



# Hot Button Land Uses

A Division of the New York Department of State

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## Can a use be prohibited?

### Exclusionary Zoning

- Regulations that singly or in concert tend to exclude low or moderate income housing municipal-wide, for example:
  - Large lot or high minimum square footage requirement
  - Excluding multiple dwellings or mobile home

Most non-residential uses may be zoned out if the exclusion is supported by the comprehensive plan



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## Spot zoning

- Parcel can be rezoned to allow use supported by comprehensive plan
- Zoning changes must be reasonably related to legitimate public purposes

“the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . .”

*Rogers v. Tarrytown, 302 NY 115, 96 NE2d 731 (1951)*

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### Inform and involve

- Unearth controversy early
  - Receptive to change
  - Before the public feels steamrolled
- Potentially controversial projects
  - Hold informational meetings with residents & stakeholders




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### Positive press for controversial issues

Bad press usually results from ignorance, not bias:

- Inaccurate, or wrong conclusions from facts
- Accurate, but unfavorable tone
- Overly selective or unbalanced reporting
- Blurred lines between fact and opinion



Remedy ignorance with non-confrontation

- Be prepared to correct false assumptions
- Response plan: phone, press release, news conference
- One spokesperson controls message

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### Community opposition



If already permitted by zoning, and requirements are met, then community opposition is generally not a valid basis for denying most applications

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### Comprehensive planning

- Reduces controversy
- Legal support
- Infrastructure investments
  - Identifies areas for municipal & private investment
- Public input on controversial issues

Municipalities with Comprehensive Plans

• Cities	92%
• Towns	71%
• Villages	66%
• All	76%

Source: NYS Legislative Commission on Rural Resources (2008)

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### Moratoria

Adopt moratorium law to:

- Update comprehensive plan to consider new uses
- Update regulations to prevent:
  - hasty decision
  - unplanned & inefficient growth
  - construction inconsistent with comprehensive plan



Wrong reasons for moratoria:

- Slow development hoping developer will go away
- Halt development while municipality considers buying land

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### Examples

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### Barn special events & activities



- Catering
  - Weddings, parties, charity events
- Tasting rooms
  - Wineries, distilleries

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### On Farm Wineries and Distilleries

License issued by the State Liquor Authority (SLA) may or may not be considered a “farm operation” for purposes of AML §305-a protection



State Alcoholic Beverage Control Laws define:

- Farm Cidery
- Farm Distillery
- Farm Winery
- Farm Brewery

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### A Partnership to Review Impacts

#### Agriculture & Markets

- Farm operation?
- In an agricultural district
- Zoning definitions
- Is activity permitted
- Require a variance
- Cost and time, etc.

#### Municipal regulations

- Reasonable
- Public health & safety threatened
- Amendments needed
- Is an expedited review an option?

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### Manufactured homes

- Federal:
  - Construction & Safety
- State:
  - Uniform Code
  - Manufacturer's Manual
  - NYS Dept. of Health:
    - Mobile home parks with 5 or more homes
      - Sanitary Code Part 17




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### Manufactured homes

- Health, safety & general welfare of the public
- Zoning
  - Lot size & setbacks
  - Special Use Permit
- Site Plan Review
- N.Y. Executive Law, Article 21-B, Title 2
  - Effective 11/20/15
  - Manufactured Home = Single Family Dwelling
  - "Identical Development Specification and Standards"

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### Farm worker housing

- Agriculture & Markets Law §25-AA
  - State Certified Agricultural Districts
- Address in zoning or adopt local law
  - Show proof of continuing employment on the farm
  - Do not allow the creation of new lots
  - Do not allow permanent additions to the home

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### Drones (Unmanned Aerial Vehicles)

- Federal Aviation Administration (FAA) regulates airspace
- All manned or unmanned aircraft requires need FAA approval
- Commercial use currently regulated on a case-by-case basis
- State and Local Laws attempting to regulate aircraft under the FAA's jurisdiction have been unsuccessful when challenged in court.




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### FAA proposed rules for commercial use

#### Commercial use

- Must be operated below 500 feet and under 100 miles per hour.
- Must be within operator's eyesight.
- Small drone must be less than 55 lbs
- Can only be operated during the day.
- Prospective drone operators need to pass a test of aeronautical knowledge.

#### Recreational use

- Should be operated below 400 ft.
- Must be within the operator's eyesight.
- Should not be flown within 5 mile radius of an airport.
- Should not be operated recklessly

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### Mining

Regulate with zoning:

- Restrict to districts or municipal-wide
- SUP with conditions:
  - Ingress & egress
  - Truck routes

Regulate without zoning:

- Site Plan Review




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### DEC mining permit process

Municipalities submit recommendations to NYS DEC:

- Setbacks from
  - property boundaries
  - public R-O-W
- Dust control
- Hours of operation
- Barriers restricting access



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### Cell towers as public utility

- Cell towers defined as a public utility
- Compelling reasons to grant use variance:
  - Necessary to provide safe & adequate service
  - Significant gaps in coverage if placed on alternative sites



Cellular Telephone Co. v. Rosenberg (NYS Court of Appeals, 1993)

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### Telecommunications Act of 1996

#### Municipality must not

- Prohibit personal wireless service
- Unreasonably discriminate among providers
- Regulate based on health effects from RF emissions

#### Municipality must

- Act on applications within "reasonable period of time"
- 90 days for co-locations
- 150 for new

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## Dish antenna (1m or less)

Over-the Air Reception Devices (OTARD) Rule

**Municipality cannot:**

- Delay or prevent signal use
- Unreasonably increase cost of installation



[www.fcc.gov/mb/facts/otard.html](http://www.fcc.gov/mb/facts/otard.html)

**Municipality can:**

- Regulate for safety
- Regulate in historic districts by least burdensome, clearly defined restrictions

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## Street vendors and food trucks



**PROS**

- Low cost for both owners and customers
- Convenient
- Variety of food choices
- Creation of dynamic "urban" environment

**CONS**

- Congestion, litter
- Complicated and inconsistent permitting
- Unfair advantage to bricks and mortar food establishments

\*Vendors cannot comply with vending laws they do not understand, be clear!

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## Street Vendors and Food Trucks



**Consider Regulating**

- Vending districts
- Distance from curb (don't crowd sidewalks), business entrances, crosswalk, bus stop, restaurant, etc.
- Amount of time vendors can remain in one location
- Permit fees
- Increase number of permits for fresh fruits/veggies
- Justify regulations by citing pedestrian congestion and other effects of street vending, not protection of other businesses

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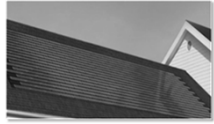
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### Solar systems

- Scale
- Solar access
- Comprehensive Plan
  - Policy statement
  - Resource map
- Potential adverse impacts
  - Glare
  - Neighborhood character



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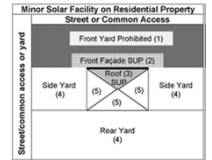
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### Residential/small solar

#### Regulations & review

- Street & lot layout
- Setbacks
- Height
  - Solar setback
  - "Solar fence"
- Solar-ready construction
  - Building Code or incentive zoning



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### Solar systems & historic resources

Design Guidelines for Solar Installations (National Trust for Historic Preservation)

- locate on non-historic buildings or additions
- minimize their visibility from the road
- avoid permanent loss of character-defining features



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### Commercial/ industrial solar

- Special Use Permit
- Site Plan Review
- Industrial & agricultural zones
- Adverse impacts
- Lot size
- Screening
- Safety
- Decommissioning
- Public Service Law Article 10




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### Wind turbines

#### Distinguish between residential, agricultural or commercial turbines

- Regulate with zoning:
  - Restrict to districts or municipal-wide
  - Setbacks
  - Sound
  - Special Use Permit (SUP)
- Regulate without zoning:
  - Site plan review
- Article 10




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### Pet facilities & uses

#### Commercial

- Veterinarians & animal hospitals
- Kennels, day care & boarders
- Groomers
- Breeders
- Trainers

#### Non-commercial

- Adoption centers
- Pounds
- Shelters
- Private pet ownership

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### Pet facilities & uses

#### Regulate or require

- Number of animals
- Minimum lot size & setbacks
- Parking requirements
- Hours outside on run
- Sound attenuation, buffering & screening
- Emergency response plan

#### Reviews

- With zoning:
  - Special Use Permit
  - Site Plan review
- Ability to impose condition on approval
- Without zoning
  - Site plan




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### Doggie day care

- Define use
  - Number of dogs per day
  - No overnights
- Address potential impacts
  - Noise
  - Parking
    - spaces per dog/ staff
    - drop off area
  - Location



*"Commercial facility for supervised dog care for less than 24 hours a day, not including facilities that provide boarding, breeding or selling of dogs, or facilities whose primary revenue is licensed veterinarian services."  
Town of Amherst*

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### Backyard chickens

#### PROS

- Urban agriculture movement
- Inexpensive protein source
- Therapeutic and educational
- Little space needed

#### CONS

- Noisy roosters (not hens)
- Fowl odor?
- Decreased property value fears
- May attract pests (foxes, coyotes)



#### Consider regulating:

- ✓ Number of birds, gender
- ✓ Setbacks for coops/pens
- ✓ Feed storage location
- ✓ Fences
- ✓ Cage size, height, materials




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### Group homes for the disabled

- “A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances.”
  - Mental Hygiene Law § 41.34
- Will facility result in a concentration of similar homes to the extent that community character is altered?




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### Religious Land Use & Institutionalized Persons Act (RLUPA)

- Religious uses are not exempt from land use regulations
- Municipalities may not:
  - Place “substantial burden”
  - Zone out of residential districts
  - Prohibit if impact similar to other allowed uses



Regulate characteristics influencing physical environment: lot coverage, parking, signage

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### Nonretail uses in retail districts

#### Nonretail uses in “storefronts”

- Reduces critical mass of central business district

#### Zoning Tools:

- Exclude residential on first floor
- Minimum percentage street-level retail
- SUP for nonretail




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### Large-scale retail

- Maximum square footage
  - Absolute
  - SUP
- Economic Impact Study through SEQR
- Review criteria
  - Architectural style
  - Landscaping
  - Buffering & screening
    - Parking requirements




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### Short-term rental housing

Pros	Cons
<ul style="list-style-type: none"> <li>• Supplemental income to owners</li> <li>• Discounted lodging and interesting tourist experience for guests</li> </ul>	<ul style="list-style-type: none"> <li>• Commercial use in residential district</li> <li>• Transient guests</li> <li>• Excessive noise</li> <li>• Increased traffic</li> <li>• Unfair competition to hotels</li> <li>• Lost lodging tax revenue</li> <li>• Inflated housing costs</li> </ul>

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### Short-term rental housing

Definitions are essential:

- Generally rented for less than 30 days
- Permanent provision for living, sleeping, eating, cooking, and sanitation
- Owner not necessarily on premises




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### Quantitative Restrictions

- Restrict by zoning district
- Cap number of permits
- Proximity restrictions
- Maintain ratio of long-term dwelling units to short-term units




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### Operational Restrictions

- Maximum occupancy limits
- Rental period and frequency
- Parking
- Noise
- Emergency access
- Mandatory designated representatives
- Trash and refuse




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### Adult uses

- Cannot prohibit
  - 1<sup>st</sup> Amendment Protection
- Regulate with zoning
  - Must provide viable locations
  - Definitions must be clear
- Aim regulations at secondary effects




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### Billboards

- Can't regulate content
  - 1<sup>st</sup> Amendment protection
- Regulate size & location:
  - State Uniform Code
  - Zoning
  - Site Plan Review
  - Local Permit
- NYS DOT regulates signs along interstate & primary highways
  - Municipality may be more restrictive than DOT



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### Temporary signs

- Regulate physical characteristics:
  - traffic safety, aesthetics, property values
- Regulation should be content neutral:
  - size, height & location:
    - ban all signs on public property
  - Permits: apply to all signs
  - Duration: apply evenly
  - Fees: relate to administrative costs



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### Medical Marijuana: Legislation

- Federal Controlled Substances Act (CSA)
- NYS Compassionate Care Act 2014
  - S7923/A6357-E
- NYS Medical Marijuana Program
  - Administered by the NYS Department of Health
  - Rolled out 1/7/16



Dispensary in Manhattan  
Credit: Benjamin Norman for The NY Times

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### Local regulation of Medical Marijuana

- Police power: enact regulations regarding dispensaries necessary to protect public welfare of people in community
- Nuisance law: file public nuisance actions against dispensaries to abate "conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all"
- Currently no case law to suggest local bans of dispensaries would be invalidated
  - Concerned municipalities should commission health impact assessments

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### Monster houses

- Recognize desire for larger homes
  - Consider economic health of community
  - Balance affordable housing interests
- Limit size
  - Set floor area ratio
- Site plan review for new or expanded homes




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### Home day care

Comprehensive plan should recognize need for residential day care and identify appropriate areas; zoning should follow suit

- Enforceable:**  
fire, building and health regulations
- Not enforceable:**  
anything beyond the underlying residential use, i.e.:
- minimum lot size
  - minimum floor-space per child
  - off-street parking
  - off-street pickup/drop-off areas
  - no outdoor play area after \_\_ P.M.

Definitions are important:

- "Family home day care" and "Group family home day care" allowed by right in single-family and multi-family dwellings
- "Child day care center" and "school age child care" are different, and fully subject to zoning

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### Solid waste facilities

Includes storage, transfer, disposal, treatment or internment of landfills, open dumps, and transfer stations

#### REGULATION

- With zoning: as of right, SUP
- Without zoning: site plan review
- State: NY ECL §27-0701(1) & 6 NYCRR 360
- Federal: Resource Conservation & Recovery Act of 1976 (40 CFR Part 258)




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### Exceptions

**DEC permit & registration not needed for certain Construction & Demolition (C & D) landfills determined by:**

- Hours of operation (sunrise & sunset)
- No fee
- Debris type
  - Must be recognizable
  - Must originate & be disposed of on properties under same ownership or control

- Recognizable: uncontaminated concrete & concrete products (steel or fiberglass reinforcing rods embedded in concrete, asphalt pavement, brick, glass, soil & rock)
- Trees, stumps, yard waste & wood chips

6 NYCRR Part 360 – 7.1(b)

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### Transfer stations



- PROS:**
- Economically viable if dump is more than 15-20 miles
  - Potential reuse of empty buildings
- CONS:**
- Increased traffic, noise, odors, litter
  - May be sited in poor/minority areas

#### Regulate with zoning:

- Restrict to districts or municipal-wide
- SUP with conditions:
  - Ingress & egress
  - Truck routes

#### Regulate without zoning:

- Site Plan Review

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## Economies of scale

### Single large station

- Less equipment, construction, waste handling, and transportation costs
- Easier than siting multiple facilities
- Conducive to barge or rail operations (less traffic impacts)
- Negative neighborhood impacts
- Longer travel means down time for collection crew, vehicle wear & tear
- No backup facility for equipment failure or other emergencies.

### Serving smaller stations

- More costs relative to station with same total capacity
- Repeated siting processes
- Less conducive to barge or rail operations (increased traffic impacts)
- Impacts spread around neighborhood
- Reduced travel times means lower overall system costs
- Backups for scheduled/emergency shutdowns.

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## Defending Your Decisions

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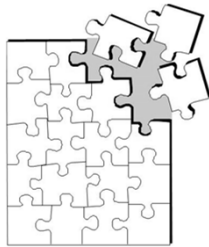
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## The Record

Materials in the record tell the story of the application & typically include:

- Application & supporting documentation
- Newspaper notices
- Meeting minutes
- SEQR materials
- Public hearing testimony
- Written submissions from public
- Expert opinion
- Decision, conditions, findings




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### Findings

- Describe application's reasons for denial or approval & may support:
  - Why a condition was imposed
  - Decision if challenged in court
- Conclusory statements are not "Findings"
  - "The standards were not met."
- A decision based on conclusory statements is:
  - Not supported by factual information in the record
  - Will be struck down in the courts




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### NYS Department of State Local Government Division

- Training Unit: (518) 473-3355
- Counsel's Office: (518) 474-6740
- Toll Free: (800) 367-8488
- Email: [localgov@dos.ny.gov](mailto:localgov@dos.ny.gov)
- Website: [www.dos.ny.gov](http://www.dos.ny.gov)
- [www.dos.ny.gov/lq/lut/index.html](http://www.dos.ny.gov/lq/lut/index.html)




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## Real Property Tax

§ 487. Exemption from taxation for certain solar or wind energy systems or farm waste energy systems. 1. As used in this section:

(a) "Solar or wind energy equipment" means collectors, controls, energy storage devices, heat pumps and pumps, heat exchangers, windmills, and other materials, hardware or equipment necessary to the process by which solar radiation or wind is (i) collected, (ii) converted into another form of energy such as thermal, electrical, mechanical or chemical, (iii) stored, (iv) protected from unnecessary dissipation and (v) distributed. It does not include pipes, controls, insulation or other equipment which are part of the normal heating, cooling, or insulation system of a building. It does include insulated glazing or insulation to the extent that such materials exceed the energy efficiency standards required by law.

(b) "Solar or wind energy system" means an arrangement or combination of solar or wind energy equipment designed to provide heating, cooling, hot water, or mechanical, chemical, or electrical energy by the collection of solar or wind energy and its conversion, storage, protection and distribution.

(c) "Authority" means the New York state energy research and development authority.

(d) "Incremental cost" means the increased cost of a solar or wind energy system or farm waste energy system or component thereof which also serves as part of the building structure, above that for similar conventional construction, which enables its use as a solar or wind energy or farm waste energy system or component.

(e) "Farm waste electric generating equipment" means equipment that generates electric energy from biogas produced by the anaerobic digestion of agricultural waste, such as livestock manure, farming waste and food processing wastes with a rated capacity of not more than one thousand kilowatts that is (i) manufactured, installed and operated in accordance with applicable government and industry standards, (ii) connected to the electric system and operated in conjunction with an electric corporation's transmission and distribution facilities, (iii) operated in compliance with the provisions of section sixty-six-j of the public service law, (iv) fueled at a minimum of ninety percent on an annual basis by biogas produced from the anaerobic digestion of agricultural waste such as livestock manure materials, crop residues and food processing wastes, and (v) fueled by biogas generated by anaerobic digestion with at least fifty percent by weight of its feedstock being livestock manure materials on an annual basis.

(f) "Farm waste energy system" means an arrangement or combination of farm waste electric generating equipment or other materials, hardware or equipment necessary to the process by which agricultural waste biogas is produced, collected, stored, cleaned, and converted into forms of energy such as thermal, electrical, mechanical or chemical and by which the biogas and converted energy are distributed on-site. It does not include pipes, controls, insulation or other equipment which are part of the normal heating, cooling or insulation system of a building.

2. Real property which includes a solar or wind energy system or farm waste energy system approved in accordance with the provisions of this section shall be exempt from taxation to the extent of any increase in the value thereof by reason of the inclusion of such solar or wind energy system or farm

waste energy system for a period of fifteen years. When a solar or wind energy system or components thereof or farm waste energy system also serve as part of the building structure, the increase in value which shall be exempt from taxation shall be equal to the assessed value attributable to such system or components multiplied by the ratio of the incremental cost of such system or components to the total cost of such system or components.

3. The president of the authority shall provide definitions and guidelines for the eligibility for exemption of the solar and wind energy equipment and systems and farm waste energy equipment and systems described in paragraphs (a) and (b) of subdivision one of this section.

4. No solar or wind energy system or farm waste energy system shall be entitled to any exemption from taxation under this section unless such system meets the guidelines set by the president of the authority and all other applicable provisions of law.

5. The exemption granted pursuant to this section shall only be applicable to solar or wind energy systems or farm waste energy systems which are (a) existing or constructed prior to July first, nineteen hundred eighty-eight or (b) constructed subsequent to January first, nineteen hundred ninety-one and prior to January first, two thousand twenty-five.

6. Such exemption shall be granted only upon application by the owner of the real property on a form prescribed and made available by the commissioner in cooperation with the authority. The applicant shall furnish such information as the commissioner shall require. The application shall be filed with the assessor of the appropriate county, city, town or village on or before the taxable status date of such county, city, town or village. A copy of such application shall be filed with the authority.

7. If the assessor is satisfied that the applicant is entitled to an exemption pursuant to this section, he or she shall approve the application and enter the taxable assessed value of the parcel for which an exemption has been granted pursuant to this section on the assessment roll with the taxable property, with the amount of the exemption as computed pursuant to subdivision two of this section in a separate column. In the event that real property granted an exemption pursuant to this section ceases to be used primarily for eligible purposes, the exemption granted pursuant to this section shall cease.

8. (a) Notwithstanding the provisions of subdivision two of this section, a county, city, town or village may by local law or a school district, other than a school district to which article fifty-two of the education law applies, may by resolution provide that no exemption under this section shall be applicable within its jurisdiction with respect to any solar or wind energy system or farm waste energy system which began construction subsequent to January first, nineteen hundred ninety-one or the effective date of such local law, ordinance or resolution, whichever is later. A copy of any such local law or resolution shall be filed with the commissioner and with the president of the authority.

