Chapter XVI

Land Use Planning and Regulation

One of the most powerful tools in the local government arsenal is the power to regulate the physical development of the municipality. This power is exercised through a variety of available authorizations and regulatory mechanisms. Through control of land use and development, each community is able to develop and display the most desirable physical features of the community.

The Police Power

Police power is the power government has to provide for public order, peace, health, safety, morals and general welfare. It resides in the sovereign state, but may be delegated by the State to its municipalities. Land use controls are an exercise of the police power long recognized by the United States Supreme Court. In New York, the power to control land use is granted to each municipal government by reference in Article IX, Section 2, of the Constitution and by the various state enabling statutes.

With few exceptions, the exercise of the police power to control land use is a city, town or village function in New York State. This includes the decision whether to control land use, and, if so, to determine the nature of the controls. When exercised, the power to control land use is governed by the state enabling statutes which have granted the power to local governments: the General City Law, the Town Law, the Village Law, the General Municipal Law, the Municipal Home Rule Law and its companion Statute of Local Governments.

The Planning Board

The local legislative bodies of cities, towns and villages may create planning boards in a manner provided for by state statute or municipal charter, and may grant various powers to the planning board (General City Law §27; Town Law §271; Village Law §7-718). The statutes authorize municipal legislative bodies to provide for the referral of any municipal matter to the planning board for its review and report prior to final action. While the functions of a planning board may extend beyond land use, in most municipalities the planning board performs primarily a land use control function. Many local zoning laws or ordinances establish a procedure for referral to the local planning board of all applications for rezoning, variances and special use permits. Such planning board reports and recommendations are often of vital importance in deciding these matters. In addition, the local planning board can have an advisory role in preparing and amending comprehensive plans, zoning regulations, official maps, long-range capital programs, special purpose controls and compliance with the State Environmental Quality Review Act (SEQRA). Further, the local legislative body may grant the planning board such regulatory functions as control of land subdivision, site plan review and issuance of special use permits. Where these and related

functions are effectively administered, the local planning board can do much to advance the land use and development policies of the local legislative body.

Comprehensive Planning

Comprehensive planning can (and should) be performed by all municipalities, whether or not a set of land use controls is the result. Comprehensive planning logically forms the basis of all efforts by the community to guide the development of its governmental structure as well as its natural and built environment. Nonetheless, the most significant feature of comprehensive planning in most communities is its foundation for land use controls.

Most successful planning efforts begin with a survey of existing conditions and a determination of the municipality's vision for the future. This process should not be confused with zoning or other land use regulatory tools. Instead, the comprehensive plan should be thought of as a blueprint on which zoning and other land use regulations are based.

The State statutes define a comprehensive plan as "the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development" of the municipality (General City Law §28-a(3)(a); Town Law §272-a(2)(a); Village Law §7-722(2)(a)). State statutes, while the use of the state comprehensive plan statutes is optional, they can guide boards through the comprehensive plan process. (General City Law §28-a; Town Law §272-a; Village Law §7-722). An important component of the process is public participation. Under the statutes, this occurs both formally, through mandatory hearings held by the preparing board and by the legislative body prior to adoption of the plan, and through the informal participation of the public at workshops and informational sessions.

Communities which do not have professional planners on staff to assist in the preparation of a comprehensive plan have several resources available to them. They may be able to receive assistance from their county or regional planning agency. They may also be able to contract with a professional planning or engineering firm which provides planning services. Also, municipal residents may possess expertise in planning or other environmental or design disciplines. However long or detailed the plan is, its real value is in how it is used and implemented. Since each municipality that has the power to regulate land use has a different set of constraints and options, the final form of each comprehensive plan will be unique. The size and format of the comprehensive plan will vary from municipality to municipality (and possibly from consultant to consultant). It may consist of a few pages, or it may be a thick volume of information.

County Planning

New York's counties have the statutory power to create planning boards (General Municipal Law §239-c). The county legislative body may prepare a county comprehensive plan, or delegate its

preparation to the county planning board or to a "special board" (General Municipal Law §239-d). Prior to adopting or amending a county official map, the county legislative body must refer the proposed changes to the county planning board and other municipal bodies (General Municipal Law §239-e). In addition, the county legislative body may authorize the county planning board to review certain planning and zoning actions, including certain subdivision plats, by municipalities within the county (General Municipal Law §239-c(3)).

