain conditions on that use.

2. If a piece of land is zoned for a single-family residential use and the owner wishes to operate a retail business, which variance would the owner apply for?
   A. Use Variance.
   B. Area Variance.

3. If an owner wants to build an addition to his house that encroaches onto the side-yard setback area, which variance would the owner apply for?
   A. Use Variance.
   B. Area Variance.

4. When can a request for an area variance bypass the zoning enforcement officer and go directly to the zoning board of appeals?
   A. Where a proposed special permit use contains features that do not conform to the area requirements in the zoning law.
   B. Where a proposed site plan contains features that do not conform to the area requirements in the zoning law.

C. Where a proposed subdivision contains features that do not conform to the area requirements in the zoning law.
D. All of the above.

5. What interests are considered by the zoning board of appeals when granting an area variance?
   A. The benefits to the applicant.
   B. The detriment to the health, safety, and welfare in the neighborhood.
   C. Both A and B.

6. Does the fact that the hardship is self-created prohibit to the granting of a use variance?
   A. Yes, the applicant must meet all four statutory standards.
   B. No, it is only one factor to be considered.

7. What is the remedy if the hardship is common to the whole neighborhood?
   A. To seek a change in the zoning.
   B. To request a use variance.
   C. To request an area variance.

8. Since variances may be conditioned to avoid adverse impacts on the neighborhood, they are not subject to SEQRA, which requires local agencies to review the environmental impacts of their decisions.
   A. True.
   B. False.

9. What can the zoning board of appeals do to minimize any adverse impact a variance may have on the community?
   A. Impose conditions.
   B. Just deny the variance.

10. What situations have led courts to invalidate conditions imposed on variances?
    A. No rational basis.
    B. Unreasonable.
    C. Not related to proposed development.
    D. Vague.
    E. All of the above.

NEW YORK MUNICIPAL INSURANCE RECIPROCAL
LAND USE TRAINING PROGRAM

Tutorial VI - *Special Use Permits & Permit Conditions*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL

LAND USE LAW CENTER - PACE UNIVERSITY SCHOOL OF LAW

NEW YORK PLANNING FEDERATION

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Special Use Permit Provision Could Have Saved Town $144,000

In *Triglia v. Town of Cortlandt* (1998), the applicant to the Cortlandt Town Board wished to develop multi-family housing on his property, which had previously been zoned for such a development. According to new plans that the town was attempting to enact, the property would be rezoned in a way that would prohibit multi-family housing. Acknowledging the fact that such housing was needed in the town, the Board planned to create an "overlay district" which would allow plaintiff's development under special permit provisions. In fact, the new zoning ordinance was adopted without the overlay district.

The Westchester County Supreme Court held that the ordinance was unconstitutional because the town acted either "for an exclusionary purpose or its actions had an exclusionary effect." The ordinance did not take into account the housing needs of the community or the region. The court found that lower income housing was needed in the area and because the ordinance eliminated almost all opportunity to build such housing in the town it was considered exclusionary and, therefore, unconstitutional.

The Court granted the landowner's motion for summary judgment on the issue of constitutionality and gave the Town four months to amend the ordinance. Plaintiff's request for damages resulted in a $44,000 award for counsel fees and a $100,000 award for costs of delay.

INTRODUCTION

Special use permits are referred to by a variety of terms in local practice and court decisions. These terms include special exception use, special permit, special exception permit, conditional use permits, and special exceptions. The statutory term is special use permit.



New York statutes define a special use permit as the authorization of a particular land use that is permitted in a zoning law subject to specific requirements that are imposed to assure that the proposed use is in harmony with the immediate neighborhood and will not adversely affect surrounding properties. An example is a home office or home occupation in a single-family residential neighborhood. A law, for example, might permit single-family homes as-of-right in a residential district and home occupations upon the issuance of a special use permit. This means that the legislature has concluded

that religious institutions are harmonious uses in a residential district, but that conditions may need to be imposed on them to ensure that the size, layout, parking, and lighting do not adversely affect the residential neighborhood.

The local legislature is empowered to authorize the planning board or other local administrative body to grant special use permits as set forth in the local zoning law. Some legislatures have delegated this authority to the planning board, some to the zoning board of appeals, and some have retained the authority to issue special use permits themselves.

 As an example, the Town of Patterson's Zoning Law, Article XVI (Special Permits for Residence Districts), Section 154-75, provides standards for the Zoning Board of Appeals to grant a special use permit for a religious institution. According to the law, the project may be permitted provided that: (A) The lot size and setbacks conform to all the requirements of the district in which it is located. (B) The lot frontage shall conform to the requirements of the district in which it is located. (C) Said frontage and access to lot shall be on a state or county road, and (D) The maximum lot coverage shall be ten percent.

In the Town of Patterson the zoning law sets forth which board has the authority regarding special use permits in Article XIV, Section 154-70. "A special use permit may be granted by the Zoning Board of Appeals." The law lists a variety of uses for which a special use permit may be awarded, some of which are: undertaker establishments, clubs, religious institutions, schools, trailer parks, hospitals, shopping centers, hotels and motels, and industrial parks.

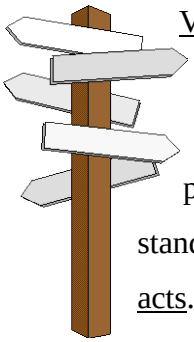
The Zoning Board of Appeals in the Town of Patterson is limited in its ability to grant special use permits, however, by standards contained in the zoning law. Some of the limitations are: (1) that the location, size, and character of the use will be in harmony with and conform to the appropriate and orderly general development of the town; (2) that the Board's decision to grant a special use

> permit must be in accordance with the comprehensive plan; (3) that the Board's decision must be made with reasonable consideration of the character of the district; (4) the Board must give weight to the fact that the proposed special use will not depreciate the value of the property in the neighborhood; and (5) that the use will not hinder or discourage the appropriate development and use of the property in the neighborhood. These guidelines allow special uses without disrupting the character of the neighborhood in which they are established. The board would use them when reviewing an application for a special use permit for a religious institution in addition to the specific standards contained in section 154 - 75 above.

Local legislatures achieve a degree of flexibility by adding special uses to the types of land uses otherwise permitted in zoning districts. At its inception, zoning was justified on the ground that the strict separation of uses was in the public interest and promoted the public health, safety, and welfare. Rigid use separation, however, would exclude a variety of land uses historically associated with one another, such as the church in a residential neighborhood, or gasoline station in a neighborhood retail district. By allowing special uses, subject to conditions, the legislature allows a diversity of compatible uses while insuring that surrounding properties are protected from negative impacts in particular instances.

A variety of such special uses may be permitted in various zoning districts. In residential zones these often include adult homes, professional offices, group homes, swimming pools, nursing homes, and day care centers. In commercial zones these may include drive-in establishments, video arcades, marinas, shopping centers, gas stations, and convenience stores. When different uses can be made compatible with principal, as-of-right uses by the imposition of conditions, they are often permitted as special uses. Once a special use permit has been issued, it is not limited to the applicant, but affixes to and runs with, the ownership of the land.

SPECIAL USE PERMIT AND VARIANCE DISTINGUISHED



Variances were discussed in an earlier tutorial in this series. A variance is a device that permits a property owner to do something on the land that is prohibited by the zoning law. Variances are awarded to avoid practical difficulties or unnecessary hardships in individual cases. The standards for issuing use and area variances are specified in the state enabling acts. "A variance is an authority to a property owner to use property in a manner forbidden by the law while a special use permit allows the property owner to put his property to a use expressly permitted by the law." *Matter of North Shore Steak House v. Board of Appeals of Thomaston* (1972). Special uses are specifically permitted under certain circumstances specified by the local legislature in the zoning law. This amounts to a legislative finding that the use permitted is harmonious with neighborhood character and ought to be allowed.



Local boards must use the correct standard when evaluating land use applications. One error is confusing special use permits and variances. The following case illustrates this mistake.



The Village of Thomastown created a twenty-five-foot buffer zone between zoning districts to accommodate owners of lots divided by zoning district boundary lines. The zoning law of the Village allowed these owners to request a special use permit from the zoning board of appeals to carry the use allowed in either zoning district twenty-five feet into the other.

The owner of a lot occupied by a restaurant, which extended north into a single-family residential zone, applied to the board for a special use permit to pave twenty-five feet of the lot for parking associated with the restaurant. The owner also asked for a use variance in order to extend the parking farther than twenty-five feet into the single-family zoned portion of its lot.

After a review of the matter, the zoning board of appeals rejected both the application for the special use permit and the variance because they were "not in harmony with the general purpose and intent of the zoning plan." In reaching this conclusion, the board cited the same grounds for denying both the special use permit and the variance: that the premises were not unique, that the hardship was self-created, and that the use would have an adverse effect on the adjoining property. The Court of Appeals reversed the zoning board of appeals' denial of the special use permit and used the occasion to explain the critical difference between a variance and a special use permit:

> The denial of the special use permit, based on factual findings used to support denial of the variance, ignores the fundamental difference between a variance and a special use permit. A 'variance' is an authority to a property owner to use property in a manner forbidden by the law while a special use permit allows the property owner to put his property to a use expressly permitted by the law. The inclusion of the permitted use in the law is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Denial of the permit on the ground that the extension of the parking lot twenty-five feet into the residential zone is 'not in harmony with the general purpose and intent of the zoning plan' is, thus, patently inconsistent. *Matter of North Shore Steak House v. Board of Appeals of Thomaston* (1972).

SPECIAL USE PERMITS AND LOCAL ADMINISTRATION

Legislative Role

The local legislature has the inherent power to decide how special use permits are to be issued and may, if it chooses, retain some or all special use permit review and approval authority.



In *Zeifman v. Board of Trustees of the Village of Great Neck* (1963), it was held that the legislature has the inherent power to retain special use permit authority. Where the legislative body retains special use permit issuance authority, there need not be standards set forth that guide and limit its discretion. As the legislative body, a legislature can "legislate" standards on a case-by-case basis. Even where standards are included, they do not limit the legislature. It may apply additional standards to particular applications in its legislative capacity. The legislature, however, must not act capriciously. It may not apply different standards to similarly situated properties or withhold a permit for reasons not related to the public health, safety, and welfare for no reason at all, or for reasons that are contrary to the evidence on the record.



In *Green Point Savings Bank v. Board of Zoning Appeals of Town of Hempstead* (1939) and *Larkin Co. v. Schwab* (1926), the courts held that when the legislature is the permit issuing board, standards need not be contained in the law for the special use permit provisions to be valid. *See also Cummings v. Town Board of North Castle* (1984) (concurring and also holding that "even if the law sets forth standards, the legislature has not divested itself of the power of further regulation unless the standards expressed purport to be so complete or exclusive as to preclude the Board from considering other factors without amendment of the zoning law").



Decisions made on special use permits must have a rational basis. Where the legislative body heard no expert testimony or scientific evidence, its denial of a permit was reversed where it was shown that the subject property would produce no greater noise, traffic, and fumes than uses allowed by the zoning as-of-right in the same district. *J.P.M. Properties, Inc. v. Town of Oyster Bay* (1994).

ADMINISTRATION BY OTHER BODIES



Where the local legislature decides not to review applications for special permits, it is empowered to authorize the planning board or other administrative body, such as the zoning board of appeals, to issue special use permits. The legislature must adopt standards to guide the issuance of special use permits by an administrative body, but those standards may be fairly general in scope. In an earlier example, it was noted that the Town Board of Patterson authorized its zoning board of appeals to issue special use permits. This authorization is found in the zoning law itself as are the standards that the zoning board must follow in reviewing special permits.

BASING DECISIONS ON STANDARDS IN THE REGULATIONS



Unless the legislative body retains special use permit authority, the zoning law must contain reasonably clear standards to guide the reviewing board in determining whether to grant a special use permit. These standards are of critical importance. If an applicant can prove that it can meet these standards, the permit must be issued. When the standards established by the legislature are met, it is not in the administrative body's power to determine that the project will be detrimental to the neighborhood and the permit denied.



In *North Shore Equities, Inc. v. Fritts* (1981), the zoning law permitted a four family apartment building in residential and commercial zones if the zoning board of appeals granted a special use permit. The board denied the applicant's request for the permit, but the court found that the record showed the applicant had complied with the special use standards. Since no proof on the record contravened the applicant's experts, there was

insufficient evidence to support a decision to deny the application. The denial by the zoning board of appeals was annulled and the application was granted.



The Second Department sustained a zoning law that authorized the board of appeals to permit the use of premises as a gasoline filling station "after taking into consideration the public health, safety and general welfare and subject to appropriate conditions and safeguards." These standards were challenged as being too bring to provide meaningful guidance to the board. *See Aloe v. Dassler* (1951). The court held that the delegation of power was proper because "standards are provided which, though stated in general terms, are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers." *See also Dur-Bar Realty Co. v. City of Utica* (1977) (holding that "the delegation of power from a legislative body to an administrative body is impermissible unless accompanied by adequate standards to guide the administrative body's exercise of discretion").

There are several cases in New York where courts have invalidated the special use permit provisions of a local zoning law because the standards were too broad and gave the reviewing board unrestricted discretion to approve or reject applications for permits.



To avoid lawsuits that challenge the adequacy of standards in a special use permit law, legislatures should include ample guidelines in the law for the reviewing agency to follow. In *Little v. Young* (1949), it was held that the failure of the town to prescribe standards for the zoning board of appeals to follow in granting special use permits invalidated the board's power to review.

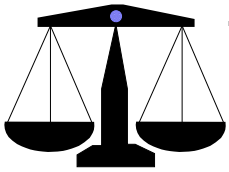
When delegating special permit authority to an administrative body, the legislature must adopt standards to guide the body in reviewing, conditioning, and approving special uses. These standards, for example, may require that gasoline stations and drive-in establishments provide adequate traffic safety improvements, that professional home

offices provide adequate parking and landscape buffering, or that shopping centers provide adequate storm drainage and lighting controls to protect surrounding areas.

When standards are included in the zoning law, they must serve as the basis for any decision to deny a permit by an administrative body. Where a theater special use permit was denied based on traffic dangers, the denial was reversed because the local legislature did not authorize the administrative board to consider the traffic impacts of a proposed special use. In another case, the denial of a special use permit because of traffic impacts was reversed where there was no evidence on the record showing that the proposed use would create greater traffic than as-of-right uses allowed in the neighborhood under the zoning law.

CONDITIONS

Permit conditions are enforced through local administrative procedures. Once a condition is imposed on a local land use approval, it must be complied with before the local building inspector or department issues a building permit. If the condition is one that is to be met during construction, its terms must be complied with before the construction is complete and local authorities grant a certificate of occupancy.



The purpose of imposing a condition on the approval of a land use permit is to balance the owner's interest in developing the land and the community's interest in being protected from any adverse impacts of that development. Conditions are imposed to minimize any adverse impact of the proposed use on the neighborhood or community, and as a means of enforcing the standards contained in the zoning law that special uses are to meet.



The reviewing board must meet several requirements to condition a special use permit approval:

- Conditions must be based on criteria in the law.

- Conditions must be reasonable.
- Conditions must be directly related and incidental to the proposed use.
- Conditions must be stated in terms that are sufficiently clear and definite.
- Conditions must have a factual basis.

LIMITATIONS ON THE IMPOSITION OF CONDITIONS

The authority to impose conditions on the issuance of a special use permit is expressly delegated to local governments by statute. However, this authority is not without limits. The statute states that the conditions must be "reasonable" and "directly related to and incidental to the proposed use of the property." A number of cases have also held that conditions must be incidental and related to the proposed use of the property. *See Conmar Bldrs. v. Board of Appeals* (1964); *Oakwood Is. Yacht Club v. Board of Appeals of the City of New Rochelle* (1961); *Pearson v. Shoemaker* (1960).



Bernstein v. Bd. of Appeals, Village of Matinecock (1969), held that conditions imposed on a special use permit "cannot go beyond the law, which is the source of the board's power." The power to impose conditions is not unlimited, but must be based on facts in the record and criteria found in the law.



Any condition imposed on an applicant for a special use permit must be imposed to achieve one or more of the standards contained in the special use permit provisions. If the permit is to be conditioned or denied, the decision to deny or impose conditions must be made for the purpose of enforcing the articulated standards.



In *Holmes & Murphy, Inc. v. Bush* (1958), the court invalidated the denial by the zoning board of appeals of a special use permit. The landowner applied for a special use permit in an industrial district.

The law permitted the use unless it constituted a “trade, industry or use which is or may be injurious, offensive or noxious by reason of vibration or noise or by the emission of odor, stenches, dust, smoke or gas.” The zoning board of appeals denied the permit because its members suspected that the use would require the use of large trucks.

Although the landowner would have to comply with the local regulation of trucks contained elsewhere in the municipal code, this was not a proper basis for the board to deny the special use permit. The court concluded that it was improper for the village to deny a special use permit on the grounds that excessively heavy trucks would be used on site because no such consideration was contained in the standards found in the provisions of the law related to special use permits.



Often, but not always, conditions that limit the details of operation of a business are set aside as not relating to the proposed use of the land. When a use variance for a real estate office in a residential district was conditioned on the requirement that it be used only in conjunction with the applicant's personal real estate business, that condition was set aside as unrelated to the impacts of the use proposed. It was strictly personal in nature. When the details of the operation of a nursery school, including the age of students, hours of school operation, and the number of hours to be worked by a caretaker, were the subjects of a condition imposed on the granting of a variance, the court determined that these details were unrelated to zoning matters and inappropriate. *Bernstein v. Village of Matinecock Board of Appeals* (1969). These same limitations apply to conditions imposed on special use permits.

However, a condition limiting the period of operation of the school from September through June was deemed valid because the definition of a private school in the law contained a similar limitation. In another case, a condition that limited an automobile repair shop from keeping more than two non-employee

vehicles outside the shop during working hours was sustained as related to the use of the land proposed by the owner's application.



In *Old Country Burgers v. Town of Oyster Bay* (1990), the court annulled conditions that dealt with the manner of a business' operation. The use of the land as a drive-through restaurant was allowed in the law as a specially permitted use. The board approved the proposed use but imposed meal-time restrictions on the operation of drive through windows. The court stated that since there were no studies or other evidence that showed the potential for traffic problems, the restriction was without basis. Instead, the condition amounted to an impermissible regulation of the manner of operation rather than an attempt to minimize adverse affects.

The standards governing the granting of special use permits, as with the approval of subdivision and site plan applications, are contained in the zoning law or other regulations adopted by the local legislature. Before granting its approval of the application, the reviewing board must insure that the standards contained in the law or other regulations are complied with by the proposed development. Frequently approval is conditioned on the developer agreeing to modify the design of the development or to add site features to meet the underlying standards adopted by the legislature. These conditions are appropriate when their purpose is to insure the standards are complied with.



Although the imposition of conditions is clearly within the authority of the governing body, the conditions must serve to achieve the standards contained in the zoning law or they can be declared invalid. Courts also invalidate a condition when there is no evidence in the record justifying its imposition, or when the condition is unreasonable or is not related to the impacts of the proposed development.

ADMINISTRATION AND PROCEDURE

The Application and its Review



A landowner makes the decision to apply for a special use permit. The application must be submitted to the local administrative body that is delegated review and approval authority.

The applicant should be familiar with the standards that are contained in the law that give the reviewing body the authority to deny or condition the permit if the standards are not met by the proposed project. If a proposed project meets these standards, the special use permit must be issued. If not, it may be subject to conditions imposed to meet those standards or denied if the project cannot meet the standards even when conditions are imposed.



Initially, the burden is on the applicant to demonstrate that the standards can be met. This can be done by completing traffic studies, presenting landscape plans, and submitting architect's renderings of the completed project as seen from relevant points. Where such evidence demonstrates that the proposed project complies with the standards, the reviewing board must approve the application unless it can demonstrate that the applicant's evidence is faulty or that it has found additional evidence that rebuts the information submitted by the applicant. If the reviewing board imposes a condition or denies an application without evidence that supports that action, it runs the risk of reversal in court where the applicant has submitted competent evidence that the project meets the legislated standards.



The reviewing board's decision on the special use permit must be rendered within sixty-two days of the date of the public hearing. Any decision of the reviewing board must be made 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 and a copy mailed to the applicant.

County/Regional Planning Agency

In certain instances, the reviewing board must submit special use permits to a county or regional planning agency. Such referral must be sent at least ten days before the public hearing on the special use permit, accompanied by a full statement of the matter under consideration.



General Municipal Law § 239-m requires certain special use permits to be submitted to the county or regional planning agency for review and comment. Failure to provide the notice and referral required by General Municipal Law § 239-m amounts to a jurisdictional defect in the responsible agency's ultimate action on the permit application. *Old Dock Associates v. Sullivan* (1989). Any permit awarded without such referral may be annulled by a court.

Certain matters must be referred to the county or regional planning agency. Proposed special use permit applications must be referred when they affect property within 500 feet of (a) a city, town, or village boundary; (b) the boundary of an existing or proposed county or state park or recreation area; (c) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road, or highway; (d) the right-of-way of any stream or drainage owned by the county; (e) the boundary of any county or state owned land on which a public building or institution is situated; or (e) the boundary of a farm operating under an agricultural district governed by the Agriculture and Markets Law.



The county must make its recommendation within thirty days. If the county recommends modification or disapproval, the board may accept and implement the recommendation, or it may vote to override the county. A majority plus one of the board's members must vote to override the county's recommendation in most counties in the state.

Environmental Review



The provisions of the State Environmental Quality Review Act (SEQRA), which requires public agencies to consider the impacts of their land use decisions on the environment, must be complied with by the reviewing board. Where the approval of a special use permit may have a potentially significant adverse impact on the environment, the extensive procedural requirements and the extended timetable of SEQRA must be followed and coordinated with other requirements for the issuance of a special use permit. Normally the administrative body that reviews the application for the special use permit will be designated the lead agency that is charged with the legal responsibility for determining whether the proposed project may have a substantial negative impact on the environment and, if so, complying with the extensive requirements of SEQRA.

SUMMARY

The rules regulating the issuance of special use permits are defined carefully by state statutes. These statutes define a special use permit, empower the local legislative body to authorize a local agency to grant such permits, allow conditions to be attached to them, authorize the waiver of permit requirements in appropriate circumstances, require public hearings to be held before special use permits are granted, require compliance with environmental review provisions of state law, provide for notice to county and regional planning agencies, require the filing of decisions on special use permits, and allow any person aggrieved by the board's decision to petition the courts to review it.



Village Law § 7-725-b, Town Law § 274-b and General City Law § 27-b.



The following list generally outlines the procedural steps followed for special use permit applications.

- Landowner makes application for special use permit to the authorized local board, which may be the local legislature itself, the planning board, zoning board of appeals, or other local administrative body.
- If required, an environmental review form is submitted and the State Environmental Quality Review Act (SEQRA) must be complied with before the application is deemed complete (*see* tutorial titled "Environmental Review").
- Notice may be required to be given to the county or regional planning board for its review under General Municipal Law § 239-m.
- The reviewing board must hold a public hearing within sixty-two days of the day an application for a special use permit is received and deemed complete. Public notice of the hearing must be published at least five days before it is held.
- The reviewing board must decide upon the application within sixty-two days after the hearing.
- The authorized board must file the decision with the municipal clerk within five days of its decision.

Where special use permit authority is delegated to a local administrative body, the legislature must establish standards to guide the board in reviewing a permit application. Although the board may impose reasonable conditions on the permit approval, the conditions imposed "cannot go beyond the law, which is the source of the Board's power." As with any land use decision, conditions imposed on a special use permit approval must be directly related and incidental to the proposed use of the property and the conditions must be sufficiently clear and definite to remove any doubt as to the allowed use.

Landowners or neighbors may challenge a decision of a local board to award, deny, or condition a special use permit. The following is a list of some of the challenges that aggrieved parties may bring against administrative bodies for their decisions on special use permits:

- The law is invalid because it does not contain standards for the board to follow.
- The administrative body based its decision on standards not contained in the law.
- The impact of a special permitted use that was denied is no greater than as-of-right uses permitted on the property under the zoning law.
- The administrative body did not base its decision on facts in the record.
- Conditions imposed are not incidental and related to the proposed use of the property or do not advance the standards set in the law.

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1. Between Chaos and Constraint: The Imposition of Reasonable Conditions on Land Use Approvals, Cozata Solloway, Land Use Law Center (1996). www.law.pace.edu/landuse/homepage.html
2. John R. Nolon, Well Grounded, Shaping the Destiny of the Empire State, Local Land Use Law and Practice, Chapter 3.

QUIZ



1. Which local body may be designated to review and approve applications for special use permits:
   A. The local legislature.
   B. The planning board.
   C. The zoning board of appeals.
   D. Any one of the above.

2. The standards for reviewing and approving a special use permit and a variance are:
   A. The same.
   B. Different.

3. Is a use authorized by a special use permit deemed to be harmonious with other uses allowed in the zoning district?
   A. Yes.
   B. No.

4. The standards on which decisions regarding special use permits are to be based are normally contained in:
   A. Subdivision regulations.
   B. Site plan regulations.
   C. Local environmental regulations.
   D. The zoning law.

5. A denial of a special use permit can be based on:
   A. Neighborhood opposition.
   B. Facts on the record.
   C. Either of the above.

6. A special use permit can be issued subject to the condition that it is limited in duration to the time that the current owner holds title.
   A. True.
   B. False.

7. In order for conditions imposed on approvals of special use permits to be valid, they must be:
   A. Directly related and incidental to the impacts of the proposed special use.
   B. Needed to achieve the standards contained in the law.
   C. Both A and B.

8. A condition cannot be imposed on the award of a special use permit to:
   A. Respond to a neighbor's complaint.
   B. Limit the operation of the business on the site.
   C. Both A and B.

9. Which of the following is not a requirement that a condition placed on a special use permit must meet:
   A. Must be based on standards in the law.
   B. Must be reasonable.
   C. Must be directly related and incidental to the proposed development.
   D. Must be intended to increase property values and local taxes.
   E. Must be based on facts in the record.

10. Which local body has the responsibility for determining whether a detailed environmental review of a proposed special use must be completed:
   A. The administrative body that will review the application for the special use permit.
   B. The local legislative body.
   C. The zoning board of appeals.
   D. The State Department of Environmental Conservation.

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Land Use Training Program

Tutorial Component VII - *Environmental Review*

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INTRODUCTION

State Environmental Quality Review, or SEQR ("seeker") for short, is a procedure which applies to almost all land use decisions. The basic purpose of SEQR is built on the recognition that we are all stewards of our environment and, as such, we must include environmental considerations in our decision-making. SEQR's provisions provide the legal framework for assuring that such considerations are included in a board's decisions. Typically the board must directly activate SEQR procedures because in almost all cases involving the application of local planning, zoning and land use regulations, the local board will be the lead agency. So, if you desire to avoid all contact with SEQR, it's simple. Just don't bother joining a board.

SEQRA applies to most local land use decisions. The basic purpose of SEQRA is to incorporate environmental consideration into the planning, review, and decision-making processes of local governmental agencies at the earliest possible time. This is accomplished by requiring all agencies to determine whether the actions they undertake, fund, or approve may have a significant impact on the environment. Each of these terms is defined very broadly in the regulations. For example, environment means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archaeological, historic, or aesthetic significance, existing patterns of population concentration, distribution, or growth, existing community or neighborhood character, and human health. This definition is all-inclusive.

All agencies must determine whether their actions may have a significant adverse effect on the environment. This includes local agencies such as legislatures, planning boards, and zoning boards of appeals, or any other land use permitting or policy-making body. The SEQR process is required by SEQRA, the State Environmental Quality Review Act (Article 8 of the Environmental Conservation law) and is generally governed by the State SEQRA Regulations - 19 NYCRR Part 617, better known simply as Part 617 - which are

promulgated by the Commissioner of the New York State Department of Environmental Conservation ("DEC"). Those regulations list types of projects, and categorize them according to their probable effect on the environment. Projects are divided into "Type I Actions" — those which have the potential for significant environmental impact, and "Type II Actions" — those which probably will not have a significant impact. These lists are not all-inclusive, so there is a large unlisted category of actions known as, you guessed it, "Unlisted Actions."

The State Environmental Quality Review Act (SEQRA) became effective in 1975. It requires local bodies such as legislatures, planning boards, and zoning boards of appeals to consider and mitigate the environmental impact of their actions. 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 adoption of comprehensive plans and zoning laws, and their amendments, must also 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 in the decision-making process and that local agencies act effectively to lessen any possible environmental impacts. This environmental objective is to be balanced with social and economic objectives.

Where a proposal is deemed to have no significant negative impact on the environment, no further environmental review is required and the project may proceed through the normal land use review process. Where it has been determined, however, that a proposed project may have a significant negative impact on the environment, the normal process is interrupted and either the local agency or the applicant must prepare an environmental impact statement as part of the application for a local land use approval. 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 submitted by the applicant is deemed to be complete by the local reviewing

agency, the underlying land use application is not complete and the time periods applying to that approval process do not begin to run.

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. Since the environment is defined very broadly, SEQRA extends local agency authority to impose conditions on land use approvals well beyond the types of conditions that may be imposed to meet the standards of subdivision and site plan regulations or special permits, for example. Both with regard to the imposition of conditions and the procedures that reviewing agencies must follow, SEQRA amounts to a regulatory overlay on the local land use review and approval process. The requirements of SEQRA are found in the 1975 statute enacted by the state legislature and the regulations adopted by the commissioner of the State Department of Environmental Conservation.

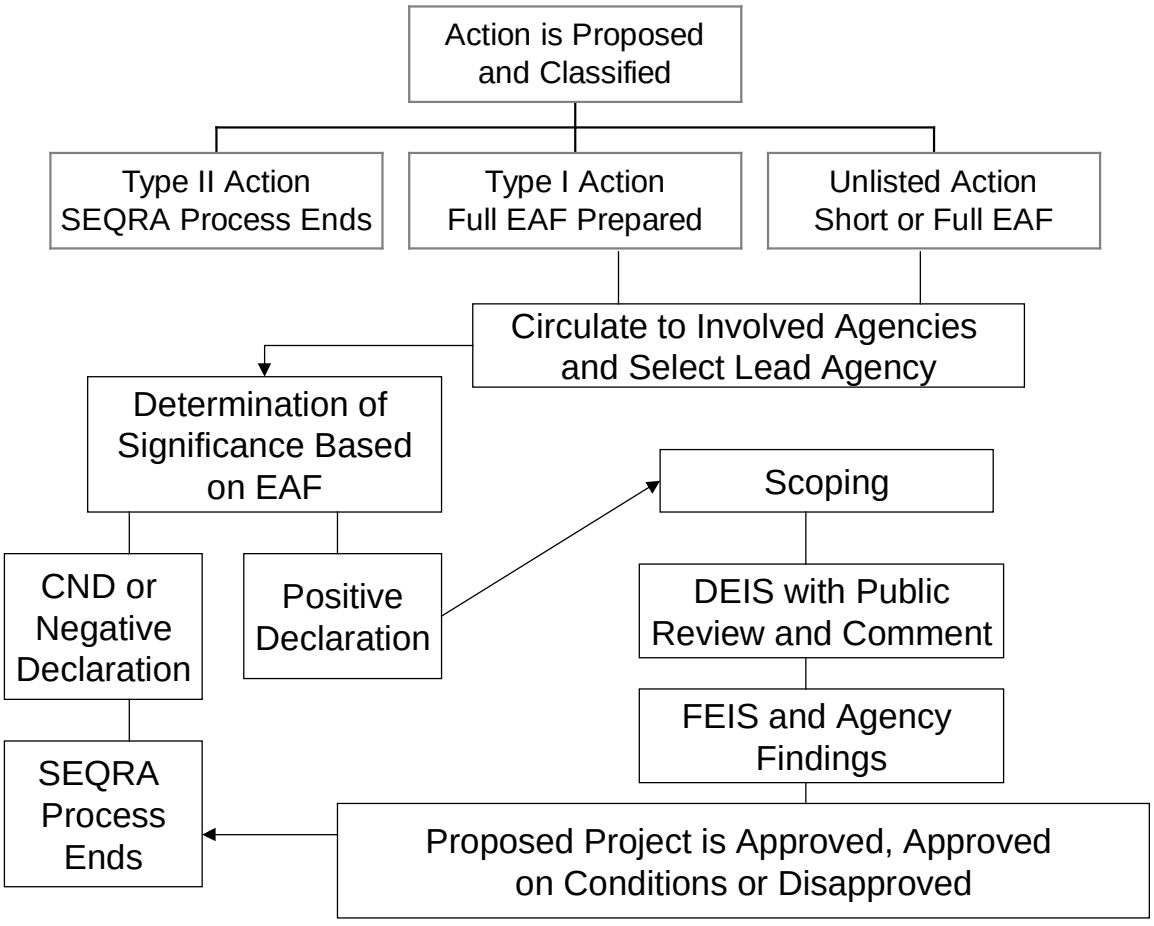
SEQRA also gives local governments additional authority to conduct studies and adopt plans for areas of environmental significance. Under SEQRA, localities may designate critical environmental areas, conduct cumulative impact analyses, and perform generic environmental impact statements. These environmental review tools expand the techniques available to villages, towns, and cities to review future land use impacts in a more proactive manner.

Steps Involved in the Environmental Review Process: An Overview

Although the environmental review process is highly complex, it can be generally described as a nine-step process, beginning with a landowner, submitting an application for a land use approval or action:

1. **Action proposed;**
2. **Action classified: Type I, Type II, or Unlisted;**

3. **Complete and submit EAF;**
4. **Circulate application and EAF to Involved Agencies;**
5. **Lead Agency is established;**
6. **Determination of significance;**
7. **Draft Environmental Impact Statement is prepared – Comments submitted? Hearing held?;**
8. **Final Environmental Impact Statement is prepared – Comments submitted?;**
9. **Proposed project is approved, approved on conditions, or disapproved.**



VOCABULARY

Familiarity with a number of terms is essential to understanding the environmental review requirements and procedures established by SEQRA. Key terms under the SEQRA statutes and regulations include:

Approval – An approval is a discretionary decision made by a local agency to issue a permit, certificate, license, lease, or other entitlement, or to otherwise authorize a proposed project or activity.

Action – An action includes any law, regulation, or policy adopted by a local agency, any project directly undertaken or funded by a local agency, or the approval of any proposed project by such agency that may affect the environment.

Type I Action - Actions that are more likely to have a significant negative impact on the environment are listed as Type I Actions in the regulations of the DEC Commissioner. These actions are more likely to require the preparation of an EIS than actions not contained on the list.

Type II Action - Actions that are not subject to environmental review under SEQRA are listed as Type II Actions in the regulations of the DEC Commissioner. These actions have been determined not to have a significant adverse impact on the environment.

Exempt Actions - Certain actions are declared exempt from environmental review under the DEC regulations. **Unlisted Actions** - All actions that are not listed as "Type I" or "Type II" actions are considered Unlisted Actions under the SEQRA regulations. These actions are subject to review by the lead agency to determine whether they may cause significant adverse environmental impacts.

Agency – All local agencies that take actions subject to SEQRA, including zoning boards of appeals, local legislative boards, planning boards, are agencies that must comply with the statute and regulations requiring environmental review. The lead agency is the agency that is primarily responsible for the action.

Involved Agency - An agency that has jurisdiction by law to fund, approve, or directly undertake an action.

Lead Agency - An involved 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.

Environment - 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.

Scoping – A process by which the lead agency identifies the potentially significant adverse impacts related to the proposed action and how they are to be addressed in an EIS. This defines the scope of issues to be addressed in the draft EIS, including the content and level of detail of the analysis, the range of alternatives, the mitigation measures needed, as well as issues that do not need to be studied. Scoping provides a project sponsor with guidance on matters that must be considered and provides an opportunity for early participation by involved agencies and the public in the review of the proposal.

Environmental Assessment Form ("EAF") - A form used by an agency to assist it in determining the environmental significance of actions. A properly completed EAF must contain enough information to describe the proposed action, its location, purpose, and potential impacts on the environment. The regulations of the DEC Commissioner under SEQRA contain two model EAFs, one a short form, the other a full (sometimes referred to as the long form) EAF. These model EAFs may be modified by an agency to better serve it in implementing SEQRA, provided the scope of the modified form is as comprehensive as the model. All Type I actions require the completion of the long form EAF.

Environmental Impact Statement ("EIS") – A written document prepared by a lead agency or an applicant to provide involved agencies, project sponsors, and the public a means to systematically consider significant adverse environmental impacts, alternatives, and mitigation with respect to a proposed project. An EIS facilitates the weighing of social, economic, and environmental factors early in

the planning and decision-making process. An EIS must be prepared when a lead agency determines that an action may have a significant adverse impact on the environment. A Draft Environmental Impact Statement (DEIS) is circulated to all involved agencies and the public for comment. A Final Environmental Impact Statement (FEIS) contains the DEIS, any revisions, and the agency's responses to all substantive comments received.

Negative Declaration ("neg dec") – A written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts.

Conditioned Negative Declaration ("CND") – A CND is a declaration issued by a lead agency indicating that an action which, as initially proposed, may have resulted in one or more significant adverse environmental impacts, has been mitigated by conditions imposed by the lead agency that will modify the proposed action so that no significant adverse environmental impacts will result. A CND may not be used if the action is defined as a Type I action.

Positive Declaration – A written determination indicating that the action as proposed may have a significant adverse impact on the environment and that an environmental impact statement will be required.

APPLICATION OF SEQRA TO LAND USE DECISIONS

Most local land use decisions fall within the definition of an action under SEQRA. An action includes any project or physical activity which is directly undertaken or funded by a state or local agency or approved by such an agency which may affect the environment. Actions of local planning or zoning boards approving applications for subdivision and site plan approval or issuing permits and variances are all subject to SEQRA. Also included is the local legislature's action in adopting or amending a comprehensive plan or zoning law, or approving a capital budget or capital project.

Purely ministerial actions, such as the issuance of building permits, where no discretion is exercised, are not subject to SEQRA. An example is the issuance of a permit for an as-

of-right use. In such a case, the building inspector has no discretion. The permit must be issued if the application meets the specifications of the code. If, however, the building inspector is given discretion to vary or request modifications of such permit application, that decision is not ministerial and SEQRA will apply.



In *Pius v. Bletsch* (1987), a contractor applied for a building permit to construct an office building in a commercial zone. The Town had determined that the project might have a significant adverse impact on the environment and that an environmental impact statement would be required. The contractor brought a suit claiming that the issuance of a building permit is "purely ministerial," involving no discretion, and that no environmental review would be required because there had been no "action" under SEQRA. The building inspector, however, was specifically delegated site plan approval power. Under these circumstances, the building inspector was acting in a capacity similar to the local board exercising administrative discretion, and thus SEQRA applied. The applicant was required to prepare an environmental impact statement.

When SEQRA applies to a local land use decision, it means that the lead agency must take a hard look at possible environmental impacts of the action and determine whether it is likely to have a significant negative impact on the environment. When that determination is positive, the agency or applicant must prepare an Environmental Impact Statement. When an agency receives a developer's application, it must determine whether the action is a Type II or Exempt Action, and not subject to environmental review, or a Type I or Unlisted Action. The SEQRA regulations issued by the DEC Commissioner contain the thresholds an agency must use to classify an action as Type I, Type II, or Unlisted. If the action is a Type I action, a full Environmental Assessment Form may be used by the agency to determine whether the action may have a significant negative impact on the environment. If it is an Unlisted Action, the short environmental assessment form may be used. If the agency determines that the action will not have a significant negative environmental impact, it issues a Negative Declaration and the action is no longer subject to environmental review or the procedures and standards contained in

SEQRA no longer apply. A Positive Declaration means that an Environmental Impact Statement must be prepared and found complete before the application for the agency's approval is complete. Clearly, how an action is classified is a crucial step in the SEQRA process.

Classifying Agency Actions

Type II Actions - No Environmental Review Required

State regulations list certain actions as Type II Actions. The Type II list includes area variances for one, two, and three family houses, the construction of noncommercial structures of less than 4,000 square feet, area variances for setback, and the construction or expansion of one, two, or three family homes on an approved lot. If an action is found to fall into the Type II category, no environmental review is required. This is the end of the SEQRA process for that proposal and the project review can continue as usual.



The Department of Environmental Conservation (DEC) has issued the regulations for SEQRA. These regulations can be obtained from the DEC. They are published in the New York Code of Rules and Regulations (NYCRR). Title 6 contains the SEQRA regulations. Section 617.5 of that part contains a list of Type II actions - those which have been determined to have no significant impact on the environment or are otherwise precluded from environmental review. 6 NYCRR 617.5.

Type I Actions - Environmental Review Required

The regulations list certain actions as Type I, which are considered more likely to require the preparation of an Environmental Impact Statement than Unlisted Actions. Some examples of Type I actions are the adoption of a comprehensive plan or the initial adoption of a zoning law, changes in allowable uses in any zoning district affecting twenty-five acres or more, and the construction of fifty or more homes not to be connected to public water and sewage systems.



The Department of Environmental Conservation has issued SEQRA regulations. Section 617.4 contains a list of Type I actions - those which carry with them "a presumption that it is likely to have a significant adverse impact on the environment and may require and EIS." 6 NYCRR 617.4.



In *Save the Pine Bush, Inc. v. Planning Board of Town of Guilderland* (1995), the applicant sought approval to subdivide a parcel of land into sixty-five lots. The planning board did not require the applicant to prepare an Environmental Impact Statement (EIS) even though the action was listed as a Type I action. A citizens group challenged that decision arguing that SEQRA had been violated because no EIS was required. The court held "an EIS is not a per se requirement of all Type I actions" and that the planning board's review of the reports regarding the potential impacts was sufficient for it to issue a declaration that no adverse environmental impacts were raised by the subdivision application.

Unlisted Actions - Local Agency Makes Determination of Significance

All actions that are not Type I or Type II are Unlisted Actions. Depending on the size, location, and other characteristics of a proposal, an Unlisted Action may or may not have a significant adverse impact on the environment. Thus, Unlisted Actions may or may not require preparation of an Environmental Impact Statement. If adverse impacts are likely, an Environmental Impact Statement must be prepared and the action is subject to all of SEQRA's standards, procedures and time periods.

Lead Agencies and Involved Agencies



Where more than one agency is involved in approving, funding or undertaking an action, the agency that receives a project application may circulate it and the Environmental Assessment Form for the review of other involved agencies. Following this transmittal, a lead agency must be established by agreement of the involved agencies. The lead agency is the one that is principally responsible for undertaking, funding, or approving the action. The lead agency must be established within thirty days. The lead agency is responsible for determining the significance of any Type I or Unlisted Action and whether an Environmental Impact Statement must be prepared.