(b) Construction of a solar or wind energy system or a farm waste energy system shall be deemed to have begun upon the full execution of a contract or interconnection agreement with a utility; provided however, that if such contract or interconnection agreement requires a deposit to be made, then construction shall be deemed to have begun when the contract or interconnection agreement is fully executed and the deposit is made. The owner or developer of such a system shall provide written

notification to the appropriate local jurisdiction or jurisdictions upon execution of the contract or the interconnection agreement.

9. (a) A county, city, town, village or school district, except a school district under article fifty-two of the education law, that has not acted to remove the exemption under this section may require the owner of a property which includes a solar or wind energy system which meets the requirements of subdivision four of this section, to enter into a contract for payments in lieu of taxes. Such contract may require annual payments in an amount not to exceed the amounts which would otherwise be payable but for the exemption under this section. If the owner or developer of such a system provides written notification to a taxing jurisdiction of its intent to construct such a system, then in order to require the owner or developer of such system to enter into a contract for payments in lieu of taxes, such taxing jurisdiction must notify such owner or developer of its intent to require a contract for payments in lieu of taxes within sixty days of receiving the written notification.

(b) The payment in lieu of a tax agreement shall not operate for a period of more than fifteen years, commencing in each instance from the date on which the benefits of such exemption first become available and effective.

## SECTION 1. SHORT TITLE.

This Act may be cited as the **`Religious Land Use and Institutionalized Persons Act of 2000'**.

## SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

### (a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

### (b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

## SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

## SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

- (c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.
- (d) ATTORNEYS' FEES- Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended--
- (1) by inserting 'the Religious Land Use and Institutionalized Persons Act of 2000,' after 'Religious Freedom Restoration Act of 1993,'; and
- (2) by striking the comma that follows a comma.
- (e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).
- (f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.
- (g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

#### SEC. 5. RULES OF CONSTRUCTION.

- (a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.
- (b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.
- (c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.
- (d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--
- (1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or
- (2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.
- (e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.
- (f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.
- (g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.
- (h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.



(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

#### SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the `Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term `granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

#### SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS- Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended--

(1) in paragraph (1), by striking `a State, or a subdivision of a State' and inserting `or of a covered entity';

(2) in paragraph (2), by striking `term' and all that follows through `includes' and inserting `term `covered entity' means'; and

(3) in paragraph (4), by striking all after `means' and inserting `religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'.

(b) CONFORMING AMENDMENT- Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking `and State'.

#### SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term `claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term `demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term `Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term `government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term `land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term `program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term `religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

EDITED EXCERPTS FROM THE FEDERAL COMMUNICATIONS COMMISSION (FCC)  
INFORMATION SHEET

Over-the-Air Reception Devices Rule (OTARD)

Preemption of Restrictions on Placement of Direct Broadcast Satellite, Broadband Radio Service, and  
Television Broadcast Antennas

December 2007

*This Information Sheet, available the FCC website: <http://www.fcc.gov/mb/facts/otard.html>, provides general answers to questions concerning implementation of the rule, but is not a substitute for the actual rule. For further information or a copy of the rule, contact the FCC at 888-CALLFCC (toll free) or (202) 418-7096.*

As directed by Congress in Section 207 of the Telecommunications Act of 1996, the FCC adopted the Over-the-Air Reception Devices ("OTARD") rule concerning governmental and nongovernmental restrictions on viewers' ability to receive video programming signals from direct broadcast satellites ("DBS"), broadband radio service providers (formerly multichannel multipoint distribution service or MMDS), and television broadcast stations ("TVBS"). The OTARD rule (47 C. F. R. Section 1.4000) became effective in October 1996 and prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming.

**Q: What types of antennas are covered by the rule?**

A: The rule applies to the following types of antennas:

- (1) A "dish" antenna that is one meter (39.37") or less in diameter (or any size dish if located in Alaska) and is designed to receive direct broadcast satellite service, including direct-to-home satellite (dishes) service, or to receive or transmit fixed wireless signals via satellite.
- (2) An antenna that is one meter or less in diameter or diagonal measurement and is designed to receive video programming services via broadband radio service (wireless cable) or to receive or transmit fixed wireless signals other than via satellite. "Fixed wireless signals" are any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location, which include wireless signals used to provide telephone service or high-speed Internet access to a fixed location.
- (3) An antenna that is designed to receive local television broadcast signals (TV antennas).

**Q: What restrictions are permitted if the antenna must be on a very tall mast to get a signal?**

A: If you have an exclusive use area that is covered by the rule and need to put your antenna on a mast, the local government, community association or landlord may require you to apply for a permit for safety reasons if the mast extends more than 12 feet above the roofline. If you meet the safety requirements, the permit should be granted.

Note that the rule only applies to antennas and masts installed wholly within the antenna user's exclusive use area. "Exclusive use" means an area of the property that only you, and persons you permit, may enter and use to the exclusion of other residents. Masts that extend beyond the exclusive use area are outside the scope of the rule. For installations on single family homes, the "exclusive use area" generally would be anywhere on the home or lot and the mast height provision is usually most relevant in these situations.

For example, if a homeowner needs to install an antenna on a mast that is more than 12 feet taller than the roof of the home, the homeowners' association or local zoning authority may require a permit to ensure the safety of such an installation, but may not prohibit the installation unless there is no way to install it safely.

On the other hand, if the owner of a condominium in a building with multiple dwelling units needs to put the antenna on a mast that extends beyond the balcony boundaries, such installation would generally be outside the

scope and protection of the rule, and the condominium association may impose any restrictions it wishes (including an outright prohibition) because the Commission rule does not apply in this situation.

In addition, antennas covered by the rule may be mounted on "masts" to reach the height needed to receive or transmit an acceptable quality signal (e.g. maintain line-of-sight contact with the transmitter or view the satellite). Masts higher than 12 feet above the roofline may be subject to local permitting requirements for safety purposes. Further, masts that extend beyond an exclusive use area may not be covered by this rule.

**Q: Does the rule apply to commercial property or only residential property?**

A: Nothing in the rule excludes antennas installed on commercial property. The rule applies to property used for commercial purposes in the same way it applies to residential property.

**Q: Does the rule apply to hub or relay antennas?**

A: Effective May 25, 2001, the FCC amended the rule to apply to "customer-end antennas" that receive and transmit fixed wireless signals. "Customer-end antennas" are antennas placed at a customer location for the purpose of providing service to customers at that location. The rule does not cover antennas used to transmit signals to and/or receive signals from multiple customer locations.

**Q: What types of restrictions are prohibited?**

A: The rule prohibits restrictions that impair a person's ability to install, maintain, or use an antenna covered by the rule. The rule applies to state or local laws or regulations, including zoning, land-use or building regulations, private covenants, homeowners' association rules, condominium or cooperative association restrictions, lease restrictions, or similar restrictions on property within the exclusive use or control of the antenna user where the user has an ownership or leasehold interest in the property. A restriction impairs if it: (1) unreasonably delays or prevents installation, maintenance or use of; (2) unreasonably increases the cost of installation, maintenance or use; or (3) precludes a person from receiving or transmitting an acceptable quality signal from an antenna covered under the rule. The rule does not prohibit legitimate safety restrictions or restrictions designed to preserve designated or eligible historic or prehistoric properties, provided the restriction is no more burdensome than necessary to accomplish the safety or preservation purpose.

**Q: What types of restrictions unreasonably delay or prevent viewers from using an antenna? Can an antenna user be required to obtain prior approval before installing his antenna?**

A: A local restriction that prohibits all antennas would prevent viewers from receiving signals, and is prohibited by the Commission's rule. Procedural requirements can also unreasonably delay installation, maintenance or use of an antenna covered by this rule. For example, local regulations that require a person to obtain a permit or approval prior to installation create unreasonable delay and are generally prohibited.

Permits or prior approval necessary to serve a legitimate safety or historic preservation purpose may be permissible. Although a simple notification process might be permissible, such a process cannot be used as a prior approval requirement and may not delay or increase the cost of installation. The burden is on the association to show that a notification process does not violate our rule.

**Q: What is an unreasonable expense?**

A: Any requirement to pay a fee to the local authority for a permit to be allowed to install an antenna would be unreasonable because such permits are generally prohibited. It may also be unreasonable for a local government, community association or landlord to require a viewer to incur additional costs associated with installation. Things to consider in determining the reasonableness of any costs imposed include: (1) the cost of the equipment and services, and (2) whether there are similar requirements for comparable objects, such as air conditioning units or trash receptacles. For example, restrictions cannot require that expensive landscaping screen relatively unobtrusive DBS antennas. A requirement to paint an antenna so that it blends into the

background against which it is mounted would likely be acceptable, provided it will not interfere with reception or impose unreasonable costs.

**Q: What restrictions prevent a viewer from receiving an acceptable quality signal? Can a homeowners association or other restricting entity establish enforceable preferences for antenna locations?**

A: For antennas designed to receive analog signals, such as TVBS, a requirement that an antenna be located where reception would be impossible or substantially degraded is prohibited by the rule. However, a regulation requiring that antennas be placed where they are not visible from the street would be permissible if this placement does not prevent reception of an acceptable quality signal or impose unreasonable expense or delay. For example, if installing an antenna in the rear of the house costs significantly more than installation on the side of the house, then such a requirement would be prohibited. If, however, installation in the rear of the house does not impose unreasonable expense or delay or preclude reception of an acceptable quality signal, then the restriction is permissible and the viewer must comply.

The acceptable quality signal standard is different for devices designed to receive digital signals, such as DBS antennas, digital broadband radio service antennas, digital television ("DTV") antennas, and digital fixed wireless antennas. For a digital antenna to receive or transmit an acceptable quality signal, the antenna must be installed where it has an unobstructed, direct view of the satellite or other device from which signals are received or to which signals are to be transmitted. Unlike analog antennas, digital antennas, even in the presence of sufficient over-the-air signal strength, will at times provide no picture or sound unless they are placed and oriented properly.

**Q: Can a restriction limit the number of antennas that may be installed at a particular location?**

The Commission's rule covers the antennas necessary to receive service. Therefore, a local rule may not, for example, allow only one antenna if more than one antenna is necessary to receive the desired service.

**Q: Are all restrictions prohibited?**

A: No. Clearly-defined, legitimate safety restrictions are permitted even if they impair installation, maintenance or use provided they are necessary to protect public safety and are no more burdensome than necessary to ensure safety. Examples of valid safety restrictions include fire codes preventing people from installing antennas on fire escapes; restrictions requiring that a person not place an antenna within a certain distance from a power line; and installation requirements that describe the proper method to secure an antenna. The safety reason for the restriction must be written in the text, preamble or legislative history of the restriction, or in a document that is readily available to antenna users, so that a person who wishes to install an antenna knows what restrictions apply. Safety restrictions cannot discriminate between objects that are comparable in size and weight and pose the same or a similar safety risk as the antenna that is being restricted.

Restrictions necessary for historic preservation also may be permitted even if they impair installation, maintenance or use of the antenna. To qualify for this exemption, the property may be any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places. In addition, restrictions necessary for historic preservation must be no more burdensome than necessary to accomplish the historic preservation goal. They also must be imposed and enforced in a non-discriminatory manner, as compared to other modern structures that are comparable in size and weight and to which local regulation would normally apply.

**Q: Whose antenna restrictions are prohibited?**

A: The rule applies to restrictions imposed by local governments, including zoning, land-use or building regulations; by homeowner, townhome, condominium or cooperative association rules, including deed restrictions, covenants, by-laws and similar restrictions; and by manufactured housing (mobile home) park owners and landlords, including lease restrictions. The rule only applies to restrictions on property where the viewer has an ownership or leasehold interest and exclusive use or control.

**Q: Does the rule apply to residents of rental property?**

A: Yes. Effective January 22, 1999, the FCC amended the rule to apply to renters who install antennas within their leasehold, which means inside the dwelling or on outdoor areas that are part of the tenant's leased space and which are under the exclusive use or control of the tenant. "Exclusive use" means an area of the property that only you, and persons you permit, may enter and use to the exclusion of other residents. For example, your apartment may include a balcony, terrace, deck or patio that only you can use, and the rule applies to these areas. For rented single family homes or manufactured homes which sit on rented property, these areas include the home itself and patios, yards, gardens or other similar areas. If renters do not have access to these outside areas, the tenant may install the antenna inside the rental unit.

**Q: If I live in a condominium, does this rule apply to me?**

A: The rule applies to owners of condominiums, cooperatives, townhomes, manufactured homes, and single family homes who place antennas that meet size limitations on property that they own or rent and that is within their exclusive use or control as described above.

The rule does not apply to common areas that are owned by a landlord, a community association, or jointly by condominium or cooperative owners where the antenna user does not have an exclusive use area. Such common areas may include the roof, the hallways, the walkways or the exterior wall of a multiple dwelling unit. For example, restrictions that prevents drilling through the exterior wall of a condominium or rental unit, which may prohibit installation that requires such drilling, could be enforced.

**Q: Are there restrictions that may be placed on residents of rental property?**

A: Yes. A restriction necessary to prevent damage to leased property may be reasonable, such as, prohibiting the drilling of holes through an exterior wall. In addition, rental property is subject to the same protection and exceptions to the rule as owned property. Thus, a landlord may impose other types of restrictions that do not impair installation, maintenance or use under the rule. The landlord may also impose restrictions necessary for safety or historic preservation.

**Q: Does the rule apply to condominiums or apartment buildings if the antenna is installed so that it hangs over or protrudes beyond the balcony railing or patio wall?**

A: No. The rule does not prohibit restrictions on antennas installed beyond the balcony or patio of a condominium or apartment unit if such installation is in, on, or over a common area. An antenna that extends out beyond the balcony or patio is usually considered to be in a common area that is not within the scope of the rule. Therefore, the rule does not apply to a condominium or rental apartment unit unless the antenna is installed wholly within the exclusive use area, such as the balcony or patio.

**Q: If my association, building management, landlord, or property owner provides a central antenna, may I install an individual antenna?**

A: Generally, the availability of a central antenna may allow the association, landlord, property owner, or other management entity to restrict the installation by individuals of antennas otherwise protected by the rule. Restrictions based on the availability of a central antenna will generally be permissible provided that: (1) the person receives the particular video programming or fixed wireless service that the person desires and could receive with an individual antenna covered under the rule (*e.g.*, the person would be entitled to receive service from a specific provider, not simply a provider selected by the association); (2) the signal quality of transmission to and from the person's home using the central antenna is as good as, or better than, the quality the person could receive or transmit with an individual antenna covered by the rule; (3) the costs associated with the use of the central antenna are not greater than the costs of installation, maintenance and use of an individual antenna covered under the rule; and (4) the requirement to use the central antenna instead of an individual antenna does not unreasonably delay the viewer's ability to receive video programming or fixed wireless services.

**Q: I want a conventional "stick" antenna to receive a distant over-the air television signal. Does the rule apply to me?**

A: No. The rule does not apply to television antennas used to receive a distant signal.

**Q: I want to install an antenna for broadcast radio or amateur radio. Does the rule apply to me?**

A: No. The rule does not apply to antennas used for AM/FM radio, amateur ("ham") radio (see 47 C.F.R. §97.15), Citizen's Band ("CB") radio or Digital Audio Radio Services ("DARS").

**Q: I want to install an antenna to access the Internet. Does the rule apply to me?**

A: Yes. Antennas designed to receive and/or transmit data services, including Internet access, are included in the rule.

**Q: Does this mean that I can install an antenna that will be used for voice and data services even though it does not provide video transmissions?**

A: Yes. The most recent amendment expands the rule and permits you to install an antenna that will be used to transmit and/or receive voice and data services, except as noted above. The rule will also continue to cover antennas used to receive video programming.

**Q: What can a local government, association, or consumer do if there is a dispute over whether a particular restriction is valid?**

A: Restrictions that impair installation, maintenance or use of the antennas covered by the rule are preempted (unenforceable) unless they are needed for safety or historic preservation and are no more burdensome than necessary to accomplish the articulated legitimate safety purpose or for preservation of a designated or eligible historic site or district. If a person believes a restriction is preempted, but the local government, community association, or landlord disagrees, either the person or the restricting entity may file a Petition for Declaratory Ruling with the FCC or a court of competent jurisdiction. We encourage parties to attempt to resolve disputes prior to filing a petition. Often contacting the FCC for information about how the rule works and applies in a particular situation can help to resolve the dispute. If a local government, community association, or landlord acknowledges that its restriction impairs installation, maintenance, or use and is preempted under the rule but believes it can demonstrate "highly specialized or unusual" concerns, the restricting entity may apply to the Commission for a waiver of the rule.

SEQRA, ZONING REGULATION AND THE NORTH ELBA WAL-MART DECISION

Wal-Mart Stores, Inc. applied for a conditional use permit and site plan approval from the Town of North Elba to construct a store in the Adirondacks just outside the resort village of Lake Placid in a Scenic Preservation Overlay District with views of Whiteface Mountain. The Town's Planning Board denied the permits and Wal-Mart challenged the decision. The court held that a municipality may use the potential adverse economic and community-character impacts of a proposed "big-box" development on existing, small retail businesses as bases for the denials. A town's conditional (special) use permit regulation, however, must contain properly-worded explicit standards. In addition, the potential negative economic impact of the "big-box store" on smaller retail businesses and the visual, aesthetic, community-character and other socio-economic impacts must be explained in the State Environmental Quality Review Act (SEQRA) documents, local resolutions and findings.

The North Elba Planning Board had adopted a final environmental impact statement (EIS) that addressed the project's potential visual impact on scenic values and its effects on the community's general character and ambience. The EIS also analyzed secondary growth effects from increased competition and potential store closings on the adjacent Town and nearby Lake Placid Village areas. The SEQRA findings noted these significant adverse socio-economic and community character impacts.

The court also found, however,

[h]ere, it must be borne in mind that respondent concluded not only that the proposal did not meet the requirements of SEQRA, but also that it did not satisfy the relevant criteria set forth in the Town Land Use Code, including two of the three specific conditions for obtaining a conditional use permit (namely, those providing that a permit will only be granted if the proposed use "will not have a materially adverse impact upon adjoining and nearby properties," and "will not result in a clearly adverse aesthetic impact"). Additionally, respondent found that several "general development considerations," which it was constrained to evaluate and which have as their aim the avoidance of "any undue adverse impact on the natural, physical, social and economic resources of the Town," were not met. In making these findings, respondent was entitled to consider factors outside the scope of the environmental review mandated by SEQRA, insofar as they bear on matters legitimately within the purview of the Town Land Use Code.

The decision underscores that a municipality should conduct comprehensive planning and

- identify areas requiring special visual, aesthetic, community character and socio-economic protection;
- include specific standards for review in the zoning code;
- develop a strong record;
- derive conclusions from a thorough analysis of the impacts on the affected community; and
- articulate the reasons for denials.

It is important to remember, however, that permit denials based upon generalized opposition or sentiment unsupported by the written record are not likely to be upheld by the court.

***Excerpt from an article entitled: Store Size Cap - North Elba, NY, published by The New Rules Project of the Institute for Local Self-Reliance on the New Rules website: <http://www.newrules.org>***

Residents of North Elba, New York spent five years trying to stop Wal-Mart from erecting an 80,000-square-foot store within their town. The town's planning board rejected the retailer's plans in January 1996, citing several reasons including the fact that "the project will likely result in a large amount of impacted retail space (83,000 to 114,000 square feet), which could take up to 14 years to refill, over 20,000 square feet of which could become chronically vacant. These potential impacts would have a significant unmitigatable adverse impact on the character and culture of the community by resulting in vacant storefronts, a loss of 'critical mass' in existing downtown areas, and an adverse psychological, visual and economic climate."

The planning board was sued by Wal-Mart, which claimed its decision was unsubstantiated, arbitrary and capricious. Wal-Mart argued that the rejection of its proposal was based on impermissible considerations, including the economic impact of the development. A New York appellate court upheld the planning board, finding that although its decision "refers to the economic effect the proposed store would be expected to have upon other local businesses, it does so in the context of assessing the probability and extent of the change it would work upon the overall character of the community, as a result of an increased vacancy rate among commercial properties in the downtown area---an entirely proper avenue of inquiry. . ."

The ordeal prompted the community to enact a size cap ordinance limiting single retail stores to 40,000 square feet and capping shopping centers at 68,000 square feet.

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Enacted in February 1998, North Elba's retail size cap was part of a larger law that amended various parts of the Town Land Use Code. The relevant portion is excerpted here.

**Section 12.** Part V Section 17 (D) of said local law is hereby amended by adding a new subparagraph (22), to read as follows:

(22) Retail Trade Uses; Grouped Retail Business Uses.

A. An individual Retail Trade use shall not exceed 40,000 square feet of floor area, whether in one building or more than one building.

B. A Grouped Retail Business Use shall not exceed a total of 68,000 square feet of floor area, in all buildings which constitute the use.

C. For the purpose of the size limits set forth in clauses A and B, floor area shall include floor area or floor space of any sort within a building as well as exterior space used for sale or storage of merchandise.

New York



## NYS Department of State

### Office of General Counsel: Legal Memorandum LU02

#### RESTRICTIONS ON ELECTION SIGNS

Some local governments have attempted to deal with the clutter of election campaign signs by limiting the period in which they may be posted. Typical local regulations specify a period after an election by which such signs must be removed. Some local regulations also limit the posting of such signs to a specified period before a primary or election or the number of such signs that may be posted.

If challenged, such local regulations are likely to be struck down by the courts as an unlawful interference with the right of free expression as guaranteed by the First Amendment to the United States Constitution. The main flaw in a local law or ordinance that applies specifically to election signs is that it imposes restrictions based on the content or message. Local legislation that regulates signs must be content neutral, meaning it must apply equally to all signs, regardless of message. While local governments have greater leeway in regulating commercial signs, restrictions on noncommercial signs, including those that support a candidate, must be limited to time, place and manner of posting, and must adhere to the following criteria:

1. The regulations must be justified without reference to the content of the signs subject to the law (i.e., content neutral);
2. The regulations must be narrowly tailored to serve a significant governmental interest; and
3. The regulations must leave open ample alternative channels for communication of the information.

*Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293, 82 L.Ed.2d 221, 227, 104 S.Ct. 3065 (1984).

Applying well established principles of constitutional law, a federal appeals court decided in 1995 that provisions of the municipal sign code of a town in Missouri that specifically regulated political signs were content-based and, therefore, unconstitutional as impermissible restraints on free speech. *Whitton v. City of Gladstone*, Missouri, 54 F.3d 1400 (8th Cir. 1995). The section of the code that limited the time in which political signs may be posted was found to be both content based and constitutionally suspect by granting certain forms of commercial speech a greater degree of protection than noncommercial political speech. For example, the limitations did not apply to "for sale" signs, that fall into the category of "commercial speech."

The justification for the time limitations was to curtail traffic dangers which political signs may pose and to promote esthetic beauty, but the regulation did not apply the restrictions to identical signs displaying nonpolitical messages. Thus, the regulation "differentiated between speakers for reasons unrelated to the legitimate interests that prompted the regulation." 54 F.3d at 1407, quoting *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731 (1st Cir.), cert. denied, 515 U.S. 1103, 115 S.Ct. 2247, 132 L.Ed.2d 255 (1995). The Court in this case applied similar reasoning in striking down provisions of the sign code that prohibited external illumination of political signs and made candidates responsible for violations involving their political signs, including failure to remove within time limits specified in the code.

However, local legislation that prohibited the posting of all signs on public property has been upheld by the courts. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984). Thus, a provision of the zoning code of the Town of Orangetown, New York that prohibited the posting of signs on public property without a permit from the Town Board was upheld as constitutional, even when it was used to prohibit the posting of political signs along public streets. *Abel v. Town of Orangetown*, 724 F.Supp. 232 (S.D. N.Y., 1989). The result would likely have been different if the law only prohibited the posting of political signs.

Local legislation that specifically targets political signs for removal within a specific time period, or that specifically prohibits the posting of campaign signs on public property, is likely to be struck down if challenged in court as an illegal restriction on the constitutional guarantee of freedom of expression.

For additional information on local regulation of signs, please refer to our publication, **Municipal Control of Signs**, which is part of the NYS Department of State James A. Coon Local Government Technical Series available on the DOS website: <http://www.dos.state.ny.us/lqss/pdfs/municipalcontrolofsigns.pdf>

## MUNICIPAL REGULATION OF ADULT USES

### Constitutional Background

Municipal zoning regulation of adult business may be locally popular, but it raises serious constitutional issues when the regulation is directed at free expression protected by the federal and state Constitutions. Non-obscene expression, whether in the form of sexually explicit books, magazines, movies, or dancing, has traditionally been found to be entitled to such constitutional protection. When municipal regulations impinge on an adult business's freedom of expression, they lose the presumption of constitutionality that normally applies to zoning regulations, and the burden shifts to local governments to justify the restrictions.

In order to avoid constitutional problems, zoning regulations pertaining to adult uses must be drafted with skill and precision. Prior to adopting such zoning, a local government must usually show that it conducted or relied upon planning studies evidencing the need to protect neighborhoods from the harmful secondary effects of adult businesses. Some studies have identified such adverse secondary effects as urban blight, decreased retail shopping activity and reduced property values. However, courts will strike down regulations that seek to exclude all adult uses through an outright ban. Therefore, adult uses may be restricted (even substantially) within a community through zoning regulations, but may not be entirely prohibited.

Municipalities drafting adult use zoning legislation typically choose between two zoning techniques, which either: 1) concentrate adult uses in a single geographic area of the locality or 2) disperse adult uses using distance requirements. By concentrating adult uses in a specific area of the community, some municipalities believe these uses will affect fewer neighborhoods and can be avoided by persons who are offended by them. Other municipalities have taken the opposite approach and require that sexually oriented uses be separated from one another or from residential areas. By preventing a concentration of these uses, a municipality may attempt to avoid a "skid-row" effect.

In *City of Renton v Playtime Theaters*, 475 US 41, 89 L Ed 2d 29, 106 S Ct 925 (1986), the United States Supreme Court a four (4) part test for determining when it is permissible to use zoning to single out adult uses without violating the First Amendment of the US Constitution. In determining the constitutional validity of a zoning regulation, courts must consider whether:

1. The predominant purpose of zoning is to suppress the sexually explicit speech itself, or rather, to eliminate the "secondary effects" of adult uses;
2. The zoning regulation furthers a substantial governmental interest;
3. The zoning regulation is "narrowly tailored" to affect only those uses which produced the unwanted secondary effects; and
4. The zoning regulation leaves open reasonable alternative locations for adult uses.

This paper will focus on two New York Court of Appeals cases - *Stringfellows I* and *II* - which applied the federal constitutional test in *Renton* and delineated rules for cases relying on Article 1, Section 8 of the New York State Constitution<sup>1</sup>, the free speech provision.

### The New York City cases

In 1993, the New York City Division of City Planning conducted an "Adult Entertainment Study" to determine the nature and the impact that adult businesses had in the City. In addition, the City examined similar studies conducted in nine other localities. The City study concluded that, in the areas where they are concentrated, the presence of adult businesses tends to produce negative secondary effects such as increased crime, decreased property values, and reduced shopping and commercial activities.

In October 1995, in response to this study, the New York City Council amended its zoning regulations to place restrictions on the location and size of adult businesses. The zoning amendments were intended to break the concentration of adult businesses in certain neighborhoods by dispersing them.

The New York City zoning amendment applies to various types of "adult establishments" including adult bookstores, adult theaters, adult restaurants, and other adult commercial establishments. The definition of what is an "adult" business is keyed to the character of the activity that takes place in such establishments. If the business regularly features movies, photographs, or

live performances that emphasize "specified anatomical areas" or "specified sexual activities" and excludes minors by reason of age, it is considered "adult" and therefore covered by the zoning restrictions.

The New York City zoning amendment does not ban adult establishments outright. Rather, it limits the permissible zones or districts in New York City where they may operate, and terminates those businesses that are not located in those permitted districts. Adult uses are only allowed in a number of commercial and manufacturing districts. The zoning amendment specifically requires that, where permitted, adult establishments: (1) must be located at least 500 feet from a school, house of worship, day care center, or residential district; (2) must be located at least 500 feet from any other adult establishment; (3) must be limited to one establishment per zoning lot; and (4) must not exceed 10,000 square feet of floor space. By confining them to industrial and commercial districts and separating them within those districts, New York City used both concentration and distance requirements to control adult uses.

Any adult establishment operating in a zoning district where adult uses are prohibited must either conform to the new zoning or terminate its business within one year of the amendment's effective date. Narrow exceptions exist to this termination requirement for existing businesses which are not in compliance. Also, adult establishments faced with the one-year termination deadline may apply for an extension to the Board of Standards and Appeals, which may permit the applicant to remain open for a limited time to amortize any substantial and unrecovered costs associated with the adult portion of the establishment.

In the case of Stringfellow's of New York, Ltd., v City of New York ("Stringfellows I"), 91 N.Y.2d 382 (1998), Several adult businesses and their patrons brought three actions, consolidated by the lower court, challenging the NYC zoning regulation pertaining to adult establishments. They contended that since the NYC zoning amendment defines adult establishments as those allowing the exhibition of "specified anatomical areas" or "sexual activities," it is a content-based regulation that unlawfully suppresses expression. They claimed it was presumptively invalid under Article 1, Section 8 of the New York State Constitution.

The New York State Court of Appeals disagreed. While recognizing that municipalities possess considerable authority to enact zoning to improve the quality of their residents' lives, the Court noted that zoning authority is not unfettered. Zoning regulations that aim to curb "adult" uses implicate speech or conduct that is protected by Article I, Section 8 of the New York State Constitution. Consequently, in weighing the validity of such zoning regulations, courts must consider the constitutional values of free expression.

The Court developed a hybrid test, using state and federal constitutional standards, for determining whether zoning regulations are valid under Article 1, Section 8 of the New York State Constitution.

1. The zoning regulation must be justified by concerns unrelated to speech;
2. It must be "no broader than necessary" to achieve its purpose and
3. It must provide alternative locations for adult use businesses.

When existing adult businesses are rendered non-conforming by subsequent zoning amendments and directed to terminate operations, courts must additionally consider whether the amortization provisions allow for reasonable recoupment of the investment in the business.

#### 1. The Zoning Regulation's Purpose Is Unrelated to Speech

As a threshold issue, the Court focused on whether the City's zoning amendments were purposefully directed at controlling the content of the message conveyed through adult businesses or were instead aimed at an entirely separate societal goal. The federal constitutional analysis requires examination of the ordinance's "predominant purpose," while the State constitutional inquiry focuses on whether there has been "a purposeful attempt to regulate speech." The difference in language between the federal and state tests, however, did not significantly affect the outcome, since it was apparent from the legislative history that eliminating the negative secondary effects of adult uses was the City's goal.

Before enacting the zoning amendment, the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City. The Court found that New York City properly relied on studies from other jurisdictions:

"While none of the other studies considers a municipality which duplicates New York City in terms of variety of neighborhoods and built conditions, \* \* \* the findings of adverse secondary effects and the conditions found in these other studies are relevant to the different neighborhoods of New York City."

In view of the legislative record upon which the City Council rested its decision to regulate adult uses, enactment of the zoning amendment was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose.

As to the content of the City's regulation, the Court said:

"Nor is it significant that definitions of adult uses in the Amended Zoning Resolution are based in part on the content of the entertainment offered rather than exclusively on the age of the businesses' clientele (cf., *Town of Islip v Caviglia*, supra, at 557). *The test under both Islip and Renton is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content.* That test is plainly met here." (Emphasis added.)

## 2. The Zoning Amendment Is No Broader Than Necessary

The Court next held that the City's zoning amendment represents a coherent regulatory scheme narrowly designed to attack the problems associated with adult establishments. The zoning amendment must set forth explicit standards for those who apply them to preclude arbitrary and discriminatory application. The amended zoning must affect only the category of uses that produce the unwanted negative effects. By preventing adult businesses from locating in residential districts while allowing such establishments to locate in manufacturing and commercial districts, the Court found the amendment protects only those communities and community institutions that are most vulnerable to their adverse impacts. Municipalities may constitutionally bar adult establishments from, or within, a specified distance of residentially-zoned areas and facilities in which families and children congregate. Moreover, zoning regulations may be used to prohibit an adult business from operating within a specified distance of another in order to avoid the undesirable impacts associated with concentration of such uses.

## 3. Reasonable Alternative Avenues of Communication

To further satisfy constitutional requirements, the City needed to assure reasonable alternative avenues of communication. In particular, there must be (1) ample space available for adult uses after the rezoning and (2) no showing by the challenger that enforcement of the ordinance will either substantially reduce the total number of adult outlets or significantly reduce the accessibility of those outlets to their potential patrons.

In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the likelihood of their ever realistically becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise."

In the case of New York City, the zoning amendment's enforcement will lead to the forced relocation of some 84% of the City's 177 adult businesses. Given the extent of the dislocation, it was incumbent upon the City to demonstrate that sufficient alternative sites were available. The City asserted that the space available for adult uses constituted over 11% of the City's total land area and about 4% when reduced by land encumbered by properties that are unlikely to be developed for commercial use. City officials asserted that the amended zoning code leaves at least 500 potential sites available for adult use relocation. All of the area in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs is within a 10-minute walk from a subway line or a major bus route. The Court concluded that the City satisfied its burden of showing that the space zoned for adult uses is adequate to accommodate the 177 existing adult businesses.

In their response, the adult businesses failed to make concrete allegations as to precisely how many of the 500 potential receptor sites identified by the City were unavailable. The criticisms raised by the adult businesses about various individual sites did not provide an adequate counter to the City's supported claim that, as a whole, there are more than enough receptor sites to accommodate the existing adult entertainment industry. Any future challenge to a similar zoning plan would need to analyze, with particularity and specificity, the sufficiency of alternative locations zoned for adult businesses.

#### 4. Termination and Amortization

Finally, the Court rejected the claim that enforcement of the zoning amendment would lead to an unconstitutional taking because substantial investments in the businesses would be lost if they are required to relocate. The Court said that no taking claim existed because the zoning amendments provide for hardship extensions. Under these provisions, a nonconforming adult establishment may apply to the Board of Standards and Appeals for permission to continue to operate beyond the one-year amortization period set forth in the statute where it can show that it has made substantial expenditures related to the adult use, that such expenditures cannot be recouped within a year and that the requested extension is the minimum period necessary to permit such recoupment.

#### **Stringfellows II**

Some adult businesses have tried some novel approaches to avoid having to comply with New York City's adult zoning restrictions. In a case that generated a good deal of publicity, City of New York v. Stringfellow's of New York, and Ten's World-Class Cabaret ("Stringfellows II"), 96 N.Y.2d 51 (2001), the Court of Appeals held that topless entertainment club could not admit minors to avoid being defined as an adult business under the New York City zoning regulations.

Under the City's zoning, a business is considered "adult" if it regularly features movies, photographs, or live performances that emphasize "specified anatomical areas" or "specified sexual activities" and is not customarily open to the general public during such features because *it excludes minors by reason of age*. In order to circumvent the City's zoning law, Ten Cabaret instituted a policy of *admitting children*, accompanied by a parent, if both sign statements that the child will not smoke or drink alcoholic beverages and will not be harmed by seeing "exposed female breasts." By allowing children onto its premises, Tens argued it was not an "adult" business.

Supreme Court Justice Crane agreed and ruled that Ten's adult cabaret was not subject to the City's zoning law since it did not exclude minors by reason of age<sup>2</sup>. The Appellate Division reversed Justice Crane<sup>3</sup> and the Court of Appeals affirmed. The Court ruled that Ten's was attempting to make "an end run" around the City zoning law. It said that the letter of a statute will not be slavishly followed when it leads away from the true intent and purpose of the legislation and statutes are not to be read with literalness that destroys meaning, intention, purpose or beneficial end for which the statute has been designed. As a matter of policy, it certainly is highly inappropriate to encourage adult businesses to allow minors to enter their establishment, simply to circumvent the Zoning.

#### Conclusion

In conclusion, the Court of Appeals held that New York City's effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the applicable federal or state constitutional standards. The *Stringfellows* decisions are an important adult use case for claims brought under the New York State Constitution.

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#### Footnotes

1. Article 1, Section 8 of the New York State Constitution provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

2. *City of New York v. Stringfellow's of New York*, 11/10/98 N.Y.L.J. 26 (col. 1)

3. 253 A.D.2d 110 (1st Dept. 1999). The matter was remanded to Justice Crane, who subsequently granted the City of New York partial summary judgment on the issue of whether defendant's cabaret falls within the definition of adult eating or drinking establishment contained in New York City Zoning Resolution. On appeal, the Appellate Division affirmed. 268 AD2d 216.

## NYS Department of State

### Office of General Counsel: Legal Memorandum LU-16

#### The Regulation of Day Care Facilities

The demand for child day care has increased tremendously in recent decades. This article explores the statutory history of day care regulation as a land use activity, and examines the landmark New York cases on the subject. It is not the purpose of this article to describe in detail either the state licensing process or the panoply of state regulations regarding day care, except to the extent they affect land use. The article will conclude with reference to several typical local zoning approaches to day care.

Beginning as far back as 1942, the State Legislature has required day care providers to be state-licensed.<sup>1</sup> The licensing statute enacted then was known as Social Welfare Law §390. With numerous revisions throughout the ensuing years, it is codified today as Social Services Law §390.

In 1960, the first significant court decision dealing with day care was handed down by the New York City Municipal Court. In rejecting a landlord's petition to evict a tenant under the terms of her lease (which, in turn, he claimed, gave him eviction rights under the City's Emergency Housing Rent Control Law) for using the apartment as a "day nursery", the court stated "[t]he proper care of working mother's children is a basic social and economic problem of our time and society. The construction here sought by the landlord would have a crippling effect on an indispensable social technique."<sup>2</sup>

Until 1964, Social Services Law §390 considered any form of day care facility for three or more children to be a "day nursery", requiring a license to operate as such. But in 1964 the Legislature recognized the growing importance of day care as an activity provided in private homes. It created a new licensed category of "family home day care", under which up to six children could be cared for in a private home.<sup>3</sup> The following year, the Legislature enacted Laws of 1965, Chapter 395, which empowered local governments to provide day care at public expense. And several years later, the Legislature enacted Laws of 1969, Chapter 1013. In addition to recognizing a shortage of adequate day care facilities and adopting certain provisions facilitating the funding of new day care centers, the Legislature in Chapter 1013 declared that providing adequate day care is a legitimate public purpose.

Until 1970, however, neither state statutes nor court decisions precluded day care from being regulated by local zoning laws, regardless of the setting in which it was provided. In that year, the State Supreme Court, Nassau County in *Unitarian Universalist Church of Central Nassau v. Shorter*<sup>4</sup> held that a day care center operated on church property constituted a use encompassed within the general land use protection accorded to religious activities, even though the center was operated by a private corporation under contract with the church. The court held that since the church was already an allowed use on the property, it was not required to secure a separate special use permit for its day care center under the regulations of the Village of Garden City. Secondly, the court based its opinion on the public policy in favor of day care, enunciated by the Legislature in Chapter 1013. Notwithstanding the decision, the statutes continued to be silent on the issue of local zoning control.

The next case to deal meaningfully with the issue of local day care regulation resulted in a holding that seemed to give comfort to those who might have wished to see a common-law

preemption in favor of residential day care providers. The case did not, however, go quite that far. In *People v. Bacon*<sup>5</sup>, decided in 1986, a district court in Nassau County found that a town's building zone ordinance should be construed to permit day care of pre-school age children in a private home. The court reached this conclusion because the ordinance allowed a number of uses "customarily incidental" to the primary allowed uses, and also permitted "home occupations". The ordinance did not, however, define either of the terms "customarily incidental" or "home occupations". While "day care" was not expressly stated in the ordinance as an allowed "incidental" use or as a "home occupation", the court found that it was nonetheless not expressly prohibited as such, and should therefore be allowed. The decision seemed to draw a fine distinction. On the one hand, the court held that, absent a specific prohibition, state policy required an interpretation of the term "customarily incidental" to include day care as a matter of common law. But the court did not go so far as to find that the state day care license alone preempted the local ordinance.

By enacting Chapter 875 of the Laws of 1986, effective January 1, 1987, the State Legislature created the licensed activity known as "group family day care"<sup>6</sup>. In so doing, it established the first statutory preemption from local land use controls for that defined activity. "Group family day care" was essentially an expansion of the old category of "family home day care". It was newly-defined as the providing of care in a home for up to ten children of all ages, provided that no more than four of those children were under two years of age. Alternatively, "group family day care" could consist of care for up to twelve children, if all of those children were over two years of age. So long as one of those numerical alternatives were met, the home could also provide care during non-school hours for up to two additional children of school age.

Significantly, the legislation provided that the owners of certain classes of dwellings used as group family day care homes would be entitled to protection from local land use regulations. No local government could prohibit the following classes of dwelling units from being used for group family day care, so long as the home had received a permit to operate from the State Department of Social Services: (a) single family dwellings, (b) multiple family dwellings classified as fireproof, and (c) dwelling units on the ground floor of multiple family dwellings not classified as fireproof. In the latter two cases, the unit was required to comply with the State Uniform Fire Prevention and Building Code as well as all other standards applicable to multiple family dwellings. These requirements were codified as parts of Social Services Law §390 (hereafter "§390"), which deals comprehensively with child day care.

In a single-family dwelling, then, the local government could not prohibit group family day care outright. But could the local government nonetheless apply standards more stringent than those contained in state law? In 1990 this issue was placed squarely before the courts, and this time a decision was rendered which left no doubt. In *People v. Town of Clarkstown*<sup>7</sup>, the Appellate Division, Second Department, struck down the Town of Clarkstown's local zoning law establishing a set of strict standards and restrictions for the operation of "family day care homes". The court held that, by enacting §390, the State Legislature had intended to "occupy the field" of family day care regulation, and thus supersede the authority of local governments to regulate that use through zoning laws. While the opinion referred to earlier enactments and statements of policy by the Legislature (including Chapter 1013 of 1969) which had signaled the State's awareness of the critical need for adequate day care, it was clear that the enactment of Chapter 875 of 1986 was a watershed event in the court's view. Justice Rosenblatt's opinion admitted that there was no express preemption of local regulatory authority in state law. Nonetheless, he cited prior law<sup>8</sup> holding that there need not be any such express preemption-- that a local law will be preempted where it contains restrictions and conditions on a use "so as

to inhibit the operation of the state's general laws", and where, at the same time, the State Legislature has "impliedly evinced" its desire to preempt local authority.

The court cited the Legislature's recognition of the critical shortage of child day care facilities, as expressed in its 1969 legislation. The court also cited the "comprehensive scheme of highly detailed family day care regulations" that was enacted by the Legislature pursuant to §390.<sup>9</sup> Those regulations required, among other things: that the day care licensee undergo a character evaluation as well as an evaluation of his or her fitness to care for children; that the day care premises be clean and sanitary as well as "safe and suitable" for children; that the licensee must abide by stated procedures for the admission of children; and that standards regarding the health, diet, and activities of the children must be maintained. The court further held that, although the Social Services Law required that the day care facility comply with local fire, health, and safety regulations, this only evidenced the Legislature's establishment of an adequate means of insuring that safety and health concerns would be met, and was not an indication that localities could wield separate and conflicting control. The court went on to find the Town of Clarkstown's law to be in direct conflict with state law and regulations in several respects, including the number of children that could be accommodated in a day care home, the type of residence which could lawfully be used for the purpose, the minimum amount of floor space to be allocated per child, and the required number of off-street parking spaces to be provided. The town's additional regulations in these areas, said the court, had "the effect, if not the design, of undermining the development of home day care services in the Town".

Effective in July of 1991, the State Legislature enacted a sweeping revision of §390<sup>10</sup>. In that revision, the Legislature separated the old category of "group family day care" into two new categories. A "group family day care home" would now be a home providing day care lasting more than three hours per day for seven to ten children, of whom up to four could be under two years of age, or for up to 12 children if all were over two years of age--again with the proviso that two school-age children could be added to the group if they were cared for only during non-school hours. A new category, "family day care home", was created. This would be a home wherein care is provided for more than three hours per day for only three to six children. A proviso was added allowing a seventh or eighth child, so long as no more than six of the children were less than school age and the school age children were cared for only during non-school hours. While a "group family day care home" was required to obtain a state license to operate, a "family day care home" was required only to register with the Department of Social Services and to otherwise comply with that agency's rules. The law retained the protection from local zoning regulations for single-family and certain multi-family dwelling units, but the protection continued to apply only to "group family day care" homes<sup>11</sup>.

Local governments retain a limited measure of control over "family day care" and "group family day care". This control exists chiefly in the realm of enforcement of fire, building, and health regulations. In February of 1997, a state-licensed day care provider on Long Island was cited for illegally using a cellar as "habitable space" to provide day care services. The provider apparently had been granted her state license incorrectly, in that §390 required compliance with all provisions of the State Uniform Fire Prevention and Building Code. Under the Uniform Code, however, a space meeting the definition of a "cellar" could not lawfully be used as habitable space. While she did not dispute the violation, nonetheless the licensee asserted a claim that her state day care license preempted the Village of Valley Stream from enforcing the Code against her. The village justice court found her assertions to be without merit. While the village was preempted from enforcing laws and regulations of its own which would conflict with state requirements, §390 clearly allowed local municipalities to enforce applicable provisions of the Uniform Code and to conduct inspections necessary to carry out such enforcement.<sup>12</sup>



Effective in January of 1998, the State Legislature amended §390 once again.<sup>13</sup> In addition to removing the limit of four children who could be under two years of age in a “group family day care home” and making several technical changes, the Legislature corrected what may have been an oversight in Chapter 750 of 1990. It extended the law’s protection from prohibitory local zoning regulations to the owners of single-family and certain multi-family dwelling units used for the provision of “family day care”.

While the statutes now provide clear protection from local zoning, no mention is made of private covenants that may restrict day care activities. In May, 1998, the Appellate Division dealt with this issue in *Quinones v. Board of Managers of Regalwalk Condominium #14*. The owner of a condominium unit on Staten Island, who operated a licensed group family day care home within the unit, commenced an action for a declaratory judgment and sought a preliminary injunction against the condominium’s board of managers. The board of managers was seeking to enforce a provision of the condominium’s declaration, which it interpreted as prohibiting the commercial operation of a unit for day care. While the court did not invalidate the board’s judgment in so interpreting the declaration, it held that the preemption contained in §390, in favor of the owners of single-family units wherein day care is operated, “should be read to encompass the broader proposition that private parties cannot prohibit, through a restrictive use covenant, the operation of . . . a group family day care home.”

The court relied on principles it had established in its decision in *Crane Neck Association v. New York City/Long Island County Services Group*.<sup>15</sup> In *Crane Neck*, the Court of Appeals had held that a restrictive covenant could not be used to prohibit the use of a single-family home for the housing of retarded persons, even though no express preemption appeared in any statute. The Court held that the “covenant [could not] be equitably enforced because to do so would contravene a long-standing public policy favoring the establishment of such residences for the mentally disabled.” That public policy, said the Court, was expressed in Mental Hygiene Law (MHL) § 41.34, which had been enacted to facilitate the site-selection of community residences for mentally retarded persons, and which set forth a preemption of local zoning regulations similar to that of Social Services Law §390. While MHL § 41.34 did not expressly preempt private covenants, “[p]rivate covenants restricting the use of property to single-family dwellings pose the same deterrent to the effective implementation of the state policy as the local laws and ordinances that had actually been the subject of [several] legal challenges.” The Court reasoned that the Legislature did not intend to remove the impediment posed by restrictive zoning regulations yet leave intact the impediments posed by private covenants. “Similarly,” said the Appellate Division in *Quinones*, “we must ‘construe the act in question so as to suppress the evil and advance the remedy’.” Accordingly, the court found that Social Services Law §390 preempts restrictive covenants against group family day care in condominium units.

In a 2004 case, the Civil Court of the City of New York held that it was lawful for a tenant in a multifamily dwelling to operate as a state-registered family day care provider. The landlord had argued that such operation was a “child day care center”--which under Social Services Law §390(13) would not enjoy the residential protections of §390(12)--and was being operated in violation of the tenant’s lease. Alternatively, the landlord argued that, even if the operation was subject to the protections of §390, it was precluded under §390(12)(b) from being located above the ground floor in a non-fireproof multiple dwelling. The court held the operation to be a “family day care home”, not a “child day care center”, thereby affording the tenant the protection of §390(12). The court further held the premises to be in compliance with all New York City Fire Code provisions. The landlord’s §390(12)(b) argument thus failed, in that §390(12)(b) only sets forth a preclusion against municipal regulations involving ground-floor apartments, and does not itself prohibit day care above the ground floor.<sup>16</sup>

Most recently, the law has been amended to prohibit local assessing units from considering the fact that a parcel is used or registered as a “family day care home” in its assessment of the value of the parcel.<sup>17</sup>

### ***Advice to Local Communities***

A number of local laws have been reviewed which regulate the siting of day care and group family day care homes. Many existing local laws would not survive a court challenge brought on the basis of *People v. Clarkstown*. They include requirements for minimum lot size, minimum floor-space per child, off-street parking, and off-street pickup/drop-off areas. One local law restricts the use of outdoor play areas after 5:00 P.M. All of such requirements and restrictions would conflict with state law and regulations. Municipal planners would be well-advised to scrutinize their comprehensive plans and existing laws and regulations. Comprehensive plans should recognize the need for adequate provision of day care services in residential units, and identify areas of the municipality appropriate to such use. Zoning laws should follow suit. While a special use permit or site plan review procedure has never been ruled impermissible by the courts, it is clear that any resulting disapproval, or conditional approval, made on the basis of requirements which are at odds with state law and regulations, will be at legal risk.

An advisable procedure for local approval of family day care and group family day care in a private dwelling should require compliance with all state laws and regulations that relate to licensing and adequacy of the facility<sup>18</sup>, but should not impose local requirements beyond those applicable to the underlying residential use. It bears remembering that local communities retain full jurisdiction to enforce the New York State Uniform Fire Prevention and Building Code in all day care facilities.

### ***Conclusion***

The regulation of day care is by now a matter of extensive state involvement. A day care provider must, depending on category, either be state-licensed or state-registered. In addition, the owners of single-family and multi-family dwellings have the right--with allowable local limitations on use of the latter depending on fireproofing--to provide “group family day care” and “family day care” (as defined) within their dwelling. There is no similar statutory protection for the owners of “child day care centers” or for the providers of “school age child care”. These other, defined categories of child care, may require either licensing by, or in some cases merely registration with, the State. Facilities falling into these latter categories are, at present, fully subject to local zoning control. It remains to be seen how the courts will treat a future challenge to the assertion of such control, in view of their prior recognition of the Legislature’s policy.

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### Endnotes

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<sup>1</sup>Laws of 1942, Chapter 164. Today, there are 15,978 registered “family day care homes” and 3,614 licensed “group family day care homes”. In addition, there are 3,736 licensed “day care centers” caring for seven or more children, and 2,266 registered homes providing “school age day care”. The latter two categories of day care are not accorded protection from local land use regulation, and are not the subject of this article.

<sup>2</sup>*Diament v. Isaacs*, 24 Misc.2d 1026, 209 N.Y.S.2d 406 (1960).

<sup>3</sup>Laws of 1964, Chapter 440.

<sup>4</sup> 63 Misc.2d 978, 314 N.Y.S.2d 66 (Sup. Ct., Nassau Co., 1970)

<sup>5</sup>133 Misc. 2d 771, 508 N.Y.S.2d 138 (Dist. Ct., Nassau Co., 1986).

<sup>6</sup> Laws of 1986, Chapter 875 §4.

<sup>7</sup>160 AD 2d 17, 559 N.Y.S.2d 736 (2nd Dept., 1990).

<sup>8</sup> Chiefly, *Jancyn Mfg. Co. v. County of Suffolk*, 71 N.Y.2d 91, 524 N.Y.S.2d 8, 518 N.E.2d 903 (1987).