State laws require that any city, town or village which is located in a county possessing a "county planning agency" or "regional planning council" must refer to that agency certain zoning matters before taking final action on those matters. In addition, where authorized by the county legislative body, certain subdivision plats must be referred to the county by the town, village or city planning board before receiving final action. Generally, referral must be made where a proposed zoning matter or subdivision plat affects real property within 500 feet of one or more enumerated geographic features, such as a municipal boundary. Referral to the county planning agency or regional planning council is an important aid to the local planning and zoning process. It provides local planning and zoning bodies with advice and assistance from professional county and regional staff. It can result in better coordination of zoning actions among municipalities, helping in the recognition of inter-community considerations. In addition, it allows other planning agencies (county, regional and state) to better orient studies and proposals for solving local as well as county and regional needs.

Zoning and Related Regulatory Controls

Zoning

Zoning regulates the use of land, the density of land use, and the siting of development. Zoning is a land use technique that operates prospectively to help implement a municipality's comprehensive plan. It is the most commonly and extensively used local technique for regulating use of land as a means of accomplishing municipal goals. According to a 1994 survey by the Legislative Commission on Rural Resources, 100% of cities, 67% of towns and 87% of villages in New York had adopted zoning laws or ordinances.

Zoning commonly consists of two components: a zoning map and a set of zoning regulations. The zoning map divides a municipality into various land use districts, such as residential, commercial, and industrial or manufacturing. The land use districts that a municipality establishes can be even more specific, such as high, medium and low density residential, general commercial, highway commercial, light industrial, heavy industrial, or other. Mixed-use districts may also be appropriate, depending upon local planning and development goals as set forth in a comprehensive plan. Zoning regulations commonly describe the permissible land uses in each of the various zoning districts identified on the zoning map. They also include dimensional standards for each district, such as the height of buildings, minimum distances (setbacks) from buildings to property lines, and the density of development. These are referred to as "area" standards, as opposed to "use" standards. Zoning regulations will also set forth the steps necessary for approval by the type of use, the zoning district involved, or by both. For example, a single-family home is often permitted "as-of-right" in a low-density residential zoning district. "As-of-right" uses, if they meet the dimensional standards, require no further zoning approvals, and need only a building or zoning permit in order for

construction to begin.

The Zoning Board of Appeals

Zoning boards of appeal (ZBA's) are a basic part of zoning administration. The state zoning enabling statutes prescribe that zoning boards of appeals must be created when a municipality enacts zoning (General City Law §81; Town Law §267; Village Law §7-712). ZBA's serve as "safety valves" in order to provide relief, in appropriate circumstances, from overly restrictive zoning provisions. In this capacity, they function as appellate entities, with their powers derived directly from state law. In addition to their inherent appellate jurisdiction, municipal legislative bodies may give ZBAs "original" jurisdiction over other specified matters, such as special use permits and site plan reviews.

By state law, the ZBA must serve to provide for relief from the strict application of regulations that may affect the economic viability of a particular parcel, or may obstruct reasonable dimensional expansion. The state statutes give two varieties of appellate jurisdiction to ZBA's. An appeal seeking an *interpretation* of provisions of the zoning regulations is an appeal claiming that the decision of the administrative official charged with zoning enforcement is incorrect. It is a claim that the zoning enforcement officer misapplied the zoning map or regulations, or wrongly issued or denied a permit. By contrast, in an appeal for a *variance* there is no dispute whether the enforcement officer applied the zoning correctly. Instead, the applicant feels there should be an exception made in his or her case, and that some of the zoning rules should not apply. A ZBA must then apply the criteria set forth in the state statutes, in its determination whether to grant the variance requested.

Board of Appeals members are appointed by the municipality's legislative body in a manner provided for by state statute or municipal charter. ZBAs function free of any oversight by the municipal legislative body. Where the zoning board of appeals has final decision-making authority, the legislative body may not review the grant or denial of variances, special use permits, or any other decisions. However, the statutes do provide for review of ZBA decisions by the courts in an Article 78 proceeding.

Related Controls

In some communities the basic use and density separation provided by traditional zoning is all that is necessary to achieve municipal development goals and objectives. Many communities desire, however, development patterns which may be only partially achieved through traditional zoning. For example, a municipality may wish to strongly encourage a particular type of development in a certain area, or may wish to limit new development to infrastructure capacity. There are other land-use regulatory techniques available to address those objectives. Use of one or more particular techniques can serve to encourage and "market" the type of development and growth a municipality desires, more closely linking a municipality's comprehensive plan with the means to achieve it. Six of these techniques, special use permits, site plan review, subdivision review cluster, incentive zoning, and transfer of development rights are provided for in the enabling statutes and briefly discussed here.

Special Use Permits

In most municipal zoning regulations, many uses are permitted within a zoning district "as-of-right," with no discretionary review of the proposed project. On the other hand, municipalities may require a closer examination of certain designated uses. The special use permit zoning technique (sometimes referred to as conditional uses, special permits or special exceptions) allows a board discretionary authority to review a proposed development project in order to assure that it is in harmony with the zoning and will not adversely affect the neighborhood.