Determination of Significance

Based on the information contained in the Environmental Assessment Form, the lead agency must make a determination of significance. To do this, it uses criteria contained in the SEQRA regulations that are indicators of significant adverse impacts on the environment. Included in these criteria, for example, are the removal of large quantities of vegetation or fauna and a substantial adverse change in ground or surface water quality. Considering all this information, the lead agency may decide that the proposed action will not have a significant adverse impact on the environment. This is known as a "Negative Declaration." Alternatively, it may determine that the project will have a significant adverse impact on the environment. This is known as a "Positive Declaration."



The regulations provide criteria for making a determination of significance in 6 NYCRR 617.7. The lead agency has 20 days from its establishment as lead agency to make a determination of significance. 6 NYCRR 617.6.

Negative Declarations

A Negative Declaration is a statement that ends the SEQRA process. It is a declaration that, after reviewing relevant information, the lead agency has found that the proposal will not have a significant adverse impact on the environment. This declaration of negative significance must be in writing, must identify and evaluate the relevant areas of concern, and must be filed so that it is available for review.



If a Negative Declaration is made for a Type I action, the agency must maintain a public file and distribute the declaration to all involved agencies, any person who requests a copy, and the applicant. For Unlisted Actions, the lead agency need only maintain a file that is accessible to the public.



Negative Declarations must be supported by facts that justify the lead agency's determination. Declarations made summarily and without adequate explanation are subject to challenge. When a lead agency finds that an action will not have a significant impact, it must support its findings with adequate detail to explain why there will be no significant impact. A study of all legal challenges to SEQRA decisions from 1990 to 1997 indicated that only 11 percent of the challenges were successful where an Environmental Impact Statement was required. On the other hand, in cases where a Negative Declaration was made and no Environmental Impact Statement was prepared, the challenges were successful 29 percent of the time, nearly three times as often.

Conditioned Negative Declarations

Conditioned Negative Declarations can be made for Unlisted Actions when a Full EAF has been preparedThis declaration certifies that, while the original proposal may have resulted in one or more significant impacts on the environment, the lead agency has identified conditions that may be imposed on the proposal so that no significant adverse environmental impacts will result.



The Conditioned Negative Declaration must be published and the public must be allowed at least a thirty-day period for comment. After receiving public comments, information may surface indicating that the conditions will not sufficiently avoid significant adverse environmental impact. If that is the case, the lead agency must rescind the Conditioned Negative Declaration, make a Positive Declaration, and go forward with the preparation of an Environmental Impact Statement.

Positive Declarations

After reviewing the Environmental Assessment Form, if the agency determines that the action as proposed may have a significant adverse environmental impact, the agency must issue a Positive Declaration. This means that the preparation of an Environmental Impact Statement will be necessary.



A Positive Declaration must identify the significant adverse environmental impacts that require the preparation of an Environmental Impact Statement and state whether a scope of the Environmental Impact Statement will be prepared through a process called scoping. After a Positive Declaration, the environmental review process starts in earnest, including scoping, where conducted.

Draft Environmental Impact Statement

Scoping

The term "scoping" is used to define the process by which the scope of a Draft Environmental Impact Statement (DEIS) is determined. The purpose of scoping is to narrow the issues relating to the potentially significant adverse impacts of the proposed action. Through scoping, what is required in the DEIS can be clarified, including the environmental issues to be addressed, level of detail required, identification of mitigation

measures, and elimination of non-relevant issues. Scoping may be initiated by the lead agency or by the project sponsor. A draft scope is prepared containing the prominent environmental issues that have been identified, reasonable alternative actions and mitigation measures to be considered, and the extent and quality of information required. The draft scope is circulated to all involved agencies and interested individuals. In fact, scoping must include reasonable efforts to involve the public by holding meetings, requesting comments, or providing for the exchange of material. A final written scope of the DEIS is to be provided by the lead agency to the project sponsor, involved agencies, and interested individuals. Any agency or individual that raises issues after the circulation of a final scope must explain in writing why the information was not identified during scoping and why it should be included at this stage of the review process.

Contents

The Draft Environmental Impact Statement must assemble relevant facts on which a lead agency's decision will be based. It must describe and discuss the proposed action and its environmental setting. It must analyze the significant adverse impacts and evaluate all reasonable alternatives and mitigation measures that are available. It should analyze only those negative impacts that can be reasonably anticipated or have been identified in the scoping process.

The DEIS should consider all relevant environmental issues in sufficient detail to allow the agency to make an informed final decision on the project. This means that in order to weigh environmental concerns with the social and economic benefits of a proposed project, the agency must have sufficient information regarding the potential extent of any environmental impacts. If the DEIS is not prepared in sufficient detail, it can be returned, along with a written statement that identifies any deficiencies that must be corrected. When a DEIS is submitted, the lead agency has thirty days to determine whether or not the DEIS is adequate. When it is deemed adequate, the lead agency prepares and files a "Notice of Completion" for the DEIS. It is at this point that the developer's application

for the underlying land use approval is deemed complete and that the time periods applicable to that approval begin to run.

Public Participation

After the Notice of Completion is filed, a public comment period of not less than thirty days must be provided. Any members of the public who have comments on the DEIS may submit them. The lead agency may also determine that a public hearing on the DEIS is appropriate, notify the public of the hearing, and accept public comments at the hearing.



If held, a hearing must commence no more than sixty days following the filing of the Notice of Completion.

Final Environmental Impact Statement

The lead agency is responsible for preparation of the Final Environmental Impact Statement (FEIS). This document is prepared by compiling the DEIS and its revisions, public comments that were received, and the lead agency's response to those comments.



The Final Environmental Impact Statement is prepared within sixty days after the filing of the draft Environmental Impact Statement, or if a public hearing is held, forty-five days after the close of the public hearing. Then, a Notice of Completion for the FEIS is prepared, filed, and distributed just as was done for the Notice of Completion for the DEIS. At least ten days must be allowed for involved agencies and the public to consider and comment on the Final Environmental Impact Statement.

Findings Statement and Decision on the Action

Within thirty days of the filing of the Final Environmental Impact Statement, the lead agency must file a written findings statement and decision on whether or not to approve the action. This final statement must consider all the relevant environmental impacts, balance them with social and economic considerations, provide a rationale for its decision and certify that the action avoids adverse environmental impacts by incorporating conditions into its decision that mitigate the negative impacts identified. These conditions became conditions that are imposed on the land use approval originally requested. The decision of the lead agency can be to approve the proposed project, approve it on certain conditions, or to deny it.



7 Practical Tips for Implementing SEQR

1. Remember the purpose of SEQR
2. Gain Expertise to identify and assess impacts
3. Public participation is both valuable and required
4. Learn the Type II list (Actions NOT subject to review). All other actions are subject to SEQR.
5. Pay strict attention to procedures
6. With SEQR, the product is more important than the process
7. SEQR is more than disclosure

- Avoid impacts
- Look at alternatives
- Mitigate if necessary
- Say NO if you have to

Consequences of SEQRA's Environmental Review Requirement

1. ***Failure to comply literally with procedures leads to invalidation of any permit issued.***



The penalty for failure to comply with SEQRA is the invalidation of the final decision made by a local land use agency on a landowner's application. As a result, the procedural requirements of the statute must be followed literally. This protects the decision from being challenged based on failure to follow mandatory procedures and the entire review process invalidated. When a decision is invalidated, the applicant and agency must start over and follow all required procedures literally.

2. ***SEQRA time periods take precedence over time periods applicable to land use approvals.***

The SEQRA process can be a lengthy and up to or beyond a year to complete where a proposed project has been determined to have potentially significant adverse environmental impacts. On the other hand, state statutes imposing deadlines on land use actions are relatively short. For example, a public hearing on a subdivision application must be held within sixty-two days of the public hearing. On their face, these time periods are in conflict. The courts have held, however, that the protection of the environment takes precedence over an applicant's right to a speedy decision and that SEQRA's lengthier time periods prevail.

3. ***Review must be done as early as possible***



The fundamental policy of SEQRA is to inject environmental considerations into the land use decision-making process as early as possible so that agencies consider the environmental consequences of all of their decisions. One

consequence of this requirement is that an agency cannot postpone its review of the impact of a zoning amendment until landowners apply for special permits provided for in those amendments.



In *Eggert v. Town Board of Town of Westfield* (1995), the town board classified a zoning amendment as a Type I action but found that the amendment itself would not have a significant impact on the environment as the rezoning required property owners to apply for special permits before developing their land under the amendments. The town board acknowledged that there would be adverse environmental impacts to be considered at that time, but reasoned that such impacts could be adequately addressed when applications for special permits were submitted. The court rejected this argument stating, "to comply with SEQRA, the town board must consider the environmental concerns that are reasonably likely to result from, or are dependent on, the amendments ... at least on a conceptual basis."

4. Local Agencies Must Take a "Hard Look"

When applications for land use decisions are made, local agencies are required to take a "hard look" at the potential adverse environmental impacts before they proceed further with the review of the application. A hard look means that the agency identified the relevant areas of environmental concern, that facts were gathered and thoroughly analyzed regarding each environmental issue raised, and that set forth in its determination of significance was a reasoned elaboration of its decision and any documentation that supported its determination of significance.



The degree of detail required in a SEQRA review depends on the circumstances involved. In *Valley Realty Development Co, Inc. v. Town of Tully* (1992), the rezoning of land in a mining district to residential use was upheld as in compliance with SEQRA. The court stated that, in reviewing an agency's issuance of a Negative Declaration, a court's inquiry is

> limited to whether the relevant areas of concern were identified, whether a hard look was taken at those areas, and whether a reasoned elaboration was given for the Negative Declaration. In making such review, the agency's obligations under SEQRA must be viewed in light of a rule of reason. The degree of detail required will vary with the circumstances and the nature of the proposal. Here, there was no evidence that the elimination of mining as an allowed use would harm, rather than benefit, the environment.

SEQRA regulations further provide: "SEQRA provides all involved agencies with the authority, following environmental review, to impose substantive conditions upon an action to ensure that the requirements of SEQRA have been satisfied." Thus, once an adverse environmental impact has been identified the agency must identify mitigating measures and use all practicable means to minimize the environmental impact by requiring an alternative that will have less of an impact or by imposing conditions that mitigate the impact. However, "nothing in the law requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence."

5. The Application is not complete until the DEIS is found complete.

SEQRA regulations state that a landowner's application for a land use approval is not complete until the lead agency makes a declaration that the action will not have any significant adverse impacts on the environment or until a draft Environmental Impact Statement has been accepted by the lead agency as satisfactory with respect to scope, content, and adequacy. Once a draft Environmental Impact Statement is accepted as complete, other statutory time periods such as those applicable to subdivision application review, will run concurrently with the remaining steps under SEQRA.

6. Balance environmental impact with the social and economic benefits of actions.

SEQRA does not require lead agencies to make decisions that are the most favorable to the environment or to reach any particular result. SEQRA requires them to consider environmental impacts and to use all practicable means to realize SEQRA's goals. Local

land use agencies should make decisions which, consistent with social, economic and other essential considerations. Minimize or avoid identified adverse environmental effects to the maximum extent practicable. Where the lead agency proceeds carefully and makes its decisions deliberately and reasonably, courts will not require them to select any particular alternative or mitigation condition or make the decision that would be most protective of the environment.

Remember that consideration of an issue in the Environmental Impact Statement, even if environmentally adverse, does not dictate the ultimate outcome. The adverse impacts must be mitigated or avoided to the extent practicable. Even if some environmental damage may result, this may be acceptable if balanced by redeeming social or economic factors.

7. Mitigation conditions expand agency authority to impose conditions on land use actions.

Under SEQRA regulations, "mitigation" is defined as a way to avoid or minimize adverse environmental impacts. Lead agencies are required to mitigate any adverse environmental impacts to the maximum extent possible.

Mitigation measures are used when any local action, including the approval of development applications, may have a significant adverse impact on the environment. There are two instances when local agencies may impose such conditions. The first is when an applicant for local approval has been required to prepare an Environmental Impact Statement, which must contain a description of mitigation measures, and the agency has determined that one or more such measures must be adopted to minimize the impacts of the project. The second is when an Unlisted Action is found to have potential adverse impacts and one or more mitigation measures may be identified that will minimize those impacts. In this instance the lead agency can issue a Conditional Negative Declaration, noting the impact and imposing the mitigation conditions, and

thereby avoid the cost and time required in the preparation of an Environmental Impact Statement.

Because the environment is defined very broadly under SEQRA and because the statute empowers lead agencies to impose conditions that minimize environmental impacts, a land use board may have its authority to impose conditions on land owner applications expanded.



In *Weok Broadcasting Corp. v. Planning Board of Town of Lloyd* (1992), the owner's application for site plan approval of a radio transmission tower was denied based on aesthetic factors. The local planning board determined, after SEQRA review, that the petitioner had failed to adequately minimize or avoid adverse environmental effects to the maximum extent practicable. The Court of Appeals held that "aesthetic considerations are a proper area of concern in SEQRA balancing analysis inasmuch as the Legislature has declared that the 'maintenance of a quality environment ... that at all times is healthful and pleasing to the senses' is a matter of State-wide concern."

If the site plan regulations of the of the Town Lloyd did not authorize the planning board to consider aesthetic factors, it would not have been able to impose this condition if it were not for the authority given it under SEQRA.

Summary and References

The following is a checklist of the matters that a local lead agency should know about SEQRA:

1. Most land use decisions made by local land use boards are considered actions under SEQRA.

2. When a landowner requests a land use approval, the agency that is principally responsible for approving the application is the lead agency and has the responsibilities that SEQRA imposes.

3. When an application is received, the local agency must classify it for SEQRA purposes. 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. Applicants for Type I and Unlisted Actions must submit an Environmental Assessment Form listing the potential environmental impacts of their projects or proposals.

6. If the action is a Type I or Unlisted Action, an assessment of the environmental impact of the action must be conducted by the lead agency.

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 of the scope.

10. The Environmental Impact Statement must consider and examine all relevant environmental impacts, including conditions that can be imposed on the action to mitigate any negative environmental impacts found and discuss any alternatives to the proposed action that would mitigate or avoid those impacts.

11. When the draft Environmental Impact Statement is accepted as complete, the application for the local land use approval is deemed complete.

12. A public hearing on the Draft Environmental Impact Statement may be held, but one is not required. Where practicable, such public hearings should be held in conjunction with public hearings required for the underlying land use decision under consideration, such as for subdivision applications and variances.

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. Following the filing of the Final Environmental Impact Statement, the lead agency makes its findings statement and decision on the action. This statement considers the impacts discussed and the conclusions 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 or denied.

15. The lead agency's findings statement must certify that the action will avoid or minimize adverse environmental impacts to the maximum extent practicable.

References

1. The extensive provisions setting forth the procedures and requirements for the environmental review of local land use actions are found in the Environmental Conservation Law (ECL), Article 8, commonly referred to as the State Environmental Quality Review Act, or SEQRA.

2. The regulations of the Commissioner of the Department of Environmental Conservation are found in 6 N.Y.C.R.R. Part 617.

3. The SEQR Cookbook, A Step-by-Step Discussion of the Basic SEQR Process, New York State Department of Environmental Conservation (May 1998).

Quiz



1. Which of the following are actions that must be subject to environmental review?

   A. Subdivision Approval
   B. Site Plan Approval
   C. Special Permit Issuance
   D. Grant of Use Variance
   E. Amendment of Comprehensive Plan
   F. Amendment of Zoning Law
   G. All of the above

2. If a lead agency makes a Positive Declaration about a project or proposed action, it means that the agency or applicant must prepare an Environmental Impact Statement.

   A. True
   B. False

3. If a development proposal is classified as a Type I action, an Environmental Impact Statement must always be prepared.

   A. True
   B. False

4. A application for a land use decision such as a subdivision approval, which may have significant negative environmental impacts, is not deemed complete until which of the following occurs:

   A. A Negative Declaration is made
   B. A Draft Environmental Impact Statement is submitted and found complete.
   C. Either A or B, as applicable.

5. A public hearing must be held to allow the public to comment on a Draft Environmental Impact Statement.

   A. True
   B. False

6. Does SEQRA require lead agencies to impose conditions on projects that are the most protective of the environment or only those that are practical, balancing economic and social considerations as well?

   A. Most protective conditions
   B. Conditions that are practical and balanced

7. If a subdivision requires the approval of the local planning board, the county health department and the state Department of Environmental Conservation, these three agencies at the outset, under SEQRA are called:

    A. Involved Agencies
    B. Lead Agencies

8. If in question 7, the local planning board is deemed principally responsible for the decision to approve the project, it is deemed to be:

    A. An Involved Agency
    B. The lead Agency

9. An Environmental Assessment Form is:

    A. Used to determine whether a proposed action may involve a significant negative environmental impact.
    B. Used to fully study and evaluate a proposals adverse environmental impacts, identify and to consider possible alternatives to the proposal, including conditions that would mitigate these impacts.

10. The consequence a court finding a failure to comply with the procedural steps required by SEQRA is:

    A. The lead agency must complete the omitted procedure
    B. The lead agency action is deemed invalid.

New York Municipal Insurance Reciprocal

Land Use Training Program

Tutorial Component VIII - *Local Boards*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL

LAND USE LAW CENTER - PACE UNIVERSITY SCHOOL OF LAW

NEW YORK PLANNING FEDERATION

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Local Board Decision Places Potential Liability on Village

A developer was in the process of developing an area of land located in the Village of Wesley Hills. A 200-foot stretch of road in Pomona, which provided a means of ingress and egress to Plaintiff's property, was discontinued by the Board of Trustees of the Village of Pomona. Plaintiff contended that as a result, his development was left with only one means of ingress and egress and that the Wesley Hills Planning Board stayed his application for development until this issue had been resolved.

Plaintiff (Bass Building Corporation) brought an action against the Village of Pomona seeking a declaratory judgment that a Village resolution was invalid. Further, Plaintiff requested injunctive relief as well as compensatory and punitive damages. The court also maintained that Plaintiff had a good chance of succeeding on the merits due to the fact that Plaintiff had been damaged by the resolution. Finally, the court held that Plaintiff's claim for monetary damages was allowed.

INTRODUCTION

Local Boards

Local boards are the keystones of an effective land use system. They create, modify, interpret, and administer the laws that regulate the use of land. The elected and appointed officials who sit on these boards have the difficult job of creating understandable laws and administering them fairly.

Three boards are 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, which adopts the comprehensive plan, zoning, and other regulations. The second is the planning board, created to perform a variety of advisory and administrative functions related to community planning and land use decision-making and to review and approve certain applications. Third is the zoning board of appeals, which must be created when the local legislature first adopts a zoning law. A zoning board of appeals hears appeals from the decisions of the zoning enforcement officer or building inspector, interprets the zoning law, and hears applications for variances and other permits.



The New York State legislature has allowed for the creation of these local bodies to provide a decision-making structure regarding land use. This framework includes legislative, quasi-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. The result sought is to provide for the public health, safety, and welfare through a well-planned and administered local land use system.

ROLE OF THE LOCAL LEGISLATURE

The elected legislative body plays the central role in the field of local land use control. This body is typically called the city council in cities, the town board in towns, and the village board of trustees in villages. The local legislature has the authority to adopt and amend the zoning law, subdivision regulations, site plan controls, special use permit provisions, wetland ordinances, historic district provisions, and sign controls, among other land use regulations. It may also create other local boards and agencies, such as the planning board, zoning board of appeals, or conservation board, and decide what authority to delegate to these boards.

The local legislature may decide to retain certain administrative functions. For example, in the zoning law the legislature may provide that certain land uses are permitted only upon the issuance of a special use permit and may 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. Frequently, however, the legislature establishes these boards and delegates such important functions to them.

State statutes allow the local legislature to delegate the authority to review and approve applications for subdivision, site plan, and special use permits either to the planning board or the zoning board of appeals. Subdivision review authority can be delegated to the planning board and site plan authority can be delegated to the planning board or another administrative body, such as the zoning board of appeals. State law requires the zoning board of appeals to hear applications for variances and appeals from the decisions of the official charged with zoning enforcement, often the local building inspector.

Although there are exceptions (as when the legislature acts irrationally), normally the laws adopted by the local legislature are presumed to be valid and those who attack such laws have the burden of proving their illegality. Normally, the legislature is not required to act on a proposal to amend the zoning law or to take other legislative action. The legislature has the discretion to determine what is in the best interest of the community and when to act. When the legislature retains an administrative function, it must hear and decide matters submitted to it, such as applications for special use permits.



Review and determinations on site plan, subdivision plat, and special use permit applications by the legislature are administrative acts and can be appealed to the courts and reviewed just as if it had been made by any administrative body.

The local legislature is also responsible for adopting and amending the official map and the comprehensive plan of the community. These documents articulate local policy and guide and direct the deliberations and decisions of all local boards involved with land use decisions.

The local legislature is responsible for creating the substantive provisions that control land use, for creating the agencies that implement and enforce those controls, and for developing many of the procedures that the planning board, zoning board of appeals, and other local boards must follow.

ZONING BOARD OF APPEALS



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

Under Village Law § 7-712, Town Law § 267, and General City Law § 81, local legislatures are required to create zoning boards of appeals when they adopt zoning laws and to appoint their members. Additional administrative duties may be delegated to the zoning board of appeals.

Essential Function and Appellate Jurisdiction

The essential function of the zoning board of appeals is to grant variances from the strict application of the zoning laws in circumstances when they create demonstrable hardships or practical difficulties for the property owners. This makes the zoning board of appeals a safety valve, protecting landowners from unfair application of the laws in particular circumstances. The zoning board of appeals also hears appeals from the decisions of the zoning enforcement officer or building inspector when interpretations of the zoning law are involved.

A variance allows a landowner to use land or locate structures on the land in a manner not permitted by the provisions of the law. Use variances are granted only when a landowner establishes that the current use restrictions produce an "unnecessary hardship," preventing the realization of a reasonable economic return on the land. Area variances, permitting development that deviates from dimensional requirements of the law, are granted to landowners who encounter particular difficulties in locating structures on the land in compliance with the zoning regulations.

Before approaching the zoning board of appeals, property owners must seek an interpretation of the zoning law from the zoning enforcement officer or building inspector to determine how it applies to their properties. If they disagree with that decision, they may appeal it to the zoning board of appeals. If they agree, but wish to secure relief from the law's provisions, they may ask the zoning board for a variance. A majority of the members of the board must vote to reverse any such determination, order, or decision or they can grant a variance. The zoning board of appeals need not hear an appeal that is made more than sixty days after the zoning administrator's determination. Such an appeal has exceeded the time limit set in the statute, found in Town Law § 267-a(5) and Village Law § 7-712-a(5).

In hearing a timely appeal or granting a variance, the zoning board of appeals essentially is acting like a court of law. The board's procedures are quasi-judicial in nature. Its decisions, in turn, can be appealed only to a court of law for review.



The law requires a person aggrieved by a zoning enforcement officer or building inspector's ruling to appeal to the zoning board of appeals within sixty days of the date of a disputed determination, order, or decision. This requires the person to file a notice of appeal, including the grounds for the appeal and the relief that is requested. The zoning board of appeals must hold a hearing on the appeal and publish a public notice of the hearing at least five days before it is to be held. At the hearing, board members and parties to the proceedings have the right to cross-examine any witnesses regarding matters that are truly relevant to the issues being decided. If a person affected by a board's decision is denied the right to cross-examine a witness or rebut evidence presented, this may be found to be prejudicial and lead to a reversal of the board's decision by a court. The chairman has discretion to limit cross-examination and rebuttal to those matters that are truly relevant. The decision of the board must be handed down within sixty-two days of this hearing, unless the parties mutually agree to an extension.

Original Jurisdiction

The zoning board of appeals may also be delegated the authority to review applications for permits. In this case, it is exercising original jurisdiction as an administrative agency, rather than serving as an appeals board. Original jurisdiction simply refers to the power to review and make decisions on applications for administrative approval. Where, for example, special use permits are to be issued by the zoning board of appeals, an application is made directly to the board.



The zoning board of appeals may not hear appeals from the actions of the local legislature when it is 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. The board may only interpret provisions of the zoning law upon appeal by persons aggrieved by adverse determinations of the responsible administrative official. Zoning boards of appeals may not grant variances that have such a significant impact as to constitute a rezoning of the land, a function within the province of the legislature only. Decisions of the planning board regarding subdivision or site plan applications may not be appealed to or heard by the zoning board of appeals.



Where the board granted the owner of a forty acre plot a variance from a zoning law that required a two acre lot size for single-family homes, the court held that the board's action constituted an invalid rezoning, rather than a variance from the provisions of the zoning law. Changes of the zoning law of this magnitude are legislative decisions and beyond the power of the zoning board of appeals. *Hess v. Zoning Board of Appeals of the Village of Sands Point* (1955).

PLANNING BOARD

State law 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.



Under Village Law § 7-718, Town Law § 271, and General City Law § 27, local governments are authorized to create planning boards, appoint their members, and to refer various matters to planning boards for advisory opinions. Several other state statutes authorize the local legislature to delegate various land use approval responsibilities to planning boards.

The local legislature can delegate a variety of advisory functions to a local planning board, including the preparation of the comprehensive plan, drafting zoning provisions, or suggesting site plan and subdivision regulations. The legislature may request planning boards to review and comment on applications for specific zone changes or amendments to the comprehensive plan or other land use regulations. The planning board can offer advice on the official map, the adoption of capital budgets, or other matters affecting the development of the community. The local legislature must act formally to grant the planning board its power. Such powers may be found in the zoning laws that applies to the planning board's functions.

One important purpose of the planning board's advisory role is to provide an impartial and professional perspective on land use issues based on the long range needs of the community contained in the comprehensive plan or other local policy documents.

The local planning board may also be delegated the authority to review and approve site plan and subdivision applications and to issue special use permits. If the local legislature delegates such review and approval powers to the planning board, that board must strictly follow the zoning law and any other adopted land use regulations regarding these matters. These regulations contain the substantive standards that the applicant must meet, and the

planning board has no authority to vary these standards unless the legislature has specifically authorized the board to waive them. If a variance from a zoning provision is required, the matter must be referred to the zoning board of appeals. In approving applications for subdivisions, site plans, or special use permits, conditions may be attached so long as they are reasonable and "directly related and incidental to the proposed" development plan.



Planning boards are required to hold hearings within prescribed time periods before they may act on the following applications: subdivision applications (Town Law § 276; Village Law § 7-728) and special use permits (Town Law § 274-b (6); Village Law § 7-725-b (6)).



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 their delegated authority or base their decisions on standards not contained in state or local laws and regulations regarding matters over which they have jurisdiction. Planning boards do however, have the power to make discretionary decisions within that authority.

Planning Commissions

State law permits the creation of planning commissions, which have the same power as the planning boards. These commissions make recommendations on specific planning decisions that the local legislature determines. Examples are placement of public buildings or parks, location of highways, and a variety of other issues. Referral to the commission on these topics is mandatory. Provisions that prevent a city or village official from making a final decision without the planning commission's recommendation enforce these referrals.



General Municipal Law § 234 empowers the local legislature to create planning commissions and governs appointments thereto. Sections 235 - 237 contain additional requirements for planning commissions.

INTRODUCTION OF DOCUMENTARY EVIDENCE, EXPERTS AND CROSS-EXAMINATION

Local administrative bodies must base their decisions on facts on the record of their proceedings. In most cases, public hearings must be held after legal notice is given and interested citizens have been given an adequate opportunity to be heard. The courts often overturn board decisions when they are based solely on public opposition, rather than relevant and adequate facts.



Where a hearing is held prior to determining the rights of an applicant, the applicant must be given the opportunity to present evidence to the officer or body conducting the hearing. According to the U.S. Supreme Court, if this opportunity is not given, the municipality's actions will be "constitutionally inadequate." In *Goldberg v. Kelly* (1969), the board or officer failed to permit the individual applying to the board to appear personally with or without counsel before the official who made the determination. The board or officer also failed to permit that individual to present evidence to that official orally or to confront or cross-examine adverse witnesses. As a result the board's decision was invalidated and the proper procedures had to be employed. During the interim, costs to the applicant can accrue, for which the board or agency may have to reimburse the applicant.

Boards may receive studies, reports, documents, and impartial expert testimony that provide facts supporting their decisions. These facts must appear in the minutes of the meetings and hearings or must be found in the documents submitted to the board during these proceedings. If evidence or testimony is presented which is contradictory, those factors which the board found more probative and upon which it relied should be

identified in a series of findings supporting the board's decisions. It is very important that the facts on the record justify the board's decision.

PUBLIC OFFICERS AND DUE PROCESS OF LAW

Local legislators and appointed members of local planning and zoning boards are considered "public officers." To become a public officer, a person must be a resident of the municipality, 18 years of age, and a United States citizen. When one becomes a public officer, that individual must take an oath, which is kept on file for the duration of the term. This oath represents that the officer will uphold the constitutions of the United States and the State of New York, which protect landowners' and citizens' rights to due process of law.

Due process guarantees that the government will provide certain safeguards to the citizens. This ensures a fair and open process and that impartial board members make decisions based on reliable evidence that is contained in the record of the board's deliberations. State and local laws that require most land use actions be taken only after there is a hearing following adequate notice further secure these guarantees. Adequate notice means that the public is invited to be heard in a fair and impartial manner.

Code of Ethics

The Public Officers Law regulates local boards and officials in New York State. Additionally, all municipalities in New York State are required to pass a local ethics law. This law is sometimes adopted as a chapter of the municipal code. It may parallel the requirements of the Public Officers Law or may impose additional regulations.



Each municipality must adopt a code of ethics. Public Officers Law § 3 contains qualifications for public officers and the General Municipal Law § 809 also contains standards for avoiding conflicts of interest in the land use decision-making process.



The Public Officers Law prohibits a municipal official, acting in his official capacity from accepting a gift with a value exceeding seventy-five dollars. Violation of this rule, or any provision of the ethical code, is a misdemeanor. Even if the intention is innocent, public officers must avoid the appearance of impropriety. This rule reduces both the risk that the public will misunderstand the nature of an innocent gift and the risk that a municipal official will be unduly influenced. Local laws often prohibit an official from accepting a gift of any value.

CONFLICTS OF INTEREST

State law prohibits a public officer from having a private interest in a matter in which that officer is involved officially. Public officers may not make decisions in which they or a family member has a pecuniary interest. These laws ensure that the public body makes impartial decisions. To avoid such conflicts, board members must abstain from voting on any issues relating to the private interest, which is often called "recusing" one's self from all deliberations on the matter.



The laws governing public officers in general, and conflicts of interests in particular, are found in the General Municipal Law Article 18. Section 809 requires an applicant before a board to disclose the name and address of any person on the board with an interest in the matter and the extent of that interest. Article 18 governs and prohibits conflicts of interest on the part of municipal officials. Contracts entered into with the municipality and made contrary to this prohibition are void and the courts can invalidate them.

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. These laws have prevented planning and zoning board members from deliberating and voting on matters in which

they have a private interest or a special connection. Examples where conflicts of interest can exist are a financial, familial, employment, or any significant contractual relationship with the applicant.



In *Keller v. Morgan* (1989), a local planning board member had a twenty-five percent interest in the land subject to a subdivision application. It was held that the board member had a conflict of interest. On the other hand, there was no conflict of interest when a planning board member was the president of a supply company that did a few hundred dollars of business with the applicant for subdivision approval. *See Parker v. Town of Gardiner Planning Bd.* (1992).

The Public Officers Law contains guidelines as to what constitutes a conflict of interest. For example, a public officer can earn up to $750 in one year from all combined contracts in which the public officer has an interest. The law also prohibits a public officer from receiving compensation or entering into any agreement for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member, or employee. In particular, the prohibition extends to contracts whereby his compensation is to be dependent upon any action by such agency. Violation of the law is a misdemeanor. In addition, violators may be fined, suspended, or removed from office.

FREEDOM OF INFORMATION LAW

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



The requirements to provide information to the public are found in the Public Officers Law §§ 84-90. Article 6 § 86(4) requires maps, drawings, regulations, and other documents pertaining to land use decision-making to be provided to the public on request. Village Law § 4-402(e) requires the village clerk to produce books, records, and papers upon request.

FOIL ensures open access to government records. "Records" are defined very broadly in the law and include most government records without regard to the purpose for which the records were created.

The law is liberally applied in favor of access to the public, thus, its exemptions are narrowly construed. However, an agency may deny access that would amount to an invasion of privacy. This means, for instance, that giving lists of names and addresses that could be used for commercial or fundraising purposes may violate the privacy of the people on those lists. For this reason, the government can inquire about the purpose of the request. To protect privacy, the municipality can remove sensitive information and prevent its disclosure. This "redaction" of information can be performed to protect the privacy rights of individuals or the proprietary rights of businesses. Generally, information should be made freely available to the public. Other exceptions include information that would interfere with law enforcement investigations or judicial proceedings, endanger the life or safety of any person, or provide access codes to computers.



The exceptions to the Freedom of Information Law are found in the Public Officers Law § 87(2).

The New York State Committee on Open Government provides opinions, in oral or written form, to guide agencies, the public, and local governments. Information for contacting the Committee for advice is provided at the end of this tutorial.



Public officers acting for the government cannot prevent public release of most information contained in documents. It is a violation of the law for any person to intentionally "prevent the public inspection of a record."



A request for public information cannot be denied based on a lack of necessary personnel or difficulty in managing the retrieval or redaction. In *United Federation of Teachers v. New York City Health & Hospitals Corp.* (1980), the court stated that even though "it would be difficult for the municipal corporation's depleted and diminished staff to sift through its records, locate the information sought, and redact, where necessary, and identify personal details," providing such a defense "would thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the Act."

DUE PROCESS, MEETINGS & HEARINGS

Public Hearings



State statutes require that public hearings be held regarding the application for a variance, special use permit, or a subdivision approval. Public hearings regarding site plan applications may be required as a matter of local law or practice. These hearings afford citizens affected by administrative hearings an opportunity to have their views heard before decisions are made.

Notice

The fundamental guarantee of a fair and open process is that members of the public receive sufficient notice of meetings and hearings. If challenged, failure to provide the required notice will nullify the proceedings. Notice should be timely, and therefore, must be in advance of the hearing. State and local statutes contain specific notice requirements that spell out the number of days in advance of the hearing that notice must be given and

the precise means that must be used to provide notice. These may include publication in the official local newspaper and mailing or posting notices in prescribed ways.

Typical provisions require that notice be given three days in advance for meetings open to the public and five days in advance for public hearings. Posting signs on affected properties is sometimes required. In certain circumstances, mailing notice to adjacent and nearby property owners may be required. If a hearing or meeting is adjourned until a later date, notice of the time and place of the meeting may need to be given again. If notice deficiencies exist, a decision can be rendered invalid.



"Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting." Public Officers Law § 104. Under state law, however, legal public notice of meetings does not require publication in a local newspaper. Local legal requirements may be more specific. Although quasi-judicial proceedings are excluded from this requirement under § 108(1), this exemption does not apply to the zoning board of appeals .



Notice is intended to inform citizens so they may appear and be heard on matters pending before land use boards. The notice should be written in plain and simple language. The U.S. Supreme Court stated that notice should be "reasonably calculated under all the circumstances to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.* (1950).

Open Meetings Law

Local public bodies, including the legislature, zoning board of appeals, and planning board, are required by the state Open Meetings Law, or "Sunshine" Law, to allow the public access to their meetings. Under the Village, Town, and General City law, sessions

of the zoning board of appeals and planning board are subject to the Open Meetings Law. These laws permit the public to attend meetings of public bodies and hear the proceedings.



The requirements of state law regarding the conduct of open meetings is found in the Public Officers Law §§ 100-111. "Every meeting of a public body shall be open to the public." Public Officers Law § 103(a).

All meetings of these local bodies must be open to the public. Meetings are defined as any gathering that includes a quorum of a board convened for conducting public business. This includes special meetings with applicants or opponents attended by members of the board. When local legislatures, planning boards, or zoning boards of appeals conduct a site visit for the purpose of "observation and acquiring information" the visit is not required to be open to the public. *Matter of Riverkeeper, Inc. v. Planning Board of the Town of Somers.*

Executive Sessions

One exception to this rule is that the board may hold an executive session which is not open to the public. Executive sessions may be held only within an otherwise open meeting but only in the rare circumstances listed in the statute, such as discussions that might imperil public safety or contain sensitive medical, financial, credit, or employment information of a person or corporation. Courts will carefully scrutinize whether there was a valid reason to hold the meeting in private.



An executive session is the portion of a meeting not open to the public. Public Officers Law §§ 102(3), 103(a). Section 105 of the Public Officers Law governs conduct of these sessions.



No official action may be taken during an executive session. Where the deliberations are held in a closed, executive session and the public is only

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.



Executive sessions can be held only if a majority of the board votes, in an open meeting, to hold the closed session.



In *Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors* (1993), the closure of a county board committee meeting to discuss a proposal to utilize a neighboring county's landfill was a violation of the Open Meetings Law.

Hearings

Local boards hold public hearings as required by local legislation and state enabling acts. State law for subdivision approval, variances, special use permits, zoning and comprehensive plan adoption and modification requires hearings. Hearings are often held in conjunction with a meeting. In order to hold a hearing, a quorum of the board must be present. Hearings must be held prior to taking the advertised action, they must be open to the public, and accommodations must be made for citizen participation as appropriate.



An affirmative vote of a majority of all members of a planning board or zoning board of appeals is required in order to take action and to provide for a default denial by the zoning board of appeals where it fails to pass a motion overruling a decision of the enforcement officer. Village Law §§ 7-718, 7-712-a, Town Law §§ 271, 267-a, and General City Law §§ 27, 81-a.



Members of the public should be given a fair opportunity to be heard at a public hearing. The chairman of the board conducting the hearing may impose reasonable restrictions to control the conduct of the meeting, to avoid undue delay, and to create an effective means of

communication. The applicant should be given an opportunity to respond to the comments of the public, but the board is not required to allow citizens to respond to every point made by the applicant in response.

FILING & MAKING A PROPER RECORD

Record Keeping and Filing

In making decisions on site plan and subdivision applications and the issuance of variances and special permits, local boards must keep a detailed record of their deliberations. These records may be kept in narrative form rather than in verbatim transcript form. A clerk or secretary hired by the municipality often manages these records. The records should include the applications and reports, studies, documents, public comments, and the minutes of board meetings.

Minutes

The minutes of a meeting typically cover the important portions of the meeting. The Open Meetings Law requires that the minutes for public meetings include a record of motions, proposals, and actions. This record must contain the votes on any matters, and how each member voted, including any absences.



Failure to keep proper minutes undermines the board's authority. When each member's vote is not recorded in the minutes, the statute of limitations on the property owner's appeal does not run and thus does not prevent a lawsuit against the village. *McCartney v. Incorporated Village of East Williston* (1989).



"The board of appeals shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official actions. Every rule, regulation, every amendment or repeal thereof, and

every order, requirement, decision or determination of the board of appeals shall be filed in the office of the town clerk within five business days and shall be a public record." Town Law § 267-a. *See also* Village Law § 7-712-a. Public Officers Law § 106 requires that minutes be taken at all open meetings and executive sessions. "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the Freedom of Information Law within two weeks from the date of such meeting." The minutes of a subdivision matter held in an executive session must be available within one week.

Decisions

Keeping a good record is more than good practice, it is a substantive part of any decision. The board must base its decisions on facts contained in the record. The board should always base its findings and its decision on reliable evidence contained in the record. The record may be the minutes of the board, if prepared in enough detail to satisfy these requirements. The basis of the decision should be found in the decision that is filed with the clerk, if not in the minutes. Whatever form the decision takes, it should contain a fair and reasoned explanation of the board's decision.

Decisions can take several forms: letter decisions mailed to the applicant, resolutions adopted by the board, or minutes of the deliberations and actions if prepared in sufficient detail. Whichever form the decision takes, it must be filed with the municipal clerk. Findings of fact must be included. The decision document should articulate the action that was taken and the reasons for that action. The decision document must contain the record or summary of all motions, proposals, resolutions and any other matter formally voted upon and show who voted and how they voted.



When a zoning board of appeals makes a decision, that decision "shall be filed in the office of the town clerk within five business days after the day such decision is rendered, and a copy thereof mailed to the applicant." Town Law § 267(9); Village Law § 7-712-a (9).



If the decision is not filed, the statute of limitations on actions challenging that decision does not begin to run. Thus, not filing the decision extends the amount of time the applicant has to appeal the decision to the courts. By filing the decision in a timely manner, the applicant is informed of the decision and has one month to decide to appeal the decision, after which the board's decision stands regardless of any defects.

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



A decision is a written document that contains, at a minimum, the issue considered by the board, the action taken by the board on that issue, and the reason for the decision. There is no set form for decisions. Commonly, the board will adopt a resolution containing the decision and findings of fact. The document must be filed with the clerk of the municipality, and notice must be mailed to the applicant.



It is important to create the type of record that a court will need to determine the validity of a decision made by land use boards. Even if all the procedural requirements are met, the most important feature of a decision is that it is based on facts in the record. This helps ensure that the determination is not vulnerable to reversal. Since the board has discretion to make reasonable decisions, when decisions are supported with facts on the record, courts will be more likely to uphold them.



Courts give deference to board decisions because they do not want to substitute their own judgment for that of the board's. *Ifrah v. Zoning*

Board of Appeals of the Town of Harrison (2002); *Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead* (2002); *P.M.S. Assets, Ltd. v. Zoning Board of Appeals of the Village of Pleasantville* (2002).

Courts have suggested that decisions by a board must be consistent with its past decisions or must show why the board has decided to deviate from its precedents. Preparing an adequate record provides the courts with the information needed to determine whether the board made a fair decision that the court should affirm, or an arbitrary decision that the court should overturn.



In *Knight v. Amelkin* (1986), a landowner was denied a variance from an off-street parking requirement. Three previous zoning board decisions "reached contrary results on essentially the same facts" and the board did not explain the deviation in this case. The Court of Appeals reversed the determination of the zoning board of appeals and ordered the board to provide "an explanation or, in the alternative, a conforming determination."

SUMMARY

Local boards are charged with the duty of making consistent, fair, and reasoned decisions. The goal of the many laws regulating the process is fairness to the public and to the applicants. This process includes: holding meetings and hearings, providing notice of meetings, an opportunity for the public to be heard at hearings and for applicants to introduce evidence and cross-examine witnesses, and insuring the objectivity of boards by avoiding conflicts of interest and the appearance of impropriety.

1. Harry J. Willis, David Church & James W. Hotaling, The Short Course, A Basic Guide for Planning Boards and Zoning Boards of Appeals in New York State, New York Planning Federation (1997).
2. Robert J. Flynn, Robert J. Flynn, Jr. Zoning Board of Appeals Practice in New York, New York State Bar Association (1996).
3. Committee on Open Government, NYS Department of State, 41 State Street, Albany, New York 12231. Telephone: (518) 474-2518; Fax: (518) 474-1927.
4. John R. Nolon, Well Grounded, Shaping the Destiny of the Empire State, Local Land Use Law and Practice, Chapter -- (1998). http://www.law.pace.edu/landuse/

QUIZ



1. Which of the following local boards are responsible for making land use decisions?
    A. Local Legislature.
    B. Zoning Board of Appeals.
    C. Planning Board.
    D. All of the Above

2. Which board hears applications for variances and appeals from the decisions of the zoning enforcement officer?
    A. Local Legislature.
    B. Zoning Board of Appeals.
    C. Planning Board.
    D. All of the Above

3. When can the zoning board of appeals' decision be reversed?
    A. If a person affected by the board's decision is denied the right to cross-examine a witness.
    B. If a person affected by the board's decision is denied the right to rebut evidence presented.
    C. Both A and B.

4. What functions can be delegated to the Planning Board?
    A. Preparation of the comprehensive plan.
    B. Advise on the official map.
    C. Review and approve site plan and subdivision applications and to issue special use permits.
    D. All of the above.

5. Which municipal body is responsible for adopting land use regulations?
   A. The state legislature.
   B. The local legislature.
   C. The Planning Board.
   D. The zoning board of appeals.

6. Which of these matters cannot be appealed to the zoning board of appeals?
   A. The denial of a request for rezoning by the local legislature.
   B. The denial of a request for subdivision approval by the planning board.
   C. A claim that a local land use regulation is unconstitutional.
   D. All of the above.

7. Which of these matters can be taken to the zoning board of appeals?
   A. A request to reverse an interpretation of the zoning enforcement officer or building inspector.
   B. Request to vary the provisions of the zoning law as they apply to an individual parcel.
   C. Both A and B.

8. Members of zoning boards of appeal and planning boards are public officers who must comply with the provisions of the Public Officers Law and a local code of ethics.
   A. True
   B. False

9. Recusing means:
   A. Not participating in a decision when a board member has a conflict of interest.
   B. Striking out confidential material in a document that is to be made available to the public.

10. Most documents submitted to a planning or zoning board to assist it in making a decision on an application must be made available to members of the public upon request.
    A. True
    B. False

New York Municipal Insurance Reciprocal
Land Use Training Program

Tutorial Component IX – *Strategic Local Laws*

NEW YORK MUNICIPAL INSURANCE RECIPROCAL
LAND USE LAW CENTER – PACE UNIVERSITY SCHOOL OF LAW
NEW YORK PLANNING FEDERATION

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INTRODUCTION

Most zoning ordinances, by creating use districts and regulating the dimensions of what can be built, provide for the orderly growth and development of the community. Frequently, however, issues arise that require amendments to zoning and land use regulations to solve emerging community problems. Citizens may report that "our community is getting too crowded," "there is too much traffic in our neighborhood," "open space is disappearing," "all these signs are ugly and driving customers away," "what do we do about cellular towers," "do we have to accept this group home, or allow this adult business, in our community."

When questions like this arise, the solution is to add specific provisions to the zoning law. New York State law provides communities with a variety of choices in responding to these growth related issues. Care must be exercised in enacting and enforcing these "strategic local laws" to respect property rights, constitutional guarantees and various requirements of state statutes.

General Authority

The authority to adopt strategic local laws is contained in the general delegation of power to localities to adopt zoning laws and the Municipal Home Rule Authority to legislate in the public interest.



Village Law § 7-700, Town Law § 261, and General City Law § 20(24) grant basic land use authority to local governments and allow them to regulate the details of land development and building construction and alteration. This may be done for "the purpose of promoting the health, safety, morals or the general welfare of the community."

Village Law § 7-702, Town Law § 262, and General City Law § 20(25) authorize local governments to divide the community into zoning districts and to regulate the use, construction, and alteration of buildings and land within those districts.

Village Law § 7-704, Town Law § 263, and General City Law § 20(24) & (25) provide that zoning and land use regulations must be in conformance with the locality's comprehensive plan. The purposes of such zoning regulations are to achieve are to lessen congestion, secure safety from fire and flood, prevent overcrowding, facilitate the provision of infrastructure, and to encourage "the most appropriate use of land throughout such municipality."

Section 10(1)(ii)(a)(11) of the Municipal Home Rule Law states that a municipality may adopt local laws for the "protection and enhancement of its physical and visual environment."

Section 10(1)(ii)(a)(14) of the Municipal Home Rule Law states that a municipality may adopt local laws as provided in the Statute of Local Governments. § 10(6) of the Statute of Local Governments authorizes cities, towns, and villages to adopt zoning regulations.

ACCESSORY USES

When zoning laws are first adopted in a community, they typically contained a provision that allowed property owners to place land uses on their parcels that were accessory to the principal permitted uses, such as a tennis court, which is accessory to a single-family home. Sometimes the development of accessory uses can be controversial and have an adverse impact on the surrounding neighborhood. Neighbors ask "is a skate board ramp really accessory to my next-door neighbor's house?" Business owners wonder "how can a helipad be considered accessory to that office building?" What is an accessory use and how can they be controlled so as to not impact adversely on the surrounding area?

Accessory uses are those uses of land found on the same lot as the primary use and that are subordinate, incidental to, and customarily found in connection with the primary use. A common example is the single-family home with an accessory garage and driveway. Local zoning laws allow accessory uses that are incidental to the primary uses and customarily associated with that use. The accessory use is essentially a part of the primary use and permitted as-of-right because it naturally accompanies the primary use.

Accessory uses are typically limited to those that are customary and incidental so that neighboring landowners, business owners, and residents can expect to see only neighboring uses that are compatible with the character of the district.

 A typical accessory use definition reads: "A building or use clearly incidental or subordinate to, and customary in connection with, the principal building or use on the same lot."



The plaintiffs in *Wike v. Herms* (1946), challenged the building of a proposed filling station and garage contending that repair shops were a prohibited use in the zoning district. Minor vehicle repairs would be done on the premises, but the court concluded that the operation of the filling station and garage was permitted in the zone and that "all operations incidental to the conduct of a garage business are impliedly authorized." Therefore, the station and its repair shop were permitted.

A use must be incidental to qualify as accessory. This means, first, that it is subordinate to the primary use. Many local laws themselves require that the accessory use may be only a minor use of the land. Second, any accessory use must also be reasonably related to the primary use. If there were no requirement that an accessory use have some connection with the primary use, any accessory use of the property would be permitted even if entirely unrelated to the primary use.



A homeowner who attempts to establish accessory parking at his home for a commercial use can be denied the right because the vehicle is commercial. Even though parking the vehicle for a social visit would be acceptable, parking of a vehicle for commercial purposes is not related or incidental to the primary use, a private residence.



In commercial zoning districts, accessory uses must be limited to tenants, patrons, or occupants of the commercial building to ensure that accessory uses remain incidental to the primary use. If, in an office building, an accessory snack stand, for example, serves people from other office buildings, it is no longer incidental. Instead, it takes on the properties of a primary use and cannot be considered accessory.

Accessory uses must also be customary. This means that they are normally well established and customarily associated with the primary use. For example, vehicle parking is customarily associated with both commercial and residential uses. However, this does not mean that novel uses cannot be established.



The Town of Lewisboro, in *Collins v. Lonergan* (1993), granted single-family homeowners a permit to construct a skateboard ramp upon certain conditions. The Zoning Board of Appeals determined that the ramp qualified as a recreational use of the property that was customarily incidental to the permitted principal use of the residence. The test used was "not whether other landowners in the municipality are engaged in similar activities, but whether such accessory use can be deemed to be normally incidental to the residential use." The Board's determination that a skateboard ramp is a permitted accessory use because it its customarily incidental to the primary use, much like a tennis court might be, was considered to be valid.

Municipalities regulate accessory uses in several ways. They may:

- Define accessory uses in a general way and simply allow them in all zoning districts. This provides no guidance to the zoning enforcement officer or zoning board of appeals and may give rise to the types of problems discussed above

 The use of a boarding house as an accessory use to a hospital, for example, may be customary. In one case, a hospital owned two houses adjacent to its medical facility in which it housed medical staff. The local law did not set out what is or is not accessory to a hospital, but hospitals customarily provide living accommodations for at least some personnel, thus it was permitted.

- Another approach is to permit certain listed accessory uses and prohibit all others. Those uses not expressly permitted in the list are prohibited unless it is clearly stated otherwise. This is the most restrictive means of accessory use regulation because the zoning enforcement officer and the zoning board of appeals are limited to the list adopted by the legislature. This could result in denying the property owner a use that is otherwise naturally incidental and customary to the primary use of the land.

- A more flexible approach is to list problematic accessory uses in the zoning law and prohibit them. This eliminates foreseeable problems with the listed uses while permitting all other accessory uses. The community is protected from potentially incompatible accessory uses yet property owners are not unduly limited in the use of their land.

- To provide guidance to assist the zoning enforcement officer and zoning board of appeals in interpreting what is an accessory use, the legislature may adopt a nonexclusive list of acceptable accessory uses. This approach allows

property owners to use their land for any listed accessory use and others that are similar to those listed.

- Some communities classify certain problematic accessory uses as "special uses" that require a permit, which allows a local board to minimize conflict with the neighborhood in which they are established. This approach allows property owners the option of applying for a special permit for potentially controversial uses rather than prohibiting them altogether.

HOME OCCUPATIONS

Historically, single-family homes have been used by their occupants for a variety of occupational uses such as beauty parlors, dressmaking, laundries, and day care. Zoning laws limit single-family homes to residential uses and to those uses that are customarily associated with residential uses, and incidental and subordinate to that residential use. Does this mean that a single-family homeowner can conduct a particular business in a particular neighborhood as an accessory use, or is the occupational use prohibited?

Some zoning authorities examine the proposed occupational use and determine whether it is customary, incidental and subordinate to the residential use. Other municipalities define "home occupations" more specifically in their zoning laws, requiring homeowners to conform their occupational uses to those definitions. Some adopt a list of permitted occupational uses of homes, while others prohibit specific types of occupations.



The Village of Brewster defines a permitted "home occupation" with these words: "An occupation, profession, activity or use that is clearly a customary, incidental and secondary use of a residential dwelling unit and which does not alter the exterior of the property or affect the residential character of the neighborhood."



In *Osborn v. Planning Board of the Town of Colonie* (1989), the court concluded that it is not unusual for a home occupation to be operated on a full-time basis as an accessory use of a residence. The defendant's zoning law permits "any profession or customary home occupation, provided that the same is carried on in the dwelling occupied as the private family residence." The court concluded that the plaintiff's proposal to create a full-time office in her home did not change the character of the residential use of the property and was therefore allowed as an accessory use.

Specific definitions of the types of home occupations that are permitted in a community are added in response to complaints from neighbors that occupational uses are altering the residential character of their neighborhoods. The local legislature may add a definition of home occupation when the local zoning enforcement officer encounters difficulties in determining if occupational uses are customary, incidental, or subordinate. In some parts of the state, economic conditions have given rise to a rapid expansion of home occupations, particularly professional offices, leading to the addition of regulatory provisions to the local code.



In *Baker v. Polisinelli* (1991), the court concluded that the intensity of use involved in a home occupation may determine whether the use is customary and permissible. The court sustained the zoning board's determination that a dance studio for 160 students, operating five days a week, was not a customary use within that district. The court held that it was rational for the board to find that the petitioner's operation was more extensive than what was intended to be permitted under the law as a home occupation.

There are a variety of techniques that municipalities use to regulate home occupations and professional offices:

- They may let their definition of accessory uses govern the matter, leaving it to the zoning enforcement official to determine, in a given instance, whether a proposed occupational use is customary, incidental, and subordinate to the principal permitted use of a parcel as a single-family home.

- Local legislatures may adopt a general definition of a home occupation to provide some guidance to enforcement officials to aid their determinations in these matters.

- They may supplement their general definition of home occupation with a list of permitted occupations, a list of prohibited occupations, and a definition of permitted professional offices.

- Certain types of home occupations may be permitted as-of-right or allowed only upon the issuance of a special use permit by a designated local board.

- Local legislatures may include specific standards that certain occupational uses must meet, such as limiting the percentage of floor area that may be used, prohibiting carrying or selling of merchandise, prohibiting any alteration of the exterior of the building, limiting businesses to those conducted by occupants of the residence, and limiting the number of associates, partners, and employees.

ACCESSORY APARTMENTS

An accessory apartment is a second residential unit that is contained within an existing single family home. The accessory apartment is designed as a complete housekeeping unit that can function separately from the primary unit. It usually has separate access,

kitchen, bedroom, and sanitary facilities. Generally, accessory apartments are contained within the residential portion of existing single-family homes and are subordinate to the primary unit in size, location and appearance. Some communities allow owners to apply to create an accessory residential unit in a garage, carriage house, or servants' quarters.

 The following are examples of how regulations around the state define accessory apartments:

"A dwelling unit which is incidental and subordinate to a permitted principal one-family residence use and located on the same lot, where either unit is occupied by the owner of the premises."

"A dwelling unit in a permitted one-family residence which is subordinate to the principal one-family dwelling unit in terms of size, location and appearance and provides complete housekeeping facilities for one (1) family, including independent cooking, bathroom and sleeping facilities, with physically separate access from any other dwelling unit."

The policy objectives served by such a law include creating a source of affordable housing for the individuals occupying the units, creating a source of revenue for existing homeowners, providing a more secure living environment for homeowners who are senior citizens, and increasing property tax revenues from existing single-family neighborhoods.

The impetus for the adoption of accessory apartment laws has often been the need to control the proliferation of illegal conversions of single-family homes to two-family or even multi-family residences. Illegal conversions are often fueled by a decline in household size in the community, the lack of affordable housing, and the aging of those who own single-family homes. Illegal conversions serve a critical market need. They provide a source of affordable housing in existing structures, provide needed revenue for their often aging owners, and provide companionship or security for these owners.

Illegal conversions of single-family homes can cause multiple problems. They complicate the sale and insurance of the affected property, raise concerns about the safety of the accommodations provided, cause overcrowding and traffic congestion, and the property improvements involved are usually not reflected in increased tax assessments. The legalization of such conversions and the creation of standards for the creation of accessory apartments allows the community to provide a safe and affordable housing choice needed in the market and to add the additional value created to the tax assessment rolls.

Generally, accessory apartment laws authorize property owners to apply for a special use permit to create an accessory apartment. The law authorizes the zoning board of appeals or planning board to approve applications submitted by eligible property owners who demonstrate that they can meet the standards and specifications contained in the accessory apartment law. This allows the local board to review the eligibility of the applicants and occupants and to conduct a review of the design of the unit and of plans for the use of the site. The board is authorized to impose reasonable conditions on each approval to insure that the impact of the apartment on the neighborhood is kept to a minimum. In drafting an accessory apartment law, a community has several choices it can make. Which choices it makes are most often guided by the objective, or combination of objectives, that the community is interested in achieving. The principal options are listed below along with other relevant information.

The local law can specify that the permit terminates upon and must be renewed at certain intervals, such as every one, two, three, or five years and when title to the property is transferred by sale, foreclosure, or the owner's death. A re-inspection and re-certification of the accessory apartment may be required before a renewal permit may be issued.

Where the objective of the community is to enable existing owner occupants to remain in their homes, the community may limit eligibility to homeowners who occupy their single-family homes. This owner-occupant requirement may be justified by a finding that such owners are more likely to maintain their homes and supervise their tenants than

absentee owners. Where the objective of the community is to enable senior citizens to continue living in the homes that they own, the eligibility requirements may be narrowed to owner-occupants who are 55, 59, 62, or 65 years of age or older. Where the objectives are to provide affordable housing and increase tax revenues, communities may make all owners of single-family homes eligible to apply for a special use permit for an accessory apartment.

The local law can stipulate that the occupant of the accessory apartment be related by blood, marriage, or adoption to the owner of the home. In general, consanguinity and affinity restrictions of this type should be avoided because of the difficulty of justifying their tendency to discriminate against unrelated persons. If the goal of such restrictions is to limit the number of accessory units, that objective may be achieved by limiting the number of such units allowed in the community or in each neighborhood. Where the goal is to create additional housing opportunities for families with children, the law may authorize the homeowner to occupy the accessory apartment and lease the rest of the house to a tenant family.



The Town of Brookhaven in *Kasper v. Town of Brookhaven* (1988), adopted an accessory apartment law that required applicants for accessory apartments to be owners and residents of the single-family residence in which the apartment is to be created. The landowner wanted to establish an accessory apartment but did not reside in the home and was denied a permit. He challenged the owner-occupancy requirement, arguing that it violated the equal protection and due process guarantees of the constitution. The court held that the defendant did not exceed its legislative authority by enacting the accessory apartment law. The town had the authority to limit eligibility to owners who occupy their homes. The purpose of the law was to protect "those homeowners who may be of modest means and who will be better able to retain ownership of their residences and to maintain them in aesthetically acceptable conditions by leasing the available, unused living space in their homes."

The size of the accessory apartment may be limited to insure that it is subordinate to the primary unit and that the impact of the occupancy of accessory apartments on the surrounding neighborhood is minimized. The size of the unit can be limited in one of three ways:

- limiting the number of square feet of space in the unit;
- limiting the unit to a percentage of the square footage in the single-family home; or
- a combination of the two.

The impact of accessory apartments on the neighborhood can be minimized through design standards. A simple provision might state that any exterior alteration to accommodate an accessory apartment must conform to the single-family character of the neighborhood. This can be accomplished by requiring the applicant to submit façade renderings as part of the special use permit application. The law can also stipulate that any exterior stairways to the accessory apartment not be constructed on the side of the residence that fronts on any street.

To limit the number of accessory apartments and the overall impacts of this additional occupancy on the community, the legislature may consider a variety of provisions. The local law can:

- simply limit the number of applications that may be approved during any period of time or the total number of accessory apartments that may exist in the community at any time;

- limit the number of units that are allowed in any given neighborhood, based on specific findings regarding the need to limit the impacts associated with the development of accessory apartments;

- limit eligibility to single-family homes existing on the date the law is adopted to prevent developers from adding a second unit in newly constructed homes;

- restrict eligibility to lots that exceed minimum lot area requirements in the zoning district by 25% – 50%; or

- limit to one the number of bedrooms that can be constructed in an accessory apartment.

The law itself can be subject to sunset provisions which limit its existence to a few years' and require a thorough revaluation prior to being extended by the legislature for another similar period.

NONCONFORMING USES

A nonconforming use is created when a zoning provision is adopted or amended to prohibit a particular use that lawfully existed prior to the enactment or amendment.

 A typical local law may state: "a nonconforming use is any use, whether of a building or tract of land or both, existing on the effective date of this chapter, which does not conform to the use regulations of the district in which it is located."

 Nonconforming uses are usually allowed to continue so that the zoning law is not challenged as having confiscated property owners' investment.

When property owners propose the improvement, expansion, rebuilding, or other change to their nonconforming property, they must comply with local regulations governing those matters. Normally, these regulations are found in a the section of the local law entitled "Nonconforming Uses." This section may regulate nonconforming uses by

limiting their expansion or enlargement, prohibiting the reconstruction of damaged structures, disallowing the reestablishment of nonconforming uses after they have been discontinued for a time, or simply terminating them after the passage of a stipulated amount of time.



The local zoning law may prohibit the restoration of a nonconforming structure that suffers significant physical damage and require that any reconstruction conform to the zoning law. Significant physical damage is usually defined as damage that exceeds a certain percentage of the structure's value. Typical standards range from 25% to 50%. These provisions are premised on the theory that owners do not have a right to reconstruct a nonconforming building after it suffers significant damage because their property rights were destroyed by the disaster, rather than by the zoning law. The owner, therefore, is in a situation similar to the owner of a vacant lot and must comply with the applicable zoning restrictions.

Local laws prohibit the enlargement, alteration or extension of a nonconforming use to achieve the underlying policy of eliminating nonconforming uses. Normally, such prohibitions do not extend to structural maintenance and repair or internal alterations that do not increase the degree of, or create any new, noncompliance with the locality's zoning regulations.



Courts have upheld prohibitions on the construction of an awning over a courtyard outside a restaurant, on the theory that it would create additional space for patrons to congregate and, in this sense, increase the degree of the nonconforming use. Similarly, the prohibition of the conversion of seasonal bungalows to year-round residences has been upheld as an acceptable method of preventing the enlargement of a nonconforming use.



A property owner's right to continue a nonconforming use may be lost by abandonment. Local zoning laws frequently stipulate that any

> discontinuance of the nonconforming use for a specified period constitutes abandonment. Where the established period is reasonable, discontinuance of the use for that time amounts to an abandonment of the use.

The property owner's right to continue a nonconforming use does not allow the owner to change the nonconforming use to a materially different use. The consequence of a finding that a material change in the use has occurred is to deem the prior nonconforming use abandoned and, therefore, terminated.

Some local laws require certain nonconforming uses to be amortized over a specified period at the end of which they must be terminated. The term "amortize" is used to describe these provisions because they allow the owner some time during which to recoup his investment in the nonconforming use.



In *Darcy v. Zoning Board of Appeals of the City of Rochester* (1992), the court upheld a local determination that a nonconforming use was abandoned when evidence showed discontinuance for at least twenty months, well beyond the six-month period specified in the law.

CLUSTER DEVELOPMENT

In New York State, cluster development is defined by statute as follows:



> A subdivision . . . in which the applicable zoning law or local law is modified to provide an alternative permitted method for the layout, configuration, and design of lots, buildings, and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands.

The statutes state that cluster development may not allow greater density than if the land "were subdivided into lots conforming to the minimum lot size and density requirements . . . of the zoning district in which the property is located."

Normally, land is subdivided and developed in conformance with the dimensional requirements of the local zoning law. Zoning usually requires that the entire parcel be divided into lots that conform to minimum lot sizes and that buildings on subdivided lots conform to rigorous set-back, height, and other dimensional requirements.



In a half acre residential zone, under normal circumstances, a property owner will be required to lay out lots of no less than one half acre in size and place homes on them that are at least thirty feet from the front lot line and no more than thirty-five feet high.

Under cluster development, the locality permits a land developer to vary these dimensional requirements. This can allow, for example, homes to be placed on quarter acre lots in a half-acre zone. The land that is saved by this reconfiguration may then be left undeveloped to serve open space or recreational needs. Often this land is owned and maintained, if necessary, by a homeowners' association.



In *Kamhi v. Yorktown* (1983), the court ruled that a planning board may not impose a condition on clustered subdivision approval that compels a developer to convey a portion of the land to the municipality for use as a park, without compensation. This does not prevent a voluntary agreement to that effect, where mutually beneficial to the developer and the municipality.

All municipalities in New York are authorized, but not required, to use this cluster development method. The ability to encourage or require cluster development is linked to the local government's authority to review and approve land subdivision, a function normally delegated to the local planning board.



The Town Law delegating cluster authority to town governments, for example, states: "the town board may, by local law or ordinance, authorize the planning board to approve a cluster development simultaneously with the approval of a subdivision plat. These sections contain nearly parallel authority for towns, villages and cities, with the exception that villages can adopt cluster development provisions only by local law while towns and cities can adopt the provisions by law or ordinance." The powers of local governments described are found in Town Law § 278, Village Law § 7-738, and General City Law § 37.

The limitations of traditional zoning requirements, including its rigorous lot size and set back provisions, have long been recognized. Their essential function, for most communities, is to establish the maximum density at which land can be developed. By knowing this maximum density, the community can determine its future service and facility needs and otherwise plan its future. As applied to particular parcels and neighborhoods, however, the rigorous dimensional requirements can limit the ability of the planning board to create developments that best meet local needs.



The Town Board of Bedford authorized its planning board to preserve "a unique or significant natural feature of the site, including but not limited to a vegetative feature, wildlife habitat, surface water supply, underground aquifer, endangered species, rock formation and steep slopes" and to protect "a unique or significant feature of the man-made environment of the site, including but not limited to a building, structure or artifact of architectural, historical or archeological value." Bedford's cluster law allows lot sizes in residential zoning districts to be reduced to 10,000 square feet, with widths reduced to no less than eighty-five feet.

The flexibility that localities enjoy under their authority to cluster development is seldom appreciated. Often, for example, it is assumed that land developers may elect the cluster development method, but may not be required to do so. If the locality wishes, however, it

may require development to be clustered to meet local objectives. Under cluster development authority, the planning board may be authorized to permit multi-family housing in a single-family zone as long as it does not increase the permitted number of houses. Further, clustering can be done in commercial and industrial zoning districts; it is not limited to residential districts, as is often assumed.

The first step in adopting cluster development provisions is for the local legislature to enact a law or ordinance authorizing the planning board to adjust the dimensional requirements of the zoning law in particular circumstances. The legislative act must specify the particular zoning districts in which clustering is to be permitted. The act must also contain the circumstances under which clustering is permitted, the objectives it is to accomplish, whether clustering may be required of a land developer and which provisions of the zoning law may be altered. These provisions of the act will define how broad the authority and discretion of the planning board will be in applying the cluster technique to subsequent subdivisions. If it wishes, the local legislature may reserve the right to authorize the planning board to permit clustering on a case-by-case basis.



The act of the local legislature giving the planning board authority to cluster must contain sufficient guidelines to assure that similar situations are treated in a corresponding fashion. If the local legislature decides to give the planning board cluster authority on a project-by-project basis, careful monitoring of its application must be done to assure even-handed treatment of applicants.

The developer must submit a conventional subdivision plan, or "plat," so that the planning board may determine the density of development that would be allowed without clustering. The planning board must exercise its judgment to determine the density that would be permitted if a conventional subdivision were approved. Then, a clustered subdivision plat may be submitted that places the permitted density on a portion of the site, leaving the remainder as undeveloped open space or as a recreational facility.



The planning board must have sufficient information to make a credible judgment as to the density permitted for a conventional subdivision, but does not need to follow all the formal steps required in the conventional subdivision process. If the applicant fails to submit sufficient information and detailed drawings to allow the planning board to perform this function, the board may deny the application.

All of the requirements of subdivision approval must be met as the clustered subdivision application is reviewed and approved. These include compliance with the provisions of the comprehensive plan; the environmental review procedures imposed by state and local law; the public notice and hearing; and other requirements applicable to all subdivision approvals, as well as the cluster development law or ordinance adopted by the local legislature.



After the clustered subdivision is approved and formally filed, a copy of the approved plat must be filed with the municipal clerk who is required to place appropriate notations and references regarding the permitted development on the zoning map of the municipality.



Localities must be careful in designing their clustering system to avoid uneven, arbitrary, and discriminatory treatment of applicants for subdivision approval.

SIGN CONTROL AND OTHER AESTHETIC CONTROLS

Local aesthetic regulations can serve two important purposes: to prevent bad design and to preserve existing visual assets. The negative impact that some developments can have on the communities, such as junkyards and imposing billboards, is mitigated or avoided by aesthetic regulation. In addition, views of positive visual assets, such as historic buildings and landmarks or a nearby landscape may be preserved through such regulations.

All land use regulations must protect the public health, safety, welfare, or morals. Aesthetic regulations are justified principally as a method of protecting the public welfare. They do so by stabilizing and enhancing the aesthetic values of the community. This enhances civic pride, protects property values, and promotes economic development. Vibrant communities generally contain natural and man-made features that provide visual quality and distinction which, in turn, enhance the reputation of the community as a desirable place to work, visit, and live. Regulations that protect important visual features and that prevent visual blight further the public welfare and constitute a valid exercise of the police power.

Visual blight can occur in a community in a variety of ways. It can occur when billboards and signs with no design integrity or consistency proliferate in a downtown area or along a commercial road. Similarly, the development of strip malls and retail stores in a commercial center or corridor can create visual confusion that repels rather than attracts shoppers, tourists, and additional investment. In some communities, unattractive land uses such as junkyards, repair shops, solid waste disposal sites, and mining operations can create an environment that prevents the development of the commercial or mixed-use neighborhoods envisioned by the zoning law.

Communities are often confronted with the issue of how to deal with signs. They can be unsafe for drivers or unsightly. Many communities have adopted local sign control laws to address this problem. Provisions can be added to the zoning law, or 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 right to free speech protects the content of signs, which may only be regulated to achieve a compelling state interest.



The Town of North Hempstead enacted a local law regulating the use of signs that completely banned freestanding political signs. The law made it "unlawful to erect and/or maintain any freestanding political sign in any use district." The law was enforced in *People v. Middlemark* (1979). Political campaign signs are a form of expression protected by the First Amendment. The defendants were found not guilty because the total prohibition of freestanding political signs is an infringement of First Amendment rights. The law also violated the constitutional guarantee of equal protection to all citizens. It made an "impermissible distinction between political signs and other signs."

The right to free speech, however, 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 State have adopted extensive provisions that regulate the type of construction, size, location, color, illumination, design, texture, and other aspects of signs and apply different standards in selected zoning districts.

There are a variety of visual resources that a community may want to protect from the potential negative effects of new development. These may include a historic district; distinctive landmark building; corridor of distinctive architecture; views from the community to outlying hills, mountains, or rivers; a dramatic visual entry into the community; or a cultural or historic landscape. When this type of visual asset enhances a community's reputation and character, regulations that preserve it for the benefit of the community may be needed.

Strategic local laws are sometimes enacted specifically to regulate junkyards. Junkyards are areas where junk, waste and discarded or salvage materials are bought, sold, exchanged, stored, baled, packed, disassembled, or handled. Section 136 of the General Municipal Law requires that junkyards be licensed, but junkyards may also be regulated locally.

Some laws completely exclude junkyards. This approach is not advisable. Instead, junkyards should be regulated to avoid negative effects on the surrounding neighborhood. This may be done by relegating junkyards to industrial zones or requiring screening. Enclosing junkyards with a high fence made of opaque material protects the public from the unsightly view of junkyards and is within the power and authority of local governments to require.



Vagueness: local junkyard regulations are sometimes invalidated for vagueness. The definition of "junkyard" should be definite and clear and the definition must not be too broad or all-inclusive. If this is the case, property owners might not be able to ascertain whether they are violating the law or not. In these situations, courts will consider the law void for vagueness.



As with junkyards, transmission lines may not be entirely excluded from a municipality. Instead, municipalities may impose reasonable regulations that do not amount to a prohibition.



Regulations that prohibit transmission lines from residential areas based on the fact that they are commercial uses will be invalidated.

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 protective of the visual environment. As lead agencies under the State Environmental Quality Review Act, local

reviewing bodies must take all practical steps to avoid significant negative environmental impacts on environmental resources of "historic or aesthetic significance."

EXCLUSIONARY ZONING COSTS TOWN OVER $700,000



In *Continental Building Co. Inc. v. The Town of North Salem*, the Supreme Court of Westchester County found a North Salem ordinance unconstitutionally exclusionary and awarded attorney's fees in the amount of $426,782.18. The Appellate Division affirmed the trial court's decision and increased the award of attorney's fees which, together with interest, ultimately amounted to approximately $750,000.

Plaintiff, a developer, submitted an application to the Town Planning Board for the construction of multi-family housing units on his property which, at the time, was zoned for such housing. While Plaintiff's application was pending, the Board passed a new zoning ordinance, drastically reducing the areas zoned for multifamily housing, that rezoned Plaintiff's property. Plaintiff brought suit, contending that the ordinance was unconstitutional on the grounds that it was exclusionary, resulting in a socioeconomic separation of classes in the Town, and that it did not comport with the Town's responsibility for its share of regional needs for multifamily housing.

GROUP HOMES

The term "group homes" includes unlicensed and licensed homes for: recovering substance abusers; the mentally and physically disabled; special needs populations such as pregnant/parenting teens and victims of domestic violence; and supervised foster homes. Typically group home residents are supervised and share a home with a common kitchen, sanitary facilities, and other common living facilities. Group homes may take the form of institutional type facilities such as shelters, transitional housing, single-room occupancy hotels, or facilities that include more than fourteen residents, but may also include other non-traditional households such as shared housing arrangements for the elderly and other unrelated populations simply seeking to create a more affordable housing alternative through home sharing.

Municipalities regulate the siting of group homes in three ways. The group homes are:

- permitted principal uses in one or more zoning districts (This typically occurs when a group home complies with a zoning code's definition of "family.");

- allowed by special permit; or

- a use expressly or impliedly not permitted, and therefore a use variance is needed.



In *McMinn v. Town of Oyster Bay* (1985), the Court of Appeals held that a zoning law that restricted the occupancy of single-family homes had no reasonable relationship to a municipality's legitimate zoning purposes. The zoning law in *McMinn* restricted the definition of family as "any number of persons related by blood, marriage, or legal adoption, living and cooking on the premises together as a single, non-profit housekeeping unit" or "any two (2) persons not related by blood, marriage or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit, both of whom are sixty-two (62) years of age or over, and residing on the premises."

According to the Court, "manifestly, restricting occupancy of single-family housing based on the biological or legal relationships between its inhabitants bears no reasonable relationship to the goals of reducing parking and traffic problems, controlling population density and preventing noise and disturbance." Thus, these legitimate goals, including the goal of preserving the character of a single-family home could be not achieved through such a narrow definition of family.



As a result of *McMinn*, zoning laws that effectively limit the number of unrelated persons living together in a single-family zone, but do not similarly restrict the number of related persons are unconstitutional pursuant to New York State constitution.



To meet the *McMinn* standard and avoid violating the New York State Constitution, a municipal law cannot differentiate between related and unrelated individuals when defining "family" or occupancy restrictions for single family zoning districts.

The Padavan Law

In New York State, the Padavan Law takes precedence over local zoning authority in the siting of licensed community residential facilities for the mentally disabled. The Padavan Law is a statute that provides for community input into the siting of group home facilities. The purpose of the law was to promote and encourage the placement of mentally disabled individuals in community settings to provide the "least restrictive environment that is consistent with" the needs of such individuals. The statute includes a community notice requirement, in which the project sponsor formally identifies the proposed site, the type of community residence, the anticipated number or residents, and provides this information in the form of a notice to the chief executive officer of the municipality. Then the municipality has a forty day response period to analyze the proposal, approve the site, suggest one or more suitable sites, or reject the siting of a facility within the municipality because of an over concentration of such facilities.



§ 41.34 of the Mental Hygiene Law, known as the Padavan Law, defines a group of individuals ranging from four to fourteen individuals as a single family for local zoning purposes, if their home is licensed by the New York State Office of Mental Health or Office of Mental Retardation and Developmental Disabilities. The law requires notice to the affected community and subjects such homes to certain dispersal guidelines to avoid saturation in any particular neighborhood.

The essential element of the Padavan Law is mandated, but flexible, dispersion guidelines. After receiving notice, a municipality may approve the recommended site, suggest alternative sites, or object to the establishment of a facility because of over-concentration. If a municipality claims saturation or over-concentration, a critical factor

is whether the nature and character of the area in which the facility is to be based would be substantially altered as a result of establishment of the facility. Over-concentration is determined by identifying the number of similar facilities (licensed community residences and residential care facilities, and facilities providing residential services to former in-patients) located in proximity to the area of the proposed siting or located within the municipality. It must be noted that these dispersion guidelines are absolute and must also be applied to alternative sites recommended by a municipality prior to approval by either the Commissioner of Mental Health or by the Commissioner of Mental Retardation and Developmental Disabilities.

Padavan's dispersion guidelines have paved the way for an efficient and effective siting process. The law has been so effective that no municipality has ever succeeded on a challenge of a proposed siting based on over-concentration. Municipalities have raised traditional local concerns to show the proposed siting will alter the character of a neighborhood. These traditionally valid concerns, such as safety and traffic, have been found to be without effect unless there is an over-concentration of similar facilities and the nature and character of a neighborhood will be substantially altered, pursuant to Padavan.



In *Jennings v. New York State Office of Mental Health* (1997), the Court of Appeals dismissed an Article 78 petition and interpreted the facility siting criteria of the Padavan Law. A community residence to be licensed by the New York State Office of Mental Health was proposed to be sited in an Albany neighborhood. The Mayor of Albany objected to the site and requested a hearing without suggesting an alternative site for the facility. At the hearing the State Office of Mental Health provided evidence that there was a significant need for more residential non-institutional programs in Albany County. The City's witnesses argued that: (1) there was an over-concentration of special needs housing (unlicensed and licensed housing) in the Albany neighborhood; (2) property values had been adversely impacted by these existing facilities; and (3)

when conducting an over-concentration analysis, facilities located in the area adjacent to the neighborhood should be included.

The Court stated that, "while over concentration is certainly relevant, whether the nature and character of an area will be substantially altered by the establishment of the proposed facility is the dispositive inquiry." Furthermore the neighborhood boundaries were defined by the City's own witnesses and there was "no indication that the larger area . . . would be any more 'saturated' than the smaller neighborhood." Moreover, the Court affirmed both the hearing officer's and Commissioner's conclusion that testimony concerning a decrease in property values was an irrelevant inquiry.

When local zoning laws prevent lower income households or group homes from living in the community, those laws are considered to be exclusionary zoning and can be declared unconstitutional by the courts.



In *Berenson v. Town of New Castle* (1975), a landowner attacked as exclusionary a suburban town's zoning law that contained no provision for the development of multi-family housing in any zoning district in the jurisdiction. The Court of Appeals found the Town's ordinance to be exclusionary, stating that the "primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land." The court held that "in enacting a zoning ordinance, consideration must be given to regional housing needs and requirements" and that there "must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met." The court also appealed to the state legislature for help on this matter, noting that zoning is "essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in

order to foster the development of programs designed to achieve sound regional planning."

CELLULAR TOWER CITING



Generally, cellular companies desiring to construct cellular transmission facilities must submit an application for a building permit to the local building inspector or department. If the proposed construction does not comply with the zoning law's use or dimensional requirements, the permit must be denied. This denial may be appealed to the Zoning Board of Appeals, which may grant a variance in conformance with state law. A site plan may then have to be submitted and approved before a building permit may be issued for the cellular facilities. Alternatively, local zoning regulations may permit cellular transmission facilities but require cellular companies to apply for site plan approval or a special use permit, in which case the applicant must be referred to the appropriate administrative agency for its review.



Local boards may not adopt moratoria on applications for approval of cellular transmission facilities or restrict or deny such applications simply because of significant citizen opposition. All such decisions must be based on facts on the record of the board's proceeding so that they are not unconstitutionally arbitrary or unreasonable.



Localities must not prohibit the location of cellular transmission facilities within their jurisdiction, but must accommodate them subject to reasonable restrictions.

Where cellular facilities are not listed as a permitted use in the zoning law, the denial of a use variance may be vulnerable to attack. If the denial will result in a gap in the cellular

service network, a variance may have to be granted under federal telecommunications law.



Local regulation of such facilities may not be based on concerns for human health. Protecting citizens from the health hazards of the radio-frequency emissions from cellular transmission facilities has been prohibited by federal telecommunications law.



Federal telecommunications law also requires that localities not discriminate among providers of functionally equivalent services or fail to respond to applications from wireless carriers within a reasonable period of time. Federal law also requires that denials of applications must be in writing and supported by substantial written evidence found in the record of the proceedings.



Local regulations that establish a preference system for the siting of cellular facilities must be careful not to discriminate against types of properties without citing a valid reason for denying them preferences for siting. Where a local law gave preference to siting on town-owned land, the court found no rational basis for preferring town-owned land, in general, over other types of properties on aesthetic grounds.

Conditions

Mitigation requirements are routinely imposed as reasonable conditions for the granting of a variance or the approval of an application for a site plan or special use permit. Local board determinations regarding variances, site plans, and special use permits are subject to environmental review under the State Environmental Quality Review Act (SEQRA). This statute requires local agencies to assess the potential environmental impacts of their actions and to disapprove applications that would result in adverse environmental impacts, or to condition their approval upon the implementation of mitigation measures designed to prevent such adverse impact. An adverse effect on resources of aesthetic

importance is considered the type of impact that may be mitigated under SEQRA or justify the denial of an application.

ADULT USES

The regulation of adult uses occurs when local governments adopt special land use laws aimed at controlling businesses that provide sexual entertainment or services to their customers. Adult uses include X-rated video shops and bookstores, live or video peep shows, topless or fully nude dancing establishments, combination book/video and "marital aid" stores, non-medical massage parlors, hot oil salons, nude modeling studios, hourly motels, body painting studios, swingers clubs, X-rated movie theaters, escort service clubs, and combinations thereof.

Adult entertainment businesses have thrived in marginal urban centers over the last twenty-five years. In recent years, these businesses have been moving into higher quality urban areas, suburban, and rural areas. Some adult businesses are characterized by blacked-out windows or large and gaudy signs. These businesses may harbor illegal sex or drug-related activities, and may attract loiterers and petty criminals. The primary concern of municipal officials is the tendency of adult uses to concentrate. Clustering of adult uses particularly impacts the surrounding neighborhoods in a variety of adverse ways.

One approach of regulating adult uses is dispersal throughout non-residential areas in an effort to avoid the deleterious secondary effects of concentration. Dispersal zoning generally requires 250 to 2500 linear feet between adult uses and sensitive uses such as churches, schools, residences and parks. Another approach, concentration zoning, limits adult uses to relatively small districts where the adverse impacts can be better controlled and isolated. Some municipalities use licensing to embellish their zoning controls. Others define adult uses as special uses, limiting them to specific zoning districts and requiring a careful review prior to the issuance of a conditional use permit.



The authority of local governments to adopt zoning provisions to protect the public safety and welfare "with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality," is found in Village Law § 7-704, Town Law § 263, and General City Law §20 (24) & (25).



Some adult use businesses involve significant financial investments that must be respected by laws that require their relocation or cessation. Amortization periods that allow the owners of such businesses time to recoup their investments are often found in laws that regulate adult uses.

The public purpose justifying adult use zoning is to prevent or contain the increased crime, diminished property values, and blight that can occur when adult businesses operate in a neighborhood. Studies prepared prior to the adoption of local adult use regulations in New York have identified the "secondary effects" of these uses. These include increased sex-related crimes, drug dealing and petty street crime, a reduction in property values, long-term economic decay, adverse effects on surrounding businesses, and the perception of blight and decay.

Communities are moved to action when they experience or fear the negative secondary effects of adult establishments and sense a need to adopt special regulations to control those effects. New York City adopted an aggressive dispersal zoning law after watching adult business uses expand greatly over a twenty-five year period. Communities have reacted differently to adult uses. Hyde Park, New York adopted a dispersal zoning law before any adult businesses were established in the community. Other communities have regulated these enterprises after the first few adult uses opened for business in their communities.

The public interest in controlling the secondary effects of adult uses provides the legal, factual, and political justification for their regulation. The Supreme Court has held that

secondary effects studies are the factual backbone supporting the substantial government interest necessary for controlling adult uses through land use regulations. Utilizing these studies, communities use the authority delegated to them by the state to adopt zoning provisions to protect the public safety and welfare "with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality."

 Hyde Park, New York prepared a report relying on studies conducted in municipalities across the country and assessing the impacts of adult uses on its rich history and tourist trade. In 1996, following this report, Hyde Park enacted adult use regulations.

Municipalities should draft adult use zoning regulations based on impact studies conducted by them or by other jurisdictions that are relevant to their particular circumstances. Courts have held that the substantial government interest in adult use restrictions must be supported by evidence gathered through public hearings, law enforcement memoranda, affidavits from planners and real estate experts, and statistical and empirical evidence. Information collected in secondary effects studies becomes the factual and evidentiary basis justifying restrictions on adult uses.

 Adult use laws should not be adopted simply in response to community opposition. The use of empirical and anecdotal evidence has been approved by courts to show the adverse impacts of existing adult businesses in communities. The evidence was provided by business owners and community leaders at public hearings held prior to the law adoption. Whenever possible, this type of evidence should be supported by factual information such as crime statistics and real estate sales or rental data.

 References to moral objections to adult uses in local laws may be enough to spark a constitutional challenge. Laws concerning themselves with the "objectionable" nature of adult businesses or requiring that applicants for adult

use permits be of "good moral character" are particularly vulnerable to attack.

Local governments should use caution when regulating obscenity. Laws regulating adult uses, particularly bans on "obscene" adult uses, are vulnerable to attack because the courts have confined obscenity to the "most explicit, thoroughly hardcore materials that lack any redeeming value whatsoever." This caveat does not prevent regulations limiting adult businesses to serving adults only because laws that prevent the sale of pornographic materials to children are constitutional.

Laws should be limited to regulating the time, place, or manner of the location and operation of adult businesses and should avoid constraining the content of any particular type of expression that amounts to constitutionally protected free speech.



Municipalities must be careful not to aim their prohibitions and restrictions at the content of the expression found in adult business services and to limit their proscriptions to regulating the secondary, adverse effects of adult use businesses.

Certain types of conduct relevant to adult uses are not protected by the First Amendment. Recreational dancing, because it lacks a communicative element between audience and performer, is not a protected form of speech when performed for exercise or personal pleasure.



The U.S. Supreme Court upheld a local zoning law requiring adult motion picture theaters to locate 1,000 feet from any residential zone, family dwelling, church, park, or school in *Renton v. Playtime Theaters, Inc.* (1986). Following *American Mini Theaters, Inc.*, the court allowed the adult use regulation to impose time, place and manner restrictions. The court reinforced *American Mini Theater's* holding that "preserving the quality of urban life" is a substantial government interest, and that interest may be justified by factual studies exposing adverse secondary effects associated with adult

businesses. The court found further that the law was narrowly tailored to affect only the group of uses producing the unwanted secondary effects. It also held that the availability of five percent of the entire land area of the town for relocation was reasonable and that adult business owner must "fend for themselves in the real estate market" because economic impact is not a viable First Amendment argument.

Where communities need time to study how best to regulate adult businesses, they are authorized to adopt a moratorium on the issuance of permits to all adult businesses or such businesses in particular zoning districts or neighborhoods. Reasonable progress toward studying the situation and drafting zoning controls should be made following the adoption of a moratorium or before one is extended.

REFERENCES

- Jeffrey Durocher, *Accessory Uses of Land in New York State*, http://www.law.pace.edu/landuse/accuses.html (1997).

- Irina Olevsky, *The Regulation of Home Occupations Under Zoning Ordinances,* http//www.law.pace.edu/landuse/

- Michael Murphy and Joseph Stinson, *Cluster Development*, http://www.law.pace.edu/landuse/

- *A Guide to Accessory Apartment Regulations: The Westchester Experience*; Westchester County Department of Planning, March, 1989.

QUIZ



1. Local government has the power to enact laws for the protection of the public welfare, safety, morals and health under which provisions of state law.
   A. The Town, Village, and General City Law
   B. The Municipal Home Rule Law
   C. Both A and B
   D. None of the above

2. Accessory uses, including accessory apartments and home occupations must be:
   A. customary
   B. incidental
   C. prohibited by local law
   D. A and B

3. Nonconforming use regulations may:
   A. Limit the expansion or enlargement of nonconforming uses
   B. Prohibit the reconstruction of damaged structures
   C. Disallow the reestablishment of nonconforming uses after they have been discontinued for a time
   D. Terminating them after the passage of a stipulated amount of time
   E. All of the above

4. Cluster development permits greater density than if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning district in which the property is located.
   A. True
   B. False

5. Local regulation of signs:
   A. violates the First Amendment
   B. is permitted if directed at offensive subject matter
   C. may only be regulated with respect to time, place and manner

6. Local laws may be enacted to prohibit the siting of group homes
   A. True
   B. False

7. Local laws may not prevent lower income households or group homes from living in the community and will be declared unconstitutional under which principle:
   A. Equal protection of the law
   B. As an unconstitutional “taking” of property
   C. Exclusionary zoning

8. The local legislature may regulate cellular towers in the following ways:
   A. Impose reasonable restrictions on cellular tower siting and construction
   B. Adopt a moratorium on cellular tower structures while the effects of radio frequencies are studied to determine their health effects
   C. Prohibit the location of cellular transmission facilities within their jurisdiction
   D. Both B and C

UNIVERSAL GLOSSARY OF TERMS AND PHRASES

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1. **Accessory Apartment.** An accessory apartment is a second residential unit that may be contained within an existing single-family home, garage, or carriage house. An accessory apartment is usually required to be a complete housekeeping unit that can function independently with separate access, kitchen, bedroom, and sanitary facilities.

2. **Accessory Use.** An accessory use is the use of land that is subordinate, incidental to, and customarily found in connection with the principal use allowed on a lot by the zoning law. A garage is incidental to the principal use of a lot as a single-family residence and customarily found on a single-family parcel.

3. **Action.** An action is, under the State Environmental Quality Review Act, any project or physical activity that is directly undertaken, funded, or approved by a state or local agency that may affect the environment. Actions include planning and policy-making activities and the adoption of rules and regulations that may affect the environment.

4. **Administrative Body.** Administrative bodies are created by local legislatures to undertake administrative functions such as the review of applications for site plans, subdivisions, and special use permits. *See* "Reviewing Board."

5. **Adult Use.** An adult use is a business that provides sexual entertainment or services to customers. Adult uses include: X-rated video shops and bookstores, live or video peep shows, topless or fully nude dancing establishments, combination book/video and "marital aid" stores, non-medical massage parlors, hot oil salons, nude modeling studios, hourly motels, body painting studios, swingers clubs, X-rated movie theaters, escort service clubs, and combinations thereof.

6. **Advisory Opinion.** An advisory opinion is a report by a local administrative body, which does not have the authority to issue permits or adopt laws and regulations, prepared for the consideration by a local body that does.

7. **Aesthetic Resources.** Natural resources such as open vistas, woods, scenic viewsheds, and attractive man-made settings whose appearance is an important ingredient in the quality of life in a community.

8. **Affordable Housing.** Housing developed through some combination of zoning incentives, cost-effective construction techniques, and governmental subsidies that can be rented or purchased by households who cannot

afford market rate housing in the community.

9. **Agency.** An agency, under the State Environmental Quality Review Act (SEQRA), is any state or local agency, including zoning boards of appeals, local legislatures, planning boards, and, under certain circumstances, even building inspectors, that make discretionary decisions that may affect the environment. These agencies are subject to SEQRA regulations whenever taking an "action."

10. **Aggrieved Party.** Only aggrieved parties may appeal a reviewing body or local legislature's land use decision to the courts. The decision must result in some demonstrable harm to the party that is different from the impact of the decision on the community as a whole.

11. **Agricultural Land Protection.** Any law, regulation, board, or process that has as its objective the preservation of farming on land dedicated to agricultural use. Examples include agricultural zoning, farmland preservation boards, property tax relief for farmers, and anti-nuisance laws.

12. **Agricultural Zoning District.** An agricultural zoning district is a designated portion of the municipality where agricultural uses are permitted as-of-right and non-farm land uses are either prohibited or allowed subject to limitations or conditions imposed to protect the business of agriculture.

13. **Amortization of Nonconforming Uses.** Nonconforming uses that are particularly inconsistent with zoning districts within which they exist and not immediately dangerous to public health or safety may be terminated or amortized within a prescribed number of years. This amortization period allows the landowner to recoup some or all of his investment in the offensive nonconforming use.

14. **Appellate Jurisdiction.** A zoning board of appeals has appellate jurisdiction to review determinations of the zoning enforcement officer. Denials of building permits and determinations that proposed land uses do not meet the zoning law's standards may be appealed to the zoning board of appeals. Land use decisions of the zoning board of appeals, planning board, and local legislature may be appealed to the courts, which exercise appellate jurisdiction over them.

15. **Approval.** An approval is a discretionary decision made by a local agency to issue a permit, certificate, license, lease, or other entitlement or to otherwise authorize a proposed project or activity.

16. **Architectural Review Board.** An architectural review board is a body that reviews proposed developments for their architectural congruity with surrounding developments and either renders an advisory opinion on the matter or is authorized to issue or deny a permit. Its review is based upon design criteria or standards adopted by the local legislature.

17. **Area Variance.** This is a variance that allows for the use of land in a way that is not permitted by the dimensional or physical requirements of the zoning law. This type of variance is needed when a building application does not comply with the setback, height, lot, or area requirements of the zoning law. For example, if an owner wants to build an addition to a house that encroaches into the side-yard setback area, that owner must apply to the zoning board of appeals for an area variance.

18. **Article 78 Proceeding.** An Article 78 Proceeding refers to an article of the Civil Practice Law and Rules that allows aggrieved persons to bring an action against a government body or officer. This device allows review of state and local administrative proceedings in court.

19. **As-of-Right.** An as-of-right use is a use of land that is permitted as a principal use in a zoning district. In a single-family district, the construction of a single-family home is an as-of-right use of the lot.

20. **Buffer.** A buffer is a designated area of land that is controlled by local regulations to protect an adjacent area from the impacts of development.

21. **Building Area.** The building area is the total square footage of a parcel of land that is allowed by the regulations to be covered by buildings and other physical improvements.

22. **Building Code.** The building code is the Uniform Fire Prevention and Building Code, as modified by local amendments. This code governs the construction details of buildings and other structures in the interests of the safety of the occupants and the public. A local building inspector may not issue a building permit unless the applicant's construction drawings comply with the provisions of the building code.

23. **Building Height.** The building height is the vertical distance from the average elevation of the proposed finished grade along the wall of a building or structure to the highest point of the roof, for flat roofs, or to the mean height between eaves and ridge, for gable, hip, and gambrel roofs.

24. **Building Inspector.** The building inspector is the local administrative official charged with the responsibility of administering and enforcing the provisions of the building code. In some communities the building inspector may also be the zoning enforcement officer.

25. **Building Permit.** A building permit must be issued by a municipal agency or officer before activities such as construction, alteration, or expansion of buildings or improvements on the land may legally commence.

26. **Bulk Regulations.** Bulk regulations are the controls in a zoning district governing the size, location, and dimensions of buildings and improvements on a parcel of land.

27. **Bulk Variance.** *See* "Area Variance."

28. **Capital Budget.** The capital budget is the municipal budget that provides for the construction of capital projects in the community.

29. **Capital Project.** Capital projects are construction projects including public buildings, roads, street improvements, lighting, parks, and their improvement or rehabilitation paid for under the community's capital budget.

30. **Cellular Facility.** An individual cell of a cellular transmission system that includes a base station, antennae, and associated electronic equipment that sends to and receives signals from mobile phones.

31. **Central Business District (CBD).** The central business district is the traditional business core of a community, characterized by a relatively high concentration of business activity within a relatively small area. The CBD is usually the retail and service center of a community. Because of its compactness, there is usually an emphasis on pedestrian traffic in the CBD.

32. **Certificate of Occupancy.** A certificate of occupancy is a permit that allows a building to be occupied after its construction or improvement. It certifies that the construction conforms to the building code and is satisfactory for occupancy.

33. **City Council.** *See* "Local Legislature."

34. **Cluster Subdivision.** A cluster subdivision is the modification of the arrangement of lots, buildings, and infrastructure permitted by the zoning law to be placed on a parcel of land to be subdivided. This modification results in the placement of buildings and improvements on a part of the land to be subdivided in order to preserve the natural and scenic quality of the remainder of the land.

35. **Components.** Components are elements of a comprehensive plan that are suggested by state law.

36. **Comprehensive Plan.** A comprehensive plan is a written document that identifies the goals, objectives, principles, guidelines, policies, standards, and strategies for the growth and development of the community.

37. **Condition.** A condition is a requirement or qualification that is attached to a reviewing board's approval of a proposed development project. A condition must be complied with before the local building inspector or department can issue a building permit or certificate of occupancy.

38. **Conditional Use Permit.** *See* "Special Use Permit."

39. **Conditioned Negative Declaration (CND).** Under the State Environmental Quality Review Act, a CND is a negative declaration issued by a "lead agency" for an

"unlisted action." This involves an action that, as initially proposed, may result in one or more significant adverse environmental impacts but, when mitigation measures are required by the lead agency to modify the proposed action, no significant adverse environmental impacts will result.

40. **Conservation Advisory Council (CAC).** A CAC is created by the local legislature to advise in the development, management, and protection of the community's natural resources and to prepare an inventory and map of open spaces.

41. **Conservation Board.** Once the local legislature has reviewed and approved an open space inventory and map, it may designate the Conservation Advisory Committee as a Conservation Board and authorize it to review and comment on land use applications that affect community open space.

42. **Conservation Easement.** A conservation easement is a voluntary agreement between a private landowner and a municipal agency or qualified not-for-profit corporation to restrict the development, management, or use of the land. That agency holds the interest and is empowered to enforce its restrictions against the current landowner and all subsequent owners of the land.

43. **Conservation Overlay Zones.** In conservation overlay zones, the legislature adopts more stringent standards than those contained in the underlying zoning districts as necessary to preserve identified resources and features in need of conservation or preservation.

44. **Critical Environmental Area (CEA).** A CEA is a specific geographic area designated by a state or local agency as having exceptional or unique environmental characteristics. In establishing a CEA, the fragile or threatened environmental conditions in the area are identified so that they will be taken into consideration in the site-specific environmental review under the State Environmental Quality Review Act.

45. **Cumulative Impact Analysis.** In conducting an environmental review of a proposed project, its negative impacts on the environment may be considered in conjunction with those of nearby or related projects to determine whether, cumulatively, their adverse impacts are significant and require the preparation of an Environmental Impact Statement.

46. **Decision.** A decision is the final determination of a local reviewing body, or administrative agency or officer regarding an application for a permit or approval.

47. **Deed Restrictions.** A covenant or restriction placed in a deed that restricts the use of the land in some way. These are often used to insure that the owner complies with a condition imposed by a land use body.

48. **Density Bonus.** *See* "Incentive Zoning."

49. **Density.** Density is the amount of development per acre on a parcel permitted under the zoning law. The density allowed could be four dwelling units per acre or 40,000 square feet of commercial building floor per acre, for example.

50. **Determination.** A determination is a decision rendered by an officer or administrative body on an application or a request for a ruling.

51. **Development Overlay Zones.** In development overlay zones, the legislature may provide incentives, such as waivers of certain zoning requirements or density bonuses, for developers who build the type of development desired.

52. **District.** A district is a portion of a community identified on the locality's zoning map within which one or more principal land uses are permitted along with their accessory uses and any special land uses permitted by the zoning provisions for the district.

53. **Dwelling Unit.** A dwelling unit is a unit of housing with full housekeeping facilities for a family.

54. **Easement.** An easement involves the right to use a parcel of land to benefit an adjacent parcel of land, such as to provide vehicular or pedestrian access to a road or sidewalk. Technically known as an easement appurtenant.

55. **Eminent Domain.** Eminent domain is the government's right to take title to private property for a public use upon the payment of just compensation to the landowner.

56. **Enabling Act.** An enabling act is legislation passed by the New York State Legislature authorizing counties, cities, towns, and villages to carry out functions in the public interest. The power to adopt comprehensive plans, zoning ordinances, and land use regulations is delegated to towns, villages, and cities under the Town Law, Village Law, General City Law, and Municipal Home Rule Law.

57. **Environment.** The environment is defined broadly under the State Environmental Quality Review Act to include 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.

58. **Environmental Assessment Form (EAF).** An EAF, as used in the State Environmental Quality Review Act process, is a form completed by an applicant to assist an agency in determining the environmental significance of a proposed action. A properly completed EAF must contain enough information to describe the proposed action, its location, purpose, and potential impacts on the environment.

59. **Environmental Impact Statements (EIS).** An EIS is a written "draft" or "final" document prepared in accordance with the State Environmental Quality Review Act. An EIS provides a means for agencies, project sponsors, and the public to systematically consider significant adverse environmental impacts, alternatives, and mitigation strategies. An EIS facilitates the weighing of social, economic, and environmental factors in the planning and decision-making process. A draft EIS (DEIS) is the initial statement prepared by either the project sponsor or the lead agency and circulated for review and comment before a final EIS (FEIS) is prepared.

60. **Environmental Quality Review.** The process that reviewing boards must conduct to determine whether proposed projects may have a significant adverse impact on the environment and, if they do, to study these impacts and identify alternatives and mitigation conditions that protect the environment to the maximum extent practicable.

61. **Environmental Review.** The State Environmental Quality Review Act requires local agencies that review applications for land use approvals to take a hard look at the environmental impact of the proposed projects. Where the proposed project may have a significant adverse impact on the environment the agency must prepare an environmental impact statement before approving the project. The adoption of comprehensive plans, zoning amendments, and other land use regulations are also subject to environmental review.

62. **Exclusionary Zoning.** When a community fails to accommodate, through its zoning law, the provision of affordable types of housing needed to meet proven regional housing needs, that community is said to practice exclusionary zoning.

63. **Executive Session.** An executive session is a meeting, or portion of a meeting, that is closed to the public because the topics to be discussed involve real estate, litigation, or sensitive personnel matters.

64. **Facilitation.** A process of decision-making guided by a facilitator who insures that all affected individuals and groups are involved in a meaningful way and that the decisions are based on their input and made to achieve their mutual interests. Facilitators may be neutral outside third parties or community leaders trained or experienced in the process.

65. **Family.** One or more persons occupying a dwelling as a single housekeeping unit.

66. **Final Plat Approval.** The final plat approval is the approval by the authorized local reviewing body of a final subdivision drawing or plat that shows the subdivision, proposed improvements, and conditions as specified in the locality's subdivision regulations and as required by that body in its approval of the preliminary plat.

67. **Floating Zone.** A floating zone is a zoning district that is added to the zoning law but that "floats" until an application is made to apply the new district to a certain parcel. Upon the approval of the application, the zoning map is amended to apply the floating district to that parcel of land.

68. **Floodplain.** A floodplain is the area on the sides of a stream, river, or watercourse that is subject to periodic flooding. The extent of the floodplain is dependent on soil type, topography, and water flow characteristics.

69. **Floor Area Ratio (FAR).** FAR is the gross floor area of all buildings permitted on a lot divided by the area of the lot. In zoning, the permitted building floor area is calculated by multiplying the maximum FAR specified for the zoning district by the total area of the parcel. A permitted FAR of 2 would allow the construction of 80,000 square feet of floor space on 40,000 square feet of land (40,000 x 2 = 80,000).

70. **Freedom of Information Law.** The Freedom of Information Law requires that the public be provided access to governmental records, including local land use documents, such as photos, maps, designs, drawings, rules, regulations, codes, manuals, reports, files, and opinions. Public access may be denied if it would constitute an invasion of privacy.

71. **Freshwater Wetlands Regulation.** These are laws passed by federal, state, and local governments to protect wetlands by limiting the types and extent of activities permitted within wetlands. These laws require landowners to secure permits before conducting many activities, such as draining, filling, or constructing buildings.

72. **Frontage.** Zoning laws typically require that developable lots have a specified number of linear feet that front on a dedicated street. A 100-foot frontage requirement means that a lot must have 100 linear feet on the side of the parcel that fronts on a street.

73. **Goals.** Goals are broad statements of ideal future conditions that are desired by the community and contained in the comprehensive plan. For example, a community may have a goal of "providing an ample stock of affordable housing."

74. **Group Home.** Group homes are residences for a variety of special populations in need of supervised living facilities. Individuals residing in group homes may be mentally or physically disabled, recovering substance abusers, teenaged mothers, or victims of domestic violence. Able-bodied elderly persons, college students, young professionals, and other people not related by blood, marriage, or adoption might also form groups that wish to live together. When such groups of unrelated persons seek housing in a single-family home, the question arises as to whether they are a "family" entitled to live in a residential unit in a single-family zoning district.

75. **Historic District.** An historic district is a regulatory overlay zone within which new developments must be compatible with that of the architecture of the historic structures within the districts. Alterations and improvements of historic structures must be made with minimum interference with the historic features of the building. The local legislature establishes standards that a historic preservation commission uses to permit, condition, or deny projects proposed in historic districts.

76. **Historic Preservation Commission.** An historic preservation commission is established to review proposed projects within historic districts for compliance with standards established for new development or alteration or improvement of historic buildings and landmarks.

77. **Home Occupation.** A home occupation is a business conducted in a residential dwelling unit that is incidental and subordinate to the primary residential use. Regulations of home occupations usually restrict the percentage of the unit that can be used for the occupation, exterior evidence of the business, and the amount of parking allowed and traffic generated.

78. **Home Rule Authority.** Home rule authority gives local governments the power to adopt laws relating to their local property, affairs, and government, in addition to the powers specifically delegated to them by the legislature. The Municipal Home Rule Law gives a municipality the authority to regulate for the "protection and enhancement of its physical and visual environment" as well as for the "government, protection, order, conduct, safety, health, and well being of persons or property therein." Zoning laws may also be adopted under home rule authority.

79. **Implementation Plan or Measures.** Implementation plans coordinate all the related strategies that are to be carried out to achieve the objectives contained in the comprehensive plan. An implementation plan answers the questions: *who, what, where, and how.*

80. **Incentive Zoning.** Incentive zoning is a system by which zoning incentives are provided to developers on the condition that specific physical, social, or cultural benefits are provided to the community. Incentives include increases in the permissible number of residential units or gross square footage of development, or waivers of the height, setback, use, or area provisions of the zoning ordinance. The benefits to be provided in exchange may include affordable housing, recreational facilities, open space, day care facilities, infrastructure, or cash in lieu thereof.

81. **Infrastructure.** Infrastructure includes utilities and improvements needed to support development in a community. Infrastructure includes water and sewage systems, lighting, drainage, parks, public buildings, roads and transportation facilities, and utilities.

82. **Intermunicipal Agreements.** Intermunicipal agreements are

compacts among municipalities to perform functions together that they are authorized to perform independently. In the land use area, localities may agree to adopt compatible comprehensive plans and ordinances, as well as other land use regulations, and to establish joint planning, zoning, historic preservation, and conservation advisory boards or hire joint inspection and enforcement officers.

83. **Involved Agency.** An agency that has jurisdiction by law to fund, approve, or directly undertake an action, but does not have the primary responsibility for that action as does with the lead agency under the State Quality Environmental Review Act.

84. **Judicial Review.** Judicial review is the oversight by the courts of the decisions and processes of local land use agencies. It is governed by special statutory provisions that limit both actions against governmental bodies, in general, and against local land use decisions, in particular. The applicable rules of judicial review depend on the type of local body that is involved and the type of action that is challenged. The courts in New York have adopted fairly liberal rules of access to the courts, typically allowing adjacent and nearby property owners and associations of residents to challenge land use decisions that affect them in some special way.

85. **Jurisdictional Defect.** When a legislative action or a land use determination is taken without following a mandated procedure, such as referral to a county planning agency or the conduct of environmental review, the action or determination suffers from a jurisdictional defect and is void. Without following mandated procedures public bodies do not have jurisdiction to act.

86. **Land Trust.** A land trust is a not-for-profit organization, private in nature, organized to preserve and protect the natural and man-made environment by, among other techniques, holding conservation easements that restrict the use of real property.

87. **Land Use Law.** Land use law encompasses the full range of laws and regulations that influence or affect the development and conservation of the land. This law is intensely intergovernmental and interdisciplinary. In land use law there are countless intersections among federal, state, regional, and local statutes. It is significantly influenced by other legal regimes such as environmental, administrative, and municipal law.

88. **Land Use Regulation [Local].** Local land use regulations are laws enacted by the local legislature for the regulation of any aspect of land use and community resource protection, including zoning, subdivision, special use permit or site plan regulation, or any other regulation that prescribes the appropriate use of property or the scale, location, or intensity of development.

89. **Landmark Preservation Law.** A landmark preservation law

designates individual historical or cultural landmarks and sites for protection. It controls the alteration of landmarks and regulates some aspects of adjacent development to preserve the landmarks' integrity.

90. **Lead Agency.** The lead agency is the "involved agency" under the State Environmental Quality Review Act that is principally responsible for undertaking, funding, or approving an action. The lead agency is 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.

91. **Local Board.** *See* "Reviewing Board."

92. **Local Law.** Local law is the highest form of local legislation. The power to enact local laws is granted by the constitution to local governments. Local laws, in this sense, have the same quality as acts of the state legislature, both being authorized by the state constitution. They must be adopted by the formalities required for the adoption of local laws.

93. **Local Legislature.** The local legislature adopts and amends the comprehensive plan, zoning and land use regulations, and sometimes retains the authority to issue certain permits or perform other administrative functions. The local legislature of a city is typically called the City Council, of a village, the Village Board of Trustees, and of a town, the Town Board.

94. **Lot Area.** Lot area is the total square footage of horizontal area included within the property lines. Zoning laws typically set a minimum required lot area for building in each zoning district.

95. **Lot.** A lot is a portion of a subdivision, plat, tract, or other parcel of land considered as a unit for the purpose of transferring legal title from one person or entity to another.

96. **Master Plan.** The term master plan is used synonymously by many to refer to the comprehensive plan. The statutory, official name for the community's written plan for the future is the comprehensive plan.

97. **Mediation.** Mediation is a voluntary process of negotiation, generally used when a dispute exists among two or more parties, conducted by a trained mediator who works with all parties involved so that their true interests are identified and a resolution is achieved that responds effectively and fully to those interests.

98. **Minutes.** The minutes typically cover the important discussions, facts found, and actions taken at a meeting. The Open Meetings Law requires that the minutes provide a record of motions, proposals, and actions.

99. **Mitigation Conditions.** Conditions imposed by a reviewing body on a proposed development project or other action to mitigate its adverse impact on the environment.

100. **Mixed Use.** In some zoning districts multiple principal uses are permitted to coexist on a single parcel of land. Such uses may be permitted, for example, in neighborhood commercial districts, where apartments may be developed over retail space.

101. **Moratorium.** A moratorium suspends the right of property owners to obtain development approvals while the local legislature takes time to consider, draft, and adopt land use regulations or rules to respond to new or changing circumstances not adequately dealt with by its current laws. A moratorium is sometimes used by a community just prior to adopting a comprehensive plan or zoning law, or major amendment thereto.

102. **Multifamily Housing.** Most zoning maps contain districts where multifamily housing is permitted by the zoning law. Under the district regulations, buildings with three or more dwelling units are permitted to be constructed, such as garden apartments or multiple story apartment buildings.

103. **Municipal Clerk.** The municipal clerk is the public official authorized by the local legislature to keep official records of the legislative and administrative bodies of the locality. Final determinations of reviewing boards ordinarily must be filed with the municipal clerk.

104. **Negative Declaration ("neg dec").** A "neg dec" is a written determination by a lead agency, under the State Environmental Quality Review Act, that the implementation of the action as proposed will not result in any significant adverse environmental impacts. A "neg dec" concludes the environmental review process for an action.

105. **Nonconforming Buildings.** A building that was constructed prior to the adoption of the zoning law or zoning amendment that is not in accordance with the dimensional provisions, such as building height or setback requirements, of that law or amendment.

106. **Nonconforming Use.** A nonconforming use is a land use that is not permitted by a zoning law but which already existed at the time the zoning law or its amendment was enacted. Most nonconforming uses are allowed to continue but may not be expanded or enlarged.

107. **Notice.** Notice requirements are contained in state and local statutes. They spell out the number of days in advance of a public hearing that public notice must be given and the precise means that must be used. These may include publication in the official local newspaper and mailing or posting notices in prescribed ways. Failure to provide public notice is a jurisdictional defect and may nullify the proceedings.

108. **Objectives.** Objectives are statements of attainable, quantifiable, intermediate-term achievements that help accomplish goals contained in the comprehensive plan. For example, an objective would be to achieve "the construction of 50 units

of affordable housing annually until the year ____."

109. **Official Map.** The official map is the adopted map of a municipality showing streets, highways, parks, drainage, and other physical features. The "Official Map" is final and conclusive with respect to the location and width of streets, highways, drainage systems, and parks shown thereon and is established to conserve and protect the public health, safety, and welfare.

110. **Open Meetings Law.** The Open Meetings Law is a state statute that requires local legislative, administrative, and quasi-judicial bodies to open all of their meetings to members of the public. This law applies to all meetings where a majority of the board members are present, except those meetings that are held as executive sessions.

111. **Ordinance.** An ordinance is an act of a local legislature taken pursuant to authority specifically delegated to local governments by the state legislature. The power of villages to adopt ordinances was eliminated in 1974. Technically, therefore, villages do not adopt, amend, or enforce zoning ordinances. Zoning provisions in villages are properly called zoning laws.

112. **Original Jurisdiction.** When an aggrieved party must appeal a determination to a quasi-judicial or judicial body in the first instance that body has original jurisdiction over that matter. The zoning board of appeals, for example, has original jurisdiction to hear appeals of the determinations of the zoning enforcement officer.

113. **Overlay Zone.** An overlay zone is a zone or district created by the local legislature for the purpose of conserving natural resources or promoting certain types of development. Overlay zones are imposed over existing zoning districts and contain provisions that are applicable in addition to those contained in the zoning law.

114. **Parcel.** A piece of property. *See* "Lot."

115. **Planned Unit Development ("PUD").** A planned unit development is an overlay zoning district that permits land developments on several parcels to be planned as single units and contain both residential dwellings and commercial uses. It is usually available to landowners as a mixed use option to single uses permitted as-of-right by the zoning ordinance.

116. **Planning Board/Commission.** Planning boards must consist of 5 to 7 members. Planning boards may be delegated reviewing board functions and a variety of advisory functions, including the preparation of the comprehensive plan, drafting zoning provisions, or suggesting site plan and subdivision regulations, in addition to other functions. One important purpose of the planning board's advisory role is to provide an impartial and professional perspective on land use issues based on the long range needs of the community contained in the

comprehensive plan or other local policy documents.

117. **Plat.** This is a site plan or subdivision map that depicts the arrangements of buildings, roads, and other services for a development.

118. **Police Power.** The police power is the power that is held by the state to legislate for the purpose of preserving the public health, safety, morals, and general welfare of the people of the state. The authority that localities have to adopt comprehensive plans and zoning and land use regulations is derived from the state's police power and delegated by the state legislature to its towns, villages, and cities.

119. **Positive Declaration ("pos dec").** A positive declaration is a written determination by a lead agency, under the State Environmental Quality Review Act, that the implementation of the action as proposed is likely to have a significant adverse impact on the environment and that an environmental impact statement will be required.

120. **Preliminary Plat Approval.** Preliminary plat approval is the approval by the authorized local administrative body of a preliminary subdivision drawing or plat that shows the site conditions, subdivision lines, and proposed improvements as specified in the locality's subdivision regulations.

121. **Principal Use.** A principal use is the primary use of a lot that is permitted under the district regulations in a zoning law. These regulations may allow one or more principal uses in any given district. Unless the district regulations allow mixed uses, only one principal use may be made of a single lot, along with uses that are accessory to that principal use.

122. **Public Hearing.** These hearings afford citizens affected by a reviewing board's decision an opportunity to have their views heard before decisions are made. State statutes require that public hearings be held regarding the application for a variance or a subdivision approval. Public hearings regarding site plan applications and draft environmental impact statements may be required as a matter of local practice.

123. **Public Services.** Public services are those services provided by the municipal government for the benefit of the community, such as fire and police protection, education, solid waste disposal, street cleaning, and snow removal.

124. **Quasi-Judicial.** A term applied to some local administrative bodies that have the power to investigate facts, hold hearings, weigh evidence, draw conclusions, and use this information as a basis for their official decisions. These bodies adjudicate the rights of the parties appearing before the body. The zoning board of appeals serves in a quasi-judicial capacity when it hears appeals from the determination of the local zoning enforcement officer.

125. **Record.** Local boards must keep a detailed record of their

deliberations in making decisions on site plan and subdivision applications and the issuance of variances and special permits. These records may be kept in narrative form rather than in verbatim transcript form. A clerk or secretary hired by the municipality often manages these records. The records should include the application and reports, studies, documents, and minutes of the board meetings.

126. **Recreational Zoning.** Recreational zoning is the establishment of a zoning district in which private recreational uses are the principal permitted uses. The types of recreational uses permitted include swimming, horse back riding, golf, tennis, and exercise clubs open to private members who pay dues and user fees or to the public on a fee basis.

127. **Recusal.** A term used when a board member has a conflict of interest and must abstain from voting on any issues relating to that private interest. The board member is said to be recusing himself from all deliberations on the matter.

128. **Redaction.** Redaction is done when a public record contains sensitive, private, or confidential information that is taken out of the document, or redacted, in a way that does not distort the meaning of the record. The practice of striking or otherwise taking out this type of material is called redaction.

129. **Regulatory Takings.** A regulatory taking is a regulation that is so intrusive that it is found to take private property for a public purpose without providing the landowner with just compensation.

130. **Resolution.** A resolution is a means by which a local legislature or other board expresses its policy or position on a subject.

131. **Restrictive Covenant.** An agreement in writing and signed by the owner of a parcel of land that restricts the use of the parcel in a way that benefits the owners of adjacent or nearby parcels. S*ee* "Conservation Easement."

132. **Reviewing Board.** The administrative body charged with responsibility for reviewing, approving, conditioning, or denying applications for a specific type of land use such as variance, special use permit, or site plan or subdivision approval.

133. **Rezoning.** An act of the local legislature that changes the principal uses permitted on one or more parcels of land or throughout one or more zoning districts. Rezoning includes the amendment of the zoning map, as well as the use provisions in the district regulations applicable to the land that is rezoned.

134. **Role of County Government.** Functions carried out by county government that affect land use include the adoption of land use plans, public health reviews of plans for water supply and sewage disposal, planning reviews of certain local land use decisions, the development of county roads and projects including parks, the creation

of Environmental Management Councils, Farmland Protection Boards, Soil and Water District Boards, and other entities, and the provision of technical and coordination sources in the land use area.

135. **Scoping.** A process under the State Quality Environmental Review Act by which the lead agency identifies the potentially significant adverse impacts related to the proposed use and how they are to be addressed in an Environmental Impact Statement (EIS). This defines the scope of issues to be addressed in the draft EIS, including the content and level of detail of the analysis, the range of alternatives, the mitigation measures needed, as well as issues that do not need to be studied. Scoping provides a project sponsor with guidance on matters that must be considered and provides an opportunity for early participation by involved agencies and the public in the review of the proposal.

136. **Screening.** The act of placing landscape features, such as trees, bushes, shrubs, or man-made screens, such as fences or berms, to reduce the impact of development on nearby properties.

137. **SEQRA.** The State Environmental Quality Review Act requires local legislatures and land use agencies to consider, avoid, and mitigate significant environmental impacts of the projects that they approve, the plans or regulations they adopt, and the projects they undertake directly.

138. **Setback.** A setback restriction requires that no building or structure be located within a specified number of feet from a front, side, or rear lot line.

139. **Sign Regulation.** Local laws that regulate the erection and maintenance of signs and outdoor advertising with respect to their size, color, appearance, movement, illumination, and placement on structures or location on the ground.

140. **Site Plan.** A site plan shows the proposed development and use of a single parcel of land consisting of a map and all necessary supporting material.

141. **Special Exception Permit.** *See* "Special Use Permit."

142. **Special Use Permit.** Special uses are allowed in zoning districts, but only upon the issuance of a special use permit subject to conditions designed to protect surrounding properties and the neighborhood from the negative impacts of the permitted use. Also called conditional use permit, special exception permit, and special permit.

143. **Spot Zoning.** The rezoning of a single parcel or a small area to benefit one or more property owners rather than carry out an objective of the comprehensive plan.

144. **Statute of Limitations.** A law that requires that an aggrieved party file a legal action in a quasi-judicial or judicial forum within a specified period or lose the right to file that action. Regarding many land use

determinations, the period begins from the date the determination is filed with the municipal clerk.

145. **Strategies.** A set of actions to be undertaken to accomplish each objective contained in a comprehensive plan. To obtain the objective of "50 units of affordable housing" the plan may include as strategies: (1) Form a housing trust fund, and (2) Allow for accessory apartments in residential units.

146. **Subdivision Plat.** *See* "Plat."

147. **Subdivision.** The subdivision of land involves the legal division of a parcel into a number of lots for the purpose of development and sale. The subdivision and development of individual parcels must conform to the provisions of local zoning which contain use and dimensional requirements for land development.

148. **Taking.** *See* "Regulatory Taking."

149. **Town Board.** *See* "Local Legislature."

150. **Transfer of Development Rights ("TDR").** Provisions in a zoning law that allow for the purchase of the right to develop land located in a *sending area* and the transfer of these rights to land located in a *receiving area*.

151. **Type I Action.** This is an action, under the State Environmental Quality Review Act, that is more likely to have a significant adverse impact on the environment than unlisted actions. They are listed as Type I Actions in the regulations of the DEC Commissioner. *See also* "Action."

152. **Type II Action.** This is an action that is not subject to environmental review under the State Environmental Quality Review Act. Type II Actions are listed in the regulations of the DEC Commissioner. These actions have been determined not to have a significant impact on the environment or to be exempt from environmental review for other reasons. *See also* "Action."

153. **Unlisted Actions.** These are all of the actions that are not listed as "Type I" or "Type II" actions for the purposes of the State Environmental Quality Review Act process. These actions are subject to review by the lead agency to determine whether they may cause significant adverse environmental impacts.

154. **Use Districts.** *See* "Zoning District."

155. **Use Variance.** A variance that allows a landowner to put his land to a use that is not permitted under the zoning law. This type of variance may be granted only in cases of unnecessary hardship. To prove unnecessary hardship, the owner must establish that the requested variance meets four statutorily prescribed conditions. If a parcel of land is zoned for single-family residential use and the owner wishes to operate a retail business, the owner must apply to the zoning board of appeals for a use variance.

156. **Variance.** This is a form of administrative relief that allows property to be used in a way that does not comply with the literal requirements of the zoning ordinance. There are two basic types of variances: use variances and area variances.

157. **Vested Rights.** Vested rights are found when a landowner has received approval of a project and has undertaken substantial construction and made substantial expenditures in reliance on that approval. The landowner's right to develop has vested and cannot be taken away by a zoning change by the legislature.

158. **Village Board of Trustees.** *See* "Local Legislature."

159. **Watershed.** A geographical area within which rain water and other liquid effluents seep and run into common surface or subsurface water bodies such as streams, rivers, lakes, or aquifers.

160. **Wetlands.** Wetlands may be either freshwater or tidal. They are typically marked by waterlogged or submerged soils or support a range of vegetation peculiar to wetlands. They provide numerous benefits for human health and property as well as critical habitat for wildlife and are generally regulated by either federal, state, or local laws.

161. **Zoning Board of Appeals.** Under state statutes, a zoning board of appeals must be formed when a local legislature adopts its zoning law. They must consist of three to five members. The essential function of the zoning board of appeals is to grant variances. In this capacity it protects landowners from the unfair application of the laws in particular circumstances. The zoning board of appeals also hears appeals from the decisions of the zoning enforcement officer or building inspector when interpretations of the zoning ordinance are involved.

162. **Zoning District.** A zoning district is a portion of the community designated by the local zoning law for certain kinds of land uses, such as single-family homes on lots no smaller than one acre in size or neighborhood commercial uses. Only these primary permitted land uses, their accessory uses, and any special uses permitted in the zoning district may be placed on the land in that portion of the community.

163. **Zoning Enforcement Officer.** This is the local administrative official who is responsible for enforcing and interpreting the zoning law. The local building inspector may be designated as the zoning enforcement officer. Land use applications are submitted to the zoning enforcement officer who determines whether proposals are in conformance with the use and dimensional requirements of the zoning law.

164. **Zoning Law or Ordinance.** State law allows city councils and town boards to adopt zoning regulations by local law or ordinance. Since 1974, village boards of trustees have not had the

authority to adopt legislation by ordinance, only by local law. Technically, zoning regulations adopted by villages are zoning laws. Only city and town legislatures may adopt zoning ordinances. Zoning regulations, however, are often referred to as zoning ordinances regardless of these technical distinctions.

165. **Zoning Map.** This map is approved at the time that the local legislature adopts a zoning ordinance. On this map, the zoning district lines are overlaid on a street map of the community. This map divides the community into districts. Each district will carry a designation that refers to the zoning code regulations for that district. 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 code, it is possible to discover the uses that are permitted within that district and the dimensional restrictions that apply to building on that land. The zoning map, implemented through the text of the zoning law, constitutes a blueprint for the development of the community over time.

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NYMIR LUTP Quiz Answers

Tutorial I - Zoning

1. E
2. D
3. C
4. A
5. 1-D
   2-F
   3-A
   4-B
   5-C
   6-G
   7-E
6. A
7. B
8. B
9. B
10. B
11. A
12. A

Tutorial II – Comprehensive Planning

1. D
2. B
3. F
4. E
5. B
6. B
7. D
8. A
9. A
10. B

Tutorial III - Subdivision

1. A
2. A
3. A
4. A
5. A
6. E
7. A
8. A
9. A
10. B

Tutorial IV - Site Plan

1. C
2. D
3. B
4. E
5. C
6. D
7. A
8. A
9. B
10. D

Tutorial V - Variances

1. A
2. A
3. B
4. D
5. C
6. A
7. A
8. B
9. A
10. E

Tutorial VI - Special Use Permits

1. D
2. B
3. A
4. D
5. B
6. B
7. C
8. C
9. D
10. A

Tutorial VII - Environmental Review

1. G
2. A
3. B
4. C
5. B
6. B
7. A
8. B
9. A
10. B

Tutorial VIII - Local Boards and Practice

1. D
2. B
3. C
4. D
5. B
6. D
7. C
8. A
9. A
10. A

Tutorial IX - Strategic Local Laws

1. C
2. D
3. E
4. B
5. C
6. B
7. C
8. A