



Department
of State

Local Undesirable Land Use Regulation

A Division of New York Department of State

2

Uses most don't want next door...

- Allowed or not allowed in zoning code
- Zoning provisions
 - "Uses not listed as allowed are prohibited"
- Special status
 - Court decisions
 - State or federal law



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3

Acronyms

- LULU Locally undesirable land use
- NIMBY Not in my backyard
- NIMEY Not in my election year
- NIMTOO Not in my term of office
- NOPE Not on planet Earth
- BANANA Build absolutely nothing anywhere near anything
- CAVEs Citizens against virtually everything


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4

Potentially controversial uses

- Mining & gas drilling
- Wind turbines
- Telecommunications facilities
- Adult uses
- Billboards & signs
- Manufactured housing
- Agri-tourism/agri-tainment

- Group homes
- "Monster" houses
- Landfills
- Home day care
- Backyard chickens
- Non-retail storefronts
- Large-scale retail



5


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)



6

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





- "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)



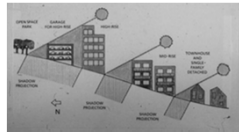
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Residential/small solar

- 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

Regulations & review

- Special Use Permit
- Industrial & agricultural zones
- Adverse impacts
- Lot size
- Screening
- Safety
- Decommissioning



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



Solid waste facilities

Includes storage, transfer, disposal, treatment or interment:

- Landfills
- Open dumps
- 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:
 - 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
 - Must originate & be disposed of on properties under same ownership or control
 - 6 NYCRR Part 360 – 7.1(b)



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

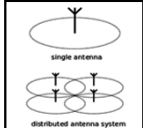
- Prohibit personal wireless service
- Unreasonably discriminate among providers
- Regulate based on health effects from RF emissions

MUNICIPALITY MUST

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



Section 6409



A diagram contrasting a single antenna configuration with DAS

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

Dish antenna (1m or less)

Over-the Air Reception Devices (OTARD) Rule

Municipality cannot:

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

Municipality can:

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



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

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)
- Can 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



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
 - Limit to certain districts
 - Lot size & setbacks
 - Special Use Permit
- Site Plan Review
- Cannot exclude completely
 - *Town of Pompey v. Parker*
- Cannot exclude based on age of home



Manufactured homes

- Amend zoning or adopt local law to address farm worker housing
- Examples of local law provisions:
 - Show proof of continuing employment on the farm
 - Do not allow the creation of new lots
 - Do not allow permanent additions to the home

Group homes for the disabled

- Will facility result in a concentration of similar homes to the extent that community character is altered?
- "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)



Religious Land Use & Institutionalized Persons Act (RLUIPA)

- 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

Doggie day care

- Often not addressed in zoning
- Allow in more districts
- Define
 - How many dogs per day, no overnights
- Address 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.”

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

Defending Your Decisions

Inform & involve public

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



Community opposition

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



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

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



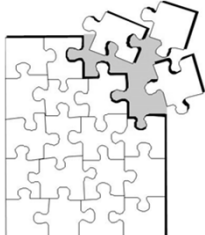
Remedy ignorance with non-confrontation

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

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



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