A special use permit is applied for and granted by the reviewing board if the proposal meets the special use permit standards found in the zoning regulations. Typically, the standards are designed to avoid possible negative impacts of the proposed project with adjoining land uses or with other municipal development concerns or objectives, such as traffic impacts, noise, lighting, or landscaping. State statutes prescribe the procedure for all special use permit applications.

Site Plan Review

Site plan review is concerned with how a particular parcel is developed. A site plan shows the arrangement, layout and design of the proposed use of a single parcel of land. Site plan review can include both small and large-scale proposals, ranging from gas stations, drive-through facilities and office buildings, to complex ones such as shopping centers, apartment complexes, and industrial parks. Site plan review can be used as a regulatory procedure standing alone, but is also often required in connection with other needed zoning approvals such as special use permits.

The authority to require site plan review is derived from the state enabling statutes (General City Law §27-a; Town Law §274-a; Village Law §7-725-a). A local site plan review requirement may be incorporated into the zoning law or ordinance, or may be adopted as a set of separate regulations. The local legislative body has the power to delegate site plan review to the planning board, zoning board of appeals, or another board. Alternatively, the legislative body may retain the power to exercise site plan review itself.

The local site plan review regulations or local zoning regulations determine what uses require site plan approval. Uses subject to review may be (1) identified by the zoning district in which they are proposed; (2) identified by use, regardless of the zoning district or proposed location within the community; or (3) located in areas identified as needing specialized design restrictions by way of an overlay zone approach, such as a flood zone or historic preservation district.

Site plan issues should be addressed through a set of general or specific requirements included in the local site plan review regulations. As an alternative to the installation of required infrastructure and improvements, the site plan statute allows a municipality to require the applicant to post a performance guarantee to cover their cost.

Subdivision Review

There is probably no form of land use activity that has as much potential impact upon a municipality, as the subdivision of land. The subdivision process controls the manner by which land is divided into smaller parcels. While a subdivision is typically thought of as the division of land into separate building lots which are sold to individual buyers, subdivision provisions may also apply to a simple division of land offered as a gift or which changes lot lines for some other reason. Subdivision regulations should ensure that when development does occur, streets, lots, open space and infrastructure are properly and safely designed and the municipality's land use objectives are met.

Planning boards, when authorized by local governing bodies, may conduct subdivision plat review. A "plat" is a map prepared by a professional which shows the layout of lots, roads, driveways, details of water and sewer facilities, and ideally, much other useful information regarding the development of a tract of land into smaller parcels or sites. The state enabling statutes contain specific procedures for the review of both preliminary and final plats (General City Law §§32, 33; Town Law §§276, 277; Village Law §§7-728, 7-730). Most municipalities use the two-step (preliminary and final plat) process.

Subdivision review is a critical tool in a municipality's land use management scheme, and has important consequences for overall municipal development. The subdivision of large tracts may induce other related development in the neighborhood, produce demands for rezoning of neighboring land, or trigger the need for additional municipal infrastructure.

Cluster Development

Cluster development is a technique that allows flexibility in the design and subdivision of land (General City Law §37; Town Law §278; Village Law §7-738). By clustering a new subdivision, certain community planning objectives can be achieved. Cluster development has great potential for a municipality to maintain its traditional physical character, while at the same time providing (and encouraging) new development. It also allows a municipality to achieve planning goals that may call for protection of open space, protection of scenic views, protection of agricultural lands, protection of woodlands and other open landscapes, and limiting encroachment of development in and adjacent to environmentally sensitive areas. It is also attractive to developers because it can result in reduced development expenses relating to roadways, sewer lines, and other infrastructure, as well as lower costs to maintain that infrastructure.

When it is used according to the enabling statutes, cluster is a variation of conventional subdivision plat approval. Cluster development concentrates the overall maximum density allowed on property onto the most appropriate portion of the property. The maximum number of units allowed on the parcel must be no greater than would be allowed under a conventional subdivision layout for the same parcel.

Incentive Zoning (Bonus Zoning)

The authority to incorporate incentive zoning into a municipality's zoning regulations is set forth in the State planning and zoning enabling statutes (General City Law §81-d; Town Law § 261-b; Village Law § 7-703). Incentive zoning is an innovative and flexible technique; it can be very effective in encouraging desired types of development in targeted locations. Conceptually, incentive zoning allows developers to exceed the dimensional, density, or other limitations of zoning regulations in return for providing certain

benefits or amenities to the municipality. A classic example of incentive zoning would be an authorization to exceed height limits by a specified amount, in exchange for the provision of public open space, such as a plaza.

If a municipality wants a certain type of development in particular locations, it can usually only wait to see if a developer will find it economical to build. Incentive zoning changes this dynamic by providing economic incentives for development that otherwise may not occur. Incentive zoning is also a method for a municipality to obtain needed public benefits or amenities in certain zoning districts through the development process. Local incentive zoning laws can even be structured to require cash contributions from developers in lieu of physical amenities under certain circumstances.

Transfer of Development Rights (TDR)

Transfer of Development Rights (TDR) is an innovative and complex growth management technique. It is based on the real property concept that ownership of land gives the owner a "bundle of rights," each of which may be separated from the rest. For example, one of the "bundle of rights" is the right to develop land. With a TDR system, landowners are able to retain their land, but sell the development rights for use on other properties.

Under the state zoning enabling statutes (General City Law §20-f; Town Law §261-a; Village Law §7-701), areas of the municipality which have been identified through the planning process as in need of preservation (e.g., agricultural land) or in which development should be avoided (e.g., municipal drinking water supply protection areas) are established as "sending districts." Development of land in such districts may be heavily restricted, but owners are granted rights under the TDR regulations to sell the rights to develop their lands. Those development rights may thereby be transferred to lands located in designated "receiving districts."

Transferrable development rights usually take the form of a number of units per acre, or gross square footage of floor space, or an increase in height. The rights are used to increase the density of development in a receiving district. Receiving districts are established after the municipality has determined that they are appropriate for increased density based upon a study of the effects of increased density in such areas. Such a study is best incorporated within the community's comprehensive plan.

The State zoning enabling statutes require that land from which development rights are transferred are subject to a conservation easement limiting the future development of the property. The statutes also require that the assessed valuation of properties be adjusted to reflect the change in development potential for real property tax purposes.

Other Land Use Controls

In addition to the six techniques described above, four others are often employed: overlay zoning, performance zoning, floating zones and planned unit development. They are not treated specifically in the enabling statutes, but have been considered to be lawful within the general statutory grants of zoning power.

Overlay Zoning

The overlay zoning technique is a modification of the system of conventionally-mapped zoning districts. An overlay zone applies a common set of standards to a designated area that may cut across several different conventional or "underlying" zoning districts. The standards of the overlay zone apply in addition to those of the underlying zoning district. Some common examples of overlay zones are the flood zones administered by many communities under the National Flood Insurance Program, historic district overlay zones, areas of very severe slopes, waterfront zones, and environmentally sensitive areas. The state enabling statutes do not contain provisions dealing with overlay zoning, but it is employed most often in conjunction with special use permits.

Performance Zoning

Some communities have enacted zoning regulations that establish performance standards, rather than strict numerical limits on building size or location, as is the case with conventional zoning. Performance zoning, as it is commonly called, regulates development based on the permissible effects or impacts of a proposed use, rather than by the traditional zoning parameters of use, area and density. Under performance zoning, proposed uses whose impacts would exceed specified standards are prohibited unless the impacts can be mitigated.

Performance zoning is often used to address municipal issues concerning noise, dust, vibration, lighting, and other impacts of industrial uses. It is also used by communities to regulate environmental impacts, such as storm-water runoff, scenic and visual quality impacts, and defined impacts on municipal character. The complexity and sophistication of these performance standards vary widely from one municipality to another, depending on the objectives of the program and the capacity of the locality to administer it.

The Floating Zone

Floating zones allow a municipality flexibility in the location of a particular type of use and allow for a use of land that may not currently be needed, but which may be desired in the future. The floating zone is also a way of scrutinizing significant projects for municipal impacts, as floating zones must be approved by the local legislative body.

The standards and allowable uses for a floating zone are set forth in the text of the municipality's zoning regulations, but the actual district is not mapped; rather, the district "floats" in the abstract until a development proposal is made for a specific parcel of land and the project is determined to be in accordance with all of the applicable floating zone standards. At that time the local legislative body maps the Floating zone by attaching it to a particular parcel or parcels on the zoning map. Because the floating zone is not part of the zoning map until a particular proposal is approved, the establishment of its boundaries on the zoning map constitutes an amendment to the municipal zoning regulations.

Planned Unit Developments (PUDs)

Planned Unit Developments, or PUDs as they are commonly called, describe a zoning technique allowing development of a tract of land (usually a large tract of land) in a comprehensive, unified manner where the development is planned to be built as a "unit." As a mapping designation, they are also known as Planned Development Districts (PDD), and are often a form of floating zone; they are not made a part of the zoning map until a PUD project is approved. The PUDs that are shown on a zoning map may require approval by special use permit.

The PUD concept allows a combination of land uses, such as single and multiple-family residential, industrial, and commercial, on a single parcel of land. It also may allow a planned mix of building types and densities. For example, a single project might contain dwellings of several types, shopping facilities, office space, open areas, and recreation areas. In creating a PUD, a municipal legislative body would need to follow the procedure for amending zoning to create a new zoning district or to establish special use permit provisions. An application for a PUD district is typically reviewed by the planning board, and a recommendation is made to the legislative body, which may then choose to rezone the parcel.

Supplementary Controls

The following is a discussion of "stand alone" laws that are commonly adopted to address specific municipal concerns, although they may also be usefully incorporated into zoning, site plan review or subdivision regulations.

Official Map

For any municipality to develop logical, efficient and economical street and drainage systems, it must protect the future rights of way needed for these systems. Such preventive action saves a municipality the cost of acquiring an improved lot and structure at an excessive cost or resorting to an undesirable adjustment in the system. To protect these rights-of ways, state statutes allow a municipality to establish and change an official map of its area, showing the streets, highways, parks and drainage systems (General City Law §§26, 29; Town Law §§270, 273; Village Law §7-724; General Municipal Law §239-e). Future requirements for facilities may be added to the official map. Without the consent of the municipality, the reserved land may not be used for other purposes.

The official map is final and conclusive in respect to the location and width of streets, highways and drainage systems, and locations of parks shown on it. Streets shown on an official map serve as one form of qualification for access requirements which must be met prior to the issuance of a building permit (General City Law §§35, 35-a, 36; Town Law §§280, 280-a, 281; Village Law §§7-734, 7-736; General Municipal Law §239-f).

Sign Control

The use and location of signs are typically subject to municipal regulation, either as part of a zoning law or as a separate regulation. Attention is focused on the number, size, type, design and location of signs.

The issues that a municipality considers important can be brought together in a sign control program. Without a program, signs can overwhelm a municipality, damaging its character and reducing the effectiveness of communication, including traffic safety messages. With an effective program, signs can enhance a locality and contribute to municipal character.

A municipality is generally free to prescribe the location, size, dimensions, manner of construction and design of signs. The U.S. Supreme Court has, however, examined the constitutional questions concerning freedom of speech with respect to sign controls, and has placed limits on the authority of municipalities to control the *content of the message* conveyed on signs.

Historic Preservation

The development of a community policy to protect historic resources, and an identification of the particular resources to be protected in the community are the first steps to providing recognition of the historic value of property or a collection of buildings. Once a community has established a policy of historic preservation, it can seek to formally recognize individual historic structures or groups of structures. The first level of recognition can be achieved through the adoption of a local historic preservation law which enables the community to designate individual properties as local historic landmarks, or groups of properties as local historic districts. Such a local law is also likely to provide standards for protection of these designated properties.

The historical importance of a building can also be recognized at the state or national level through listing on the State or National Register of Historic Places. These listings are managed, respectively, by the State Office of Parks, Recreation, and Historic Preservation, and the Federal Department of the Interior, in cooperation with the property owner and local municipality. National Register listing includes recognition of the historical importance of a single property, a group of properties, or a set of properties related by a theme.

Listing on the National Register of Historic Places is an important recognition of a property or an area's historic and cultural significance. Designation makes the property eligible for grants and loans and, possibly, federal tax credits. Additionally, any federal action that might impact such property must undergo a special review that is designed to protect the property's integrity. Similarly, listing on the State Register of Historic Places means that State agency actions that affect a designated property are subject to closer review, and makes the property eligible for grant assistance. Neither a listing on the National nor State Register of Historic Places will protect a structure from the owner's interest in redesigning or demolishing the historic structure. Only a locally-adopted historic preservation law can control such actions.

If a municipality does not wish to adopt a local historic preservation law, it may want to consider a demolition law. Such a law could require review or a delay before demolition of a historically significant building. This allows time for a community to examine alternatives to demolition, such as purchase of the property by a government or not-for-profit group.

Architectural Design Control

Many aspects of a building's design are regulated through standards for siting, orientation, density, height and setback within a municipality's zoning code. Some municipalities wish to go beyond dealing with the general size and siting of a building and its physical relationship with adjacent properties, to dealing with the appropriateness of the architectural design of the building. The review may include examining such design elements as facades, roof lines, windows, architectural detailing, materials and color.

Architectural review generally requires a more subjective analysis of private development proposals than is possible within most zoning codes. To do this, communities often establish an architectural review board, which should be able to offer guidance on design issues to other boards, such as the planning board or zoning board of appeals. Where authorized, an architectural review board may conduct an independent review of the architectural features of a proposed project. Often, a community chooses to link design review to historic preservation controls, with a focus on the design of new buildings and alterations to existing buildings within historic districts.

Junk Yard Regulations

If a municipality does not have its own junk yard regulations or zoning regulations addressing the siting of junk yards, it must apply the standards set forth in General Municipal Law §136 for automobile junk yards. This law regulates the collection of junk automobiles, including the licensing of junk yards and regulation of certain aesthetic factors. The application of this state law is limited to sites storing two or more unregistered, old or secondhand motor vehicles which are not intended or in condition for legal use on public highways. The law also applies to used motor vehicle parts, which, in bulk, equal at least two motor vehicles. A municipality may expand the state definition of "junk yard" to encompass other types of junk, such as old appliances, household waste, or uninhabitable mobile homes, in order to regulate aspects of junk not covered by state law and to ensure greater compatibility with surrounding land uses.

Control of Mining

The New York State Mined Land Reclamation Law (Environmental Conservation Law §23-2703 *et seq.)* regulates mining operations which remove more than one thousand tons or 750 cubic yards (whichever is less) of minerals from the earth. Mines coming within this statute's regulation require approval by the New York State Department of Environmental Conservation (DEC). Smaller mines may be regulated by a local mining or zoning regulation. However, even though DEC regulates larger mines, a municipality may regulate the *location* of all mines through its zoning regulations.

When a municipality permits state-regulated mining to occur within its borders through a special use permit process, conditions placed on the permit may pertain to entrances and exits to and from the mine on roads controlled by the municipality, routing of mineral transport vehicles on roads controlled by the municipality, enforcement of the reclamation conditions set forth in the DEC mining permit, and certain other requirements specified in the state permit (ECL § 23-2703).

Scenic Resource Protection

Scenic resources are important in defining community character. These resources can be

threatened by development and many communities are now seeking ways to mitigate the impacts of development on the landscape. High priority is often placed on protecting specific views and view points, and the general quality of a landscape. Policies to protect scenic resources may be included in a community's comprehensive plan, along with maps illustrating the scenic resource. Once this has been done, it is important to integrate policies into regulations. Appropriate use, density, siting and design standards can protect scenic resources by such methods as limiting the height of buildings or fences in important scenic areas.

Open Space Preservation

Many communities are now recognizing the value of "open space", i.e. vacant land and land without significant structural development. A good way for a municipality to assess the importance of its open space resources is to produce an open space plan or to include an assessment of open space resources as part of its comprehensive plan. Here, a community decides how to categorize its open space resources, examine their use and function within the community, set priorities for their protection, and consider the best way to use and protect open spaces. Once a community has identified its open space resources, it can develop policies to protect them. Those policies should be expressed in the open space plan and in the community's comprehensive plan, along with the maps showing open spaces. Once this has been done, it is important to ensure that the open space policies of the comprehensive plan are implemented through the municipality's land use controls.

Protection of Agricultural Land

One of the critical issues involved in land use planning decisions for agricultural uses is to ensure that agriculture protection deals primarily with the preservation of agriculture as an *economic activity* and not just as a use of open space. Traditionally, agricultural uses are part of large lot, low density, residential zoning districts. With increased residential development, however, conflicts between agricultural and residential uses have increased. Complaints about noise, odors, dust, chemicals, and slow-moving farm machinery may occupy enough of the resources of a farmer so as to have a negative impact on the viability of his or her farming activities.

Article 25-AA of the Agriculture and Markets Law is intended to conserve and protect agricultural land for agricultural production and as a valued natural and ecological resource. Under this statute, territory can be designated as an agricultural district. To be eligible for designation, an agricultural district must be certified by the county for participation in the State program. Once a district is designated, participating farmers within it can receive reduced property assessments and relief from local nuisance claims and certain forms of local regulation.

Agricultural district designation under Article 25-AA does not generally prescribe land uses. Under section 305-a of Article 25-AA, municipalities are, however, restricted from adopting regulations applicable to farm operations in agricultural districts which unreasonably restrict or regulate farm structures or practices, unless such regulations are directly related to the public health or safety (Agriculture & Markets Law, §305-a(1); Town Law §283-a; Village Law §7-739). The law also requires municipalities to evaluate and consider the possible impacts of certain projects on the functioning of nearby farms.

Projects that require "agricultural data statements" include certain land subdivisions, site plans, special use permits, and use variances.

Farm operations within agricultural districts also enjoy a measure of protection from proposals by municipalities to construct infrastructure such as water and sewer systems, which are intended to serve non-farm structures. Under Agriculture and Markets Law, §305, the municipality must file a notice of intent with both the State and the county in advance of such construction. The notice must detail the plans and the potential impact of the plans on agricultural operations. If, on review at either the county or State levels, the Commissioner of Agriculture and Markets determines that there would be an unreasonable adverse impact, he or she may issue an order delaying construction, and may hold a public hearing on the issue. If construction eventually goes forward, the municipality must make adequate documented findings that all adverse impacts on agriculture will be mitigated to the maximum extent practicable.

"Right-to-farm" is a term which has gained widespread recognition in the State's rural areas within the past several decades. Section 308 of the Agriculture and Markets Law grants protection from nuisance lawsuits to farm operators within agricultural districts or on land outside a district which is subject to an agricultural assessment under section 306 of the Law. The protection is granted to the operator for any farm activity which the Commissioner has determined to be a "sound agricultural practice." Locally, many rural municipalities have used their home rule power to adopt local "right-to-farm" laws. These local laws commonly grant particular land-use rights to farm owners and restrict activities on neighboring non-farm land which might interfere with agricultural practices.

A purchase of development-rights (PDR) system involves the purchase by a municipal or county government of development rights from private landowners whose land it seeks to preserve in its current state without further development. The PDR system, which has been used extensively in Suffolk County to preserve farmland, can also protect ecologically important lands or scenic parcels essential to rural character of the community. Under PDR, the land remains in private ownership and the government acquires non-agricultural development rights. These development rights once purchased by government are held and remain unsold. The farmer receives payment equal to the development value of the farmland. In return, the farmer agrees to keep the land forever in agriculture. The owner typically files property covenants similar to a conservation easement limiting the use of the property to agricultural production. The nation's first purchase of development rights program to preserve farmland was the Suffolk County in 1974.

New York State has also instituted a farmland protection program, which provides state funding to local municipalities to purchase development rights on farmland. The program funds have been made available through the 1996 Clean Water/Clean Air Bond Act and the State Environmental Protection Fund.

The PDR system may have advantages over the TDR system, in that there is a ready market for the purchase and sale of development rights at all times. In addition, the prices of various categories of development rights may be more easily maintained at or near market value, and kept uniform under the PDR system.

Floodplain Management

Floodplain regulations are land use controls governing the amount, type and location of development within defined flood-prone areas. Federal standards, applicable to communities that are eligible for Federal Flood Insurance Protection, include identification of primary flood hazard areas, usually defined as being within the 100-year floodplain. Within flood hazard areas, certain restrictions are placed on development activities. Such restrictions include a requirement that buildings be elevated above flood elevations or be flood-proofed, and also include prohibitions on the filling of land within a floodplain. Municipalities can adopt their own floodplain regulations which may be more stringent than the federal standards. Local floodplain regulations can identify a larger hazard area (such as a 500-year floodplain), and may prohibit certain types of construction within flood hazard areas. Municipalities must adopt local floodplain regulations in order to be eligible for participation in the National Flood Insurance Program.

Wetland Protection

"Wetlands" are areas which are washed or submerged much of the time by either fresh or salt water. In state regulations, they are defined chiefly by the forms of vegetation present. Wetlands provide a number of benefits to a community. Besides providing wildlife habitat, wetlands also provide habitat protection, recreational opportunities, water supply protection, and provide open space and scenic beauty that can enhance local property values. Wetlands also serve as storage for stormwater runoff, thus reducing flood damage and filtering pollutants. In coastal communities, they also serve as a buffer against shoreline erosion. The preservation of wetlands can go a long way toward protecting water quality; increasing flood protection; supporting hunting, fishing and shell fishing; providing opportunities for recreation, tourism and education; and enhancing scenic beauty, open space and property values.

State wetland regulations protect freshwater wetlands greater than 12.4 acres (1 acre in the Adirondack Park), freshwater wetlands of unusual local importance, and tidal wetlands. The State has established adjacent wetland buffer zones, prohibiting or restricting certain activities within such areas, and has established standards for permit issuance. Under the Environmental Conservation Law (ECL), DEC shares concurrent jurisdiction with local governments to regulate tidal wetlands.

With respect to freshwater wetlands, three regulatory possibilities are present:

1) All wetlands that are smaller than 12.4 acres and that are not deemed of "unusual importance," are subject to the exclusive jurisdiction of the municipalities where the wetlands are located (ECL §24-0507).

2) Under ECL, §24-0501, a local government may enact a Freshwater Wetlands Protection Law to fully assume jurisdiction over *all* freshwater wetlands within its jurisdiction from DEC, provided its law is no less protective of wetlands than Article 24 of the ECL and provided that DEC certifies that the municipality is capable of administering the Act. There is also a limited opportunity for counties to assume wetlands jurisdiction if the local government declines.

3) Under ECL, § 24-0509, local governments can now adopt freshwater wetland regulations applying to wetlands already mapped and under the jurisdiction of DEC, provided that the local regulations are *more* protective of wetlands than the state regulations in effect. No pre-certification by DEC is required.

The United States Government, through the Army Corps of Engineers, also regulates federally-defined wetlands. The Corps does not, however, map wetlands in advance of development proposals. When a proposal is made which may impact a wetland falling within federal definitions, the Corps will make a permit determination and impose appropriate conditions protective of the wetland.

