



Division of Local
Government Services

Hot Button Land Uses

In the Capital District

A Division of the New York Department of State

2

Can a use be prohibited?

Exclusionary Zoning

- Regulations that singly or in concert tend to exclude low or moderate income housing municipal-wide

Examples

- 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 & involve public

- 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 on Rural Resources (2008)

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



NYS Liquor Authority (SLA)

License issued by SLA may or may not be considered a “farm operation” for purposes of AML §305-a protection



ABC 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 aircraft manned or unmanned need FAA approval
- Commercial use currently regulated on a case-by-case basis
- State and Local Laws attempting to regulate aircraft from the FAA 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.
- Small drone must be less than 55 lbs.
- Must be within operator's eyesight.
- 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
(*Cellular Telephone Co. v. Rosenberg* (NYS Court of Appeals, 1993))
- Compelling reasons to grant use variance:
 - Necessary to provide safe & adequate service
 - Significant gaps in coverage if placed on alternative sites



Telecommunications Act of 1996

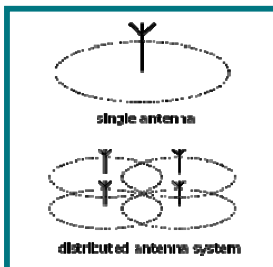
MUNICIPALITY MUST NOT

- 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 others

Section 6409



Middle Class Tax Relief & Job Creation Act of 2012

- Applies to support structures and to transmission equipment used with any Commission-licensed or authorized wireless transmission
- Limits local control of co-location and replacement of equipment on existing towers
- Good news: increased use of DAS (distributed antenna system) technology

A diagram contrasting a single antenna configuration with DAS

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

Food trucks



Food trucks used to serve construction sites, immigrant neighborhoods, and special events.

Now they appear everywhere, at all times of the day.

PROS

- Upstarts for businesses trying to become brick and mortar
- Some operate after brick and mortar close at night
- More consumer choices

CONS

- Pedestrian congestion
- Permit fees vary greatly regionally
- Some property owners pay sidewalk maintenance tax

Street Vendors



4 Types: Food, General, Disabled Veteran, and First Amendment

CONSIDER REGULATING

- Vending districts
- Size of cart or table
- Distance from curb (don't crowd sidewalks), business entrance, crosswalk, bus stop, restaurant, etc.
- Where carts go afterhours
- Increase permits for fresh fruits/veggies

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

Doggie day care

Consider regulating:

- Number of dogs per day, no overnights
- Potential impacts
 - Noise
 - Parking (staff, spaces per dog, drop off area)



DOG DAY CARE FACILITY

“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.”

Kennels: commercial & noncommercial

Definitions are important

- **Commercial:**
“ ___ or more dogs/cats over 4 months old, kept for any commercial purpose: boarding, breeding, grooming, letting for hire, training for a fee or selling.”
- **Noncommercial:**
Personal use; animal shelters, vet hospitals

Consider regulating:

- ✓ number of animals
- ✓ Minimum lot size
- ✓ Setbacks from nearest residence
- ✓ hours dogs can outside on run
- ✓ Sound barriers
- ✓ Emergency response plan

Note: Sale or exchange of 1 litter in 12 months is not a kennel operation



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 retail shopping district
- Zoning Tools:
 - Exclude residential on first floor
 - Minimum percentage street-level retail
 - SUP for nonretail
 - Exclude all or some non-sales tax generating uses
 - Minimum separation between non-sales tax generating uses
 - Pedestrian-Oriented Shopping overlay

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

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



Short-term rental housing

Pros

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

Cons

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



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

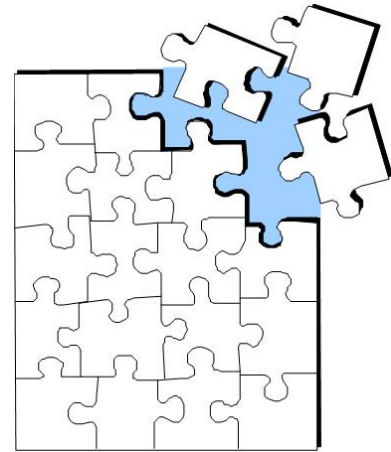


Defending Your Decisions

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

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