<sup>9</sup> 18 NYCRR Part 417.

<sup>10</sup> Laws of 1990, Chapter 750 §1.

<sup>11</sup> Laws of 1990, Chapter 750 §2. See also NY Atty. Gen. Op. No. F 97-6.

<sup>12</sup> *People v. Nicosia*, 171 Misc. 2d 915, 656 N.Y.S.2d 123 (Justice Ct., Vil. of Valley Stream, 1997).

<sup>13</sup> Laws of 1997, Chapter 587.

<sup>14</sup> 242 A.D.2d 52, 673 N.Y.S.2d 450 (2nd Dept., 1998).

<sup>15</sup> 61 N.Y.2d 154, 472 N.Y.S.2d 901, 460 NE 2d 1336 (1984).

<sup>16</sup> *Carroll Street Properties v. Puente*, 4 Misc.3d 896, 781 N.Y.S.2d 185 (2004).

<sup>17</sup> Soc. Svcs. L. §390(12)(c).

<sup>18</sup> 18 NYCRR Parts 416 (Group Family Day Care) and 417 (Family Day Care).

## Environmental Conservation Law

### Article 23

#### Title 27- NEW YORK STATE MINED LAND RECLAMATION LAW

##### § 23-2711. Permits.

1. After September first, nineteen hundred ninety-one, any person who mines or proposes to mine from each mine site more than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months or who mines or proposes to mine over one hundred cubic yards of minerals from or adjacent to any body of water not subject to the jurisdiction of article fifteen of this chapter or to the public lands law shall not engage in such mining unless a permit for such mining operation has been obtained from the department. A separate permit shall be obtained for each mine site.

2. Applications for permits may be submitted for annual terms not to exceed five years. A complete application for a new mining permit shall contain the following:

- (a) completed application forms;
- (b) a mined land-use plan;
- (c) a statement by the applicant that mining is not prohibited at that location; and
- (d) such additional information as the department may require.

3. Upon receipt of a complete application for a mining permit, for a property not previously permitted pursuant to this title, a notice shall be sent by the department, by certified mail, to the chief administrative officer of the political subdivision in which the proposed mine is to be located (hereafter, "local government"). Such notice will be accompanied by copies of all documents which comprise the complete application and shall state whether the application is a major project or a minor project as described in article seventy of this chapter.

(a) The chief administrative officer may make a determination, and notify the department and applicant, in regard to:

- (i) appropriate setbacks from property boundaries or public thoroughfare rights-of-way,
- (ii) manmade or natural barriers designed to restrict access if needed, and, if affirmative, the type, length, height and location thereof,
- (iii) the control of dust,
- (iv) hours of operation, and
- (v) whether mining is prohibited at that location.

Any determination made by a local government hereunder shall be accompanied by supporting documentation justifying the particular determinations on an individual basis. The chief administrative officer must provide any determinations, notices and supporting documents according to the following schedule:

- (i) within thirty days after receipt for a major project,
- (ii) within thirty days after receipt for a minor project.

(b) If the department finds that the determinations made by the local government pursuant to paragraph (a) of this subdivision are reasonable and necessary, the department shall incorporate these into the permit, if one is issued. If the department does not agree that the determinations are justifiable, then the department shall provide a written statement to the local government and the applicant, as to the reason or reasons why the whole or a part of any of the determinations was not incorporated.

(c) A proposed mine of five acres or greater total acreage, regardless of length of the mining period, shall be a major project. The department shall, by regulation, provide a minimum thirty day public comment period on all permit applications for mined land reclamation permits classified as major projects.

4. Upon approval of the application by the department and receipt of financial security as provided in section 23-2715 of this title, a permit shall be issued by the department. Upon issuance of a permit by the department, the department shall forward a copy thereof by certified mail, to the chief executive officer of the county, town, village, or city in which the mining operation is located. The department may include in permits such conditions as may be required to achieve the purposes of this title.

5. A permit issued pursuant to this title or a certified copy thereof, must be publicly displayed by the permittee at the mine and must at all times be visible, legible, and protected from the elements.

6. The department may suspend or revoke a permit to mine for repeated or willful violation of any of the terms of the permit or provisions of this title or for repeated or willful deviation from those descriptions contained in the mined land-use plan. The department may refuse to renew a permit upon a finding that the permittee is in repeated or willful violation of any of the terms of the permit, this title or any rule, regulation, standard, or condition promulgated thereto.

7. Nothing in this title shall be construed as exempting any person from the provisions of any other law or regulation not otherwise superseded by this title.

8. Notwithstanding any other provision of law, counties, cities, towns and villages shall be exempted from the fees for the permit, application, amendment and renewal required by this article.

9. Counties, cities, towns and villages shall not be required to obtain a permit if such county, city, town or village mines or proposes to mine from any mine site less than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months and which does not require a permit pursuant to title five of article fifteen of this chapter.

10. The applicant, permittee or, in the event no application has been made or permit issued, the person engaged in mining shall have the primary obligation to comply with the provisions of this title as well as the conditions of any permit issued thereunder.

11. Permits issued pursuant to this title shall be renewable. A complete application for renewal shall contain the following:

(a) completed application forms;

(b) an updated mining plan map consistent with paragraph (a) of subdivision one of section 23-2713 of this title and including an identification of the area to be mined during the proposed permit term; (c) a description of any changes to the mined land-use plan; and

(d) an identification of reclamation accomplished during the existing permit term.

12. The procedure for transfer of a permit issued pursuant to this title is the procedure for permit modification pursuant to article seventy of this chapter.

12-a. (a) Notwithstanding any provision of this section to the contrary, any person who engages in or proposes to engage in bluestone mining exploration shall not commence such exploration unless a written authorization for such exploration has been obtained from the department. The department may grant an

authorization for bluestone mining exploration for a period of at least one hundred eighty days and not to exceed one year where the land affected by mining will not exceed one acre, and is not adjacent to any body of water. Bluestone to be removed from the site may not exceed five hundred tons in twelve successive calendar months and any overburden shall remain on the one acre site at all times. As used in this subdivision, the term "bluestone" means quartz/feldspathic sandstone of Devonian age, which is easily separated along bedding planes.

(b) Only persons with five or fewer employees shall be eligible to apply for an authorization for bluestone mining exploration, provided, however that a small business shall be eligible to apply on behalf of such a person. A person may possess no more than five authorizations for bluestone mining exploration at any one time, and no such authorizations shall be for adjacent sites. As used in this paragraph, "small business" means any business which is resident in this state, independently owned and operated, not dominant in its field, and employing not more than one hundred individuals.

(c) An application for authorization must be submitted on a form prescribed by the department at least forty-five days before exploration and removal of bluestone is expected to commence. The requirements of such application shall include, but not be limited to, a description of the proposed activity, a map showing the area to be affected by mining, with the location of the one acre site on which mining activities are proposed and a statement that such mining activities conform with local zoning, copies of any local permits, and measures to control erosion of sediment and prevent contamination of groundwater or adverse impacts to aquifers. Upon receipt of a complete application for bluestone mining exploration authorization, for a property not previously authorized pursuant to this subdivision, a notice shall be sent by the department, by certified mail, to the chief administrative officer of the political subdivision in which the proposed bluestone mine is to be located. Such notice shall be accompanied by copies of all documents which comprise the complete application. The chief administrative officer may make a determination within thirty days after receipt accompanied by supporting documentation justifying the particular determinations on an individual basis pursuant to subparagraphs (i), (ii), (iii), (iv) and (v) of paragraph a of subdivision three of this section.

(d) An authorization for bluestone mining exploration issued pursuant to this subdivision must be publicly displayed by the holder at the one acre site and must at all times be visible, legible and protected from the elements.

(e) The person engaged in bluestone mining exploration shall complete reclamation, in accordance with requirements set forth by the department, no later than one year from the date of authorization by the department unless the person engaged in mining obtains a renewal of the authorization or a permit pursuant to this title. An authorization issued pursuant to this section may be renewed for an additional one year term upon application to the department at least thirty days prior to the expiration of the authorization. The total authorization period shall not exceed two years. Before the department may issue a bluestone mining exploration authorization, the applicant shall furnish acceptable financial security. Department review of acceptable financial security shall be governed by the provisions set forth in section 23-2715 of this title and the regulations promulgated pursuant to such section. There shall be no fee for such authorization.

(f) On or before March fifteenth, two thousand eight, the department shall submit a report to the governor and legislature regarding bluestone mining exploration in the state. Such report shall list the sites, including locations of sites, and detrimental environmental impacts, if any, an assessment as to the degree to which the adoption of this subdivision benefits the environment, as well as an assessment of the enforcement activities undertaken against individuals authorized pursuant to this subdivision.

13. The rules and regulations adopted by the department to implement this title and the provisions of article seventy and rules and regulations adopted thereunder shall govern permit applications, renewals, modifications, suspensions and revocations under this title.

## **Environmental Conservation Law**

### **Article 23-Title 27- NEW YORK STATE MINED LAND RECLAMATION LAW**

#### **§ 23-2703. Declaration of policy.**

1. The legislature hereby declares that it is the policy of this state to foster and encourage the development of an economically sound and stable mining industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices. The legislature further declares it to be the policy of this state to provide for the management and planning for the use of these non-renewable natural resources and to provide, in conjunction with such mining operations, for reclamation of affected lands; to encourage productive use including but not restricted to the planting of forests, the planting of crops for harvest, the seeding of grass and legumes for grazing purposes, the protection and enhancement of wildlife and aquatic resources, the establishment of recreational, home, commercial, and industrial sites; to provide for the conservation, development, utilization, management and appropriate use of all the natural resources of such areas for compatible multiple purposes; to prevent pollution; to protect and perpetuate the taxable value of property; to protect the health, safety and general welfare of the people, as well as the natural beauty and aesthetic values in the affected areas of the state.

2. For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from:

a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or

b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts. Where mining is designated a permissible use in a zoning district and allowed by special use permit, conditions placed on such special use permits shall be limited to the following:

(i) ingress and egress to public thoroughfares controlled by the local government;

(ii) routing of mineral transport vehicles on roads controlled by the local government;

(iii) requirements and conditions as specified in the permit issued by the department under this title concerning setback from property boundaries and public thoroughfare rights-of-way natural or man-made barriers to restrict access, if required, dust control and hours of operation, when such requirements and conditions are established pursuant to subdivision three of section 23-2711 of this title;

(iv) enforcement of reclamation requirements contained in mined land reclamation permits issued by the state; or c. enacting or enforcing local laws or ordinances regulating mining or the reclamation of mines not required to be permitted by the state.

3. No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draws its primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined.