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**INTERMUNICIPAL COOPERATION IN LAND  
USE PLANNING**

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# **INTERMUNICIPAL COOPERATION IN LAND USE PLANNING**

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## INTERMUNICIPAL COOPERATION IN LAND USE PLANNING

Patricia E. Salkin and Michael Donohue

*With increased acceptance of the fact that the impacts of local land use decisions know no political boundaries, interest continues to grow in exploring and implementing intermunicipal agreements to accomplish important land use planning and regulatory controls across the State. In addition, the 2005-2006 New York State Budget established a shared services incentive grant program funded with \$2.7 million that makes available up to \$100,000 per cooperating municipality for any number of potential cooperative ventures, including those related to planning, zoning, and resource protection.<sup>1</sup> This article revisits the laws outlining the broad powers given to local governments to enter into these joint ventures or partnerships. In addition, the article points to localities and regions where these arrangements have been successful, and it offers practitioners some ideas for drafting effective intermunicipal agreements.*

## Background

The authority to engage in zoning and other land use controls rests with the city, town, and village governments.<sup>2</sup> While the exercise of this discretion is purely local in nature, a growing number of jurisdictions are experimenting with cooperative efforts in land use planning to accomplish a variety of goals.

There are several reasons why local legislative bodies, planning boards and zoning boards might wish to consider cooperative efforts, including:

- Potential cost savings with shared enforcement efforts;

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- *More efficient use of volunteers with joint or intermunicipal boards and commissions;*
- *Added cost savings through shared use of staff and consultants;*
- *Maximized educational opportunities with joint training sessions;*
- *Greater coordination and consistency with regional or county partnerships; and*
- *Rational resource protection of economic development efforts reflecting extra-municipal boundaries.*

Contemporary land use decision-making must take into account regional awareness and regional needs given the nature of market forces and the geographic distribution of resources (e.g., a single water supply aquifer situated within the boundaries of three towns). Voluntary intermunicipal cooperative efforts with respect to land use planning and zoning serve the long term interests of all neighboring jurisdictions in ensuring effective resource protection and in meeting a variety of community challenges including affordable housing and economic development.

### The Legal Framework

New York statutes provide flexibility for municipalities interested in cooperative efforts in land use planning, zoning and other ventures.<sup>3</sup> Although a number of special laws set up a framework for voluntary regional planning through the establishment of a commission or council (e.g., the Tug Hill Commission<sup>4</sup> and the Hudson River Valley Greenway Communities Council<sup>5</sup>), the purpose of this article is to detail other legislative enactments which allow two or more localities anywhere in the State to voluntarily cooperate on their own initiative.

Article 5-g of the General Municipal Law grants to municipalities broad authorization to cooperate in the joint delivery of services and programs. Under Article 5-g, two or more municipalities may enter into a contract agreement with each other to provide cooperative services. The term "services" is broadly construed and can generally be classified as anything that each of the municipalities would legally be allowed to accomplish independent of each other.<sup>6</sup> The State Comptroller has issued several opinions with respect to joint planning and zoning arrangements under this section, each time reiterating the soundness of the agreement.

#### **The State Comptroller has opined:**

*A town and village within that town may establish a joint planning board, and that board may be given the authority for subdivision plat approval. (25 Op. State Compt. 12, 1969)*

*A town and village may agree to plan jointly in an urban planning assistance project and may appropriate costs therefore. (23 Op. State Compt. 505, 1969)*

*A town and a village may establish a joint "tree trust" to accept gifts of money to be used for planting and maintaining trees on public property (Op. State Compt. 80-768)*

In 1993, the New York State Legislature specifically clarified how municipalities might cooperate with respect to land use planning.<sup>7</sup> The provisions clearly state that municipalities may join together to:

- *Create a comprehensive land use plan as well as land use regulations, which may then be adopted by each participating municipality independently.*<sup>8</sup> [This enables jurisdictions with limited resources to jointly contract with a professional planner to assist them in developing a comprehensive plan and land use regulations.]
- *Contract with each other to administer and enforce their land use regulations.*<sup>9</sup> [Often municipalities do not have the resources to independently administer and enforce their land use regulations. Contracting with another municipality for the services of a certified building inspector allows towns with limited fiscal resources the opportunity to have their land use regulations vigorously enforced. It also enables localities to properly administer and enforce the State mandated Uniform Building and Fire Code.]