Water Resource Protection

One of New York's greatest resources is its abundant water supply. Protecting its water resources for many reasons is desirable: to protect municipal and private drinking water supplies from disease-causing microorganisms, to protect fishery resources, to enhance recreational opportunities, to prevent erosion and harmful sedimentation, and to protect the environmental quality of adjacent land. Failure to adequately protect drinking water supplies can result in public health hazards and lead to the need for treatment of drinking water at great expense to municipalities.

Municipalities may adopt laws to protect groundwater recharge areas, watersheds and surface waters. Local sanitary codes can be adopted to regulate land use practices that have the potential to contaminate water supplies. Sanitary codes can address the design of storm water drainage systems, the location of drinking water wells, and the design and placement of on-site sanitary waste disposal systems. Water resources can be further protected through the adoption of land use laws that prohibit certain potentially polluting land uses in recharge areas, watersheds and near surface waters. Site plan review laws and subdivision regulations may also be used to minimize the amount of impervious surfaces, and to require that stormwater systems be designed to protect water supplies.

Municipalities also have authority under the Public Health Law to enact regulations for the protection of their water supplies, even if located outside of the municipality's territorial boundaries. Such regulations must be approved by the New York State Department of Health. Also, under state statutes, "realty subdivisions"--those containing five or more lots which are five acres or less in size–must undergo approval of their water supply and sewerage facilities by the county health department (Pub. Health Law, Art. 11, Title II; Envir. Cons. Law, Art. 17, Title 15) the Public Health Law

The Federal Safe Drinking Water Act Amendments of 1996 established stringent water-supply capacity and quality standards for all public drinking water sources eligible for Federal assistance or otherwise coming within Federal regulatory jurisdiction.

Erosion and Sedimentation Control

Development, earth-moving and some agricultural practices can create significant soil erosion and the sedimentation that frequently follows. Through the adoption of proper erosion, sedimentation, and vegetation-clearing controls, a community can protect development from costly damage, retain valuable soils, protect water quality, and preserve aesthetics within the community.
Such regulations can be specifically directed at grading, filling, excavating and other site preparation activities, such as the clear-cutting of trees or the removal of vegetation. Local regulations may require the

use of particular methods and compliance with minimum standards when carrying out construction and other activities.

Under the Federal Water Pollution Control Act, stormwater discharge permits are required for construction activities that disturb five or more acres of land. This requirement is administered in New York by the Department of Environmental Conservation, through a "General Permit" system. The General Stormwater Permit contains a standard set of conditions the permittee must abide by when engaged in land disturbance of five or more acres. As of the printing of this publication, the United States Environmental Protection Agency has issued requirements for States to regulate land disturbances between one and five acres, and new federal regulations are forthcoming. It is expected that DEC will also implement the new federal requirements through a General Permit.

Environmental Review

The State Environmental Quality Review Act (SEQRA) was established to provide a procedural framework whereby a suitable balance of social, economic and environmental factors would be incorporated into the community planning and decision-making processes. SEQRA applies to all State agencies and local governments when they propose to undertake an "action" such as constructing a public building, or approving or funding projects proposed by private owners. (Environmental Conservation Law Article 8; Title 6, NY Codes, Rules & Regulations, Part 617). The intent of SEQRA is to review the environmental impacts of a proposed project and to take those impacts into account when deciding whether to undertake, approve, or fund it. Impacts that cannot be avoided through modification of the project should be mitigated by conditions imposed on such project.

State regulations categorize all actions as either "Type I" (more likely to have a significant environmental impact), "Type II" (no significant impact), or "Unlisted", with differing procedural requirements applicable to each.

SEQRA review can serve to supplement local controls when the scope and environmental impacts of a project exceed those anticipated by existing land use laws. SEQRA is a far-reaching statute that can provide a municipality with critical information about the impacts of a land development project, so that a more informed decision may be made on the project. The SEQRA review process also helps to establish a clear record of decision-making should the municipality ever have to defend its actions. Several publications which thoroughly explain the SEQRA process are available from the Department of Environmental Conservation.

Moratoria

A moratorium is a local law or ordinance used to temporarily halt new land development projects while the municipality revises its comprehensive plan, its land use regulations, or both. In some cases, moratoria are enacted to halt development while a municipality seeks to upgrade its public facilities or its infrastructure. Moratoria, or interim development regulations, are designed to restrict development for a limited period of time. The courts have placed strict and detailed guidelines on the enactment and content of moratorium laws.

Conclusion

It is apparent from this discussion that a panoply of land use techniques are available to local governments to assist them in carrying out their comprehensive planning goals to enhance community development and character.