



**Division of Local
Government Services**

Hot Button Land Uses

A Division of the New York Department of State

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



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)*

Inform and involve

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



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

Community opposition



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

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

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

Examples

Barn special events & activities



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

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

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?

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



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”

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

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.



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

Mining

Regulate with zoning:

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

Regulate without zoning:

- Site Plan Review



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



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)

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

Dish antenna (1m or less)

Over-the Air Reception Devices (OTARD) Rule

Municipality cannot:

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

Municipality can:

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



www.fcc.gov/mb/facts/otard.html

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!**

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

Solar systems

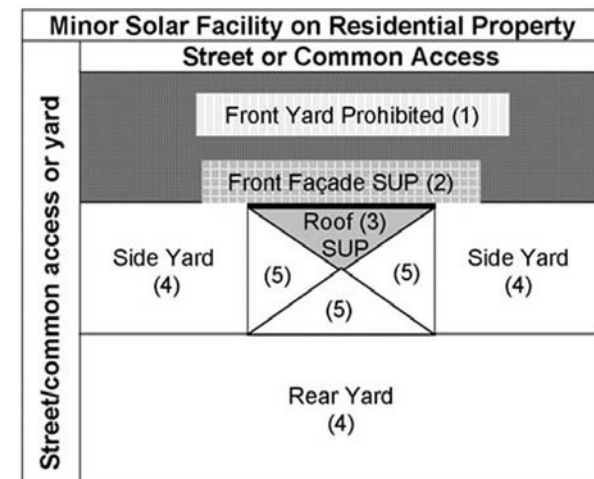
- Scale
- Solar access
- Comprehensive Plan
 - Policy statement
 - Resource map
- Potential adverse impacts
 - Glare
 - Neighborhood character



Residential/small solar

Regulations & review

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



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



Commercial/ industrial solar

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



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



Pet facilities & uses

Commercial

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

Non-commercial

- Adoption centers
- Pounds
- Shelters
- Private pet ownership

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

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

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

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?



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

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



Large-scale retail

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



Short-term rental housing

Pros

- Supplemental income to owners
- Discounted lodging and interesting tourist experience for guests

Cons

- Commercial use in residential district
- Transient guests
- Excessive noise
- Increased traffic
- Unfair competition to hotels
- Lost lodging tax revenue
- Inflated housing costs

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



Quantitative Restrictions

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



Operational Restrictions

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



Adult uses

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



Billboards

- Can't regulate content
 - 1st 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



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



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

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

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



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

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)



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)

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

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

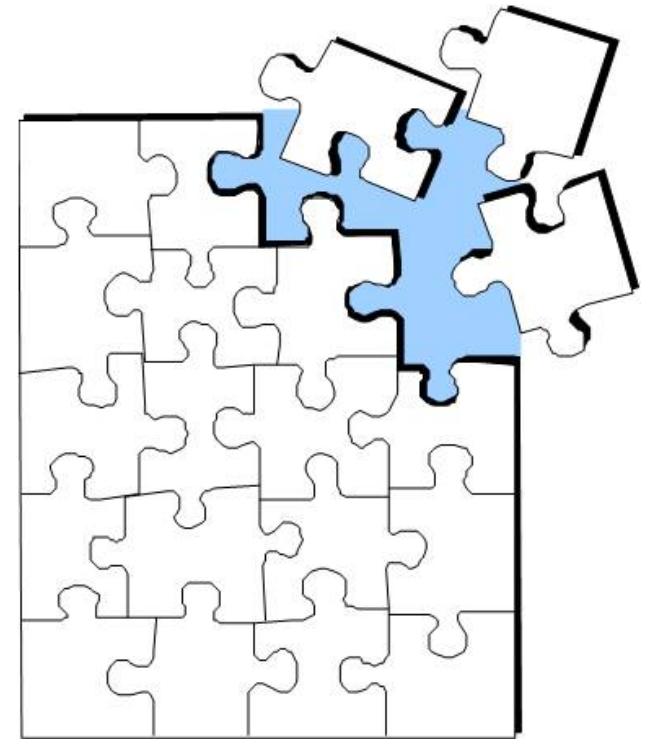
- More costs relative to station with same total capacity
- Repeated siting processes
- Less conducive to barge or rail operations (increased traffic impacts)
- Impacts spread around neighborhood
- Reduced travel times means lower overall system costs
- Backups for scheduled/emergency shutdowns.

Defending Your Decisions

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



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

NYS Department of State Local Government Division

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