The Town of Denmark and the Villages of Castorland and Capenhagen currently utilize one Cooperative Enforcement Officer who oversees the administration and enforcement of the land use ordinances for all three municipalities.

- *Create an intermunicipal overlay district.*<sup>10</sup> [This permits communities to cooperate with each other to protect, enhance or develop a shared resource.]
- *Cooperate with each other by consolidating their planning and zoning boards.*<sup>11</sup> [This facilitates the opportunity to manage growth and development while taking into account the effects of land use decisions on neighboring jurisdictions and regional resources.]

In 1993 the Town and Village of Nunda entered into an agreement to consolidate their planning and zoning boards to create joint boards with members from both communities.

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Stopping short of an actual consolidated board, recently the towns of Greenburgh and Elmsford approved intermunicipal agreements to allow them to have non-voting representatives participate on each others' Planning Boards.<sup>12</sup>

In addition to these described traditional approaches to formal contractual cooperative arrangements, New York law allows for sharing of information and technical assistance with respect to planning and zoning in a number of ways.

The PLANNING ACCORD FOR TUG HILL is a guide for what participants want their community to be in the future. It is intended to serve as a statement of shared goals for each of the member towns to use in shaping their individual town plans, land use controls, and other decisions that will influence what our communities will be. The ACCORD was drafted under the authorization contained in Article 5-G of New York State's General Municipal Law.

The intermunicipal agreement, signed by all member towns, lists among its objectives: 1) creating a plan (this ACCORD) for our area, 2) retaining its rural character through home rule, 3) providing technical and project review assistance as requested to member towns when development is proposed in designated special areas, and 4) providing project review services to member towns when projects are proposed a) in town-designated special areas on or near town boundaries, or b) that are of Cooperative Tug Hill Council area wide impact.

All members of the Cooperative Tug Hill Council have signed the intermunicipal agreement and the PLANNING ACCORD FOR TUG HILL. They outline general goals for their work together to protect the area.

Based on these goals, each town has agreed to reexamine its land use controls and the other measures it takes to shape the future of its lands. In particular, each town will identify those special areas it feels are most important to the character of their town and our multi-town area. An area wide perspective on what natural resource and cultural areas are most important to our area are contained in this document. The Cooperative Tug Hill Council will supply technical assistance in this town-by-town effort.

Once all towns have agreed to the PLANNING ACCORD FOR TUG HILL, and as towns one-by-one adopt special area maps, the Cooperative Tug Hill Council will begin to provide assistance to towns in the review of major projects proposed for special areas and projects of area wide significance.<sup>13</sup>

#### **East Putman/Dutchess Planning Alliance (EPDPA)**

In 2001 three towns and three villages in two different counties came together to achieve economic sustainability and environmental sensitivity in their region. The alliance began when each mu-

nicipality passed a resolution agreeing to participate in an intermunicipal cooperative agreement and address common concerns over water resource quality and the aesthetic and operational capacity of a local road. EPDPA is governed by an executive board that includes a planning board member and a town environmental planner.

#### **Planning Federations**

The General Municipal Law authorizes municipalities within a county to band together to form a voluntary association to promote community planning.<sup>14</sup> Such an association can: act as a clearinghouse for planning information; assist localities by providing technical assistance; serve as a convenor of regular training programs and seminars; and facilitate the exchange of information and dialogue between municipalities within the county.<sup>15</sup> The organization can be loosely coordinated, with responsibilities for yearly activities rotating among member jurisdictions, or it can be a dues collecting entity which employs part-time or full-time staff.<sup>16</sup> Currently there are a number of planning federations in New York State including ones in Onondaga, Rockland, Suffolk and Westchester.<sup>17</sup>

#### **Regional Planning Councils**

The General Municipal Law also authorizes counties and towns to form regional planning councils.<sup>18</sup> These councils are authorized to conduct land use studies and develop a regional master plan that may be used by municipalities to assist them in creating local land use regulations in conformity with a regional view of land use issues. Nine regional planning councils currently exist within the State, encompassing fifty-two of the State's fifty-seven counties outside of New York City.<sup>19</sup> These councils are voluntarily funded by participating counties, and tend to be an excellent source of statistical and demographic information for member municipalities. In addition, many of the councils have become a significant source of critical geographic information data for participating municipalities.

#### **Interacting with the County**

The General Municipal Law provides that counties may establish county planning boards and planning departments.<sup>20</sup> These bodies are a significant resource to municipalities within the county, often providing advice and technical assistance with respect to issues and impacts that cross-over traditional political boundaries.

Although counties do not possess zoning authority, General Municipal Law § 239-c provides that counties may contract with municipalities to cooperate in intermunicipal land use planning. This means that the county planning department may participate in the administration of the municipal consolidated planning and zoning programs.

#### **Overlay Districts and County Assistance in Land Use Planning**

Many municipalities share common resources. For example, a scenic highway may run through more than one jurisdiction. Each municipality would have an interest in controlling development along the highway to

preserve the quality of this resource. Historic areas, vistas and watersheds are other examples of resources that may cross municipal boundary lines. Creating a joint overlay district encompassing the entire scenic highway allows each municipality the opportunity for meaningful input and shared decision-making about how land along the highway would be developed. Going further, a special planning board and zoning board, composed of representatives from each participating municipality, could have ultimate oversight of development in the overlay district.

The involved jurisdictions may opt to contract with the county to elicit assistance in managing the shared resource. For example, a county planning board could have oversight of the overlay district, thereby freeing the municipalities from the constraints of local politics and allowing cooperation that would ultimately enhance and preserve the municipalities' shared resource.

### Drafting Effective Intermunicipal Agreements

An intermunicipal agreement is a voluntary agreement that typically begins with informal discussions between representatives of neighboring jurisdictions. To begin more formally however, two or more municipalities may wish to consider forming a joint municipal survey committee to study and propose possible cooperative activities with respect to planning and zoning.<sup>21</sup> In 2003, the Office of the State Comptroller published a Local Government Management Guide on Intermunicipal Cooperation that offers a good toolkit of practical strategies for developing successful agreements. While this part of the process involves bringing community stakeholders together as well as local government officials, it is not likely to involve the municipal attorney. However, land use lawyers may be of assistance by providing key participants early on with a list of items to be negotiated as part of the agreement (see below).

In the land use context, one municipality may desire to contract for services from another municipality. For example, one jurisdiction may employ a full-time planner or a full-time zoning enforcement officer, but the staff may not have enough work to do consistently to justify a full-time position. At the same time, a jurisdiction nearby (whether or not adjacent) may have a need for the services of a planner or an enforcement officer on a part-time basis. These two municipalities may choose to negotiate a shared services arrangement through an intermunicipal agreement to share in the benefits of the particular human resource and at the same time apportion the costs of the positions. There is no required form for an intermunicipal agreement, and no required checklist of the items that must be addressed in a shared services agreement. Sometimes the cooperating bodies simply pass resolutions stating their intention to work together or to share a particular service, and the details are specified out in a formal contract. The following is a list of some of the items that should be agreed to in the context of the above example:

- Who will supervise the personnel and how will performance evaluations be conducted? There may be a point person from each of the cooperating entities involved with this.
- Who has authority to hire and fire the shared professional staff? Must all cooperating municipalities agree or can the will of one drive the decision (e.g., the municipality that uses the services of the individual 4 days per week as opposed to the municipality that uses the services only 1 day per week)?
- What is the desired work schedule for the professional staff (e.g., specify whether they are to work specific days and hours for designated municipalities and/or whether there is flexibility to assign this on a monthly basis to adjust schedules to meet current needs)?
- Who will issue paychecks for shared planning and zoning staff?
- How will payroll and other costs be allocated among cooperating jurisdictions? (In addition to payroll, taxes and benefits, what about costs associated with advertising for and recruiting new employees?)
- Will cooperating municipalities share in the cost of professional training? If so, will they share equally or proportionally?
- How long will the agreement be in effect for?
- May the agreement be terminated at the request of any party? If so, how many days notice is required? Should there be a time allotted for the non-terminating municipality to take [optional] corrective measures should this be the cause of a desired termination?
- Will the agreement be periodically reviewed?

In addition to shared services, municipalities may desire to collaborate on other types of land use related projects. For example, where two or more jurisdictions desire to cooperate to achieve a mutual resource preservation goal, the following are examples of the types of considerations that should be agreed to at the onset:

- Where a special council, committee, or task force is to be named, how many people will be appointed from each participating entity?
- Must there be a specific quorum or vote requirement (other than simple majority of either total membership or those present) to reach agreement on reports and recommendations?
- How will the work of the body be supported both in terms of staff and in terms of financial resources? What will each cooperating entity contribute? Who will be responsible for providing public notice of meetings and attending to other legal requirements?
- Where will the meetings take place? Will they rotate between the various jurisdictions?
- If a newly created entity is to be assigned a specific staff resource, some of the issues identified in the last example should be considered.
- What is the project or entity duration? Can it be renewed? If so, what actions must be taken to do so?
- Should there be any penalties for failure to cooperate as initially agreed?

By agreeing on these types of issues ahead of time, local governments can avoid unnecessary disagreements that may hinder future cooperative efforts.

### Adopting Intermunicipal Agreements

Any joint agreement entered into by municipalities must be approved by a majority of each municipality's governing body.<sup>22</sup> This approval is accomplished through the adoption of a resolution or local law authorizing participation in the agreement. Where the authority of any municipal corporation or district to individually perform any function or provide a service, activity, project or undertaking (or the financing thereof) contemplated by the agreement is subject to a public hearing, mandatory or permissive referendum, consents of governmental agencies or other requirements applicable to the making of contracts, then participation in the agreement is subject to these same conditions.<sup>23</sup> Where the agreement is adopted by local law, the local laws must be filed with the Secretary of State.<sup>24</sup>

#### Rockland Riverfront Community Council (RRCC)

In an effort to improve land use planning and development along the Hudson River and surrounding communities, leaders from eleven different municipalities along with the county of Rockland and the Palisades Interstate Park Commission signed an intermunicipal agreement on January 16, 2002. Working together the communities have passed a steep slope ordinance and are working on a waterfront revitalization plan. The RRCC has received funding from the larger Hudson River Valley Greenway Community Council, an organization founded by statute (Article 44 of the Environmental Conservation Law) in 1991. The Council provides technical assistance and grants to municipalities and nonprofit entities to protect and preserve the area's resources.

### Conclusion

Intermunicipal cooperation in land use planning and zoning is a valuable tool for municipalities in the development and implementation of critical community development programs. Resource constraints have made it increasingly difficult for many municipalities to contend with the growing complexities in the field of land use and environmental planning. Many rural communities lack both human resources and the fiscal resources necessary to administer and enforce land use regulations. Some communities lack even the resources necessary to create land use regulations. Other municipalities have realized that they cannot solve challenging environmental issues solely within the decisionmaking of individual jurisdictions. Through intermunicipal agreements, municipalities have the opportunity to overcome these obstacles, to interact with other municipalities, to exchange information and share resources, and ultimately to preserve and enhance quality of life.

### Suggested Resources

**Local Government Technical Series: Intergovernmental Cooperation**, New York State Department of State (1994). Available at:

[www.dos.state.ny.us/lgss/pdfs/intergovt.pdf](http://www.dos.state.ny.us/lgss/pdfs/intergovt.pdf)

**Intermunicipal Cooperation and Consolidation: Exploring Opportunities for Savings and Improved Service Delivery**, Office of the New York State Comptroller (2003). Available at:

[www.osc.state.ny.us/localgov/pubsresearch/cooperation1.pdf](http://www.osc.state.ny.us/localgov/pubsresearch/cooperation1.pdf)

**Regional Planning in NYS: A State Rich in National Models, Yet Weak in Overall State-wide Planning** Coordination, 13 Pace L.Rev. 505 (1993) Available at:

[www.governmentlaw.org/filesregional\\_planning\\_in\\_NYS.pdf](http://www.governmentlaw.org/filesregional_planning_in_NYS.pdf)

**Legal Process for Facilitating Consolidation and Cooperation Among Local Governments: Models from Other States**. Government Law Center (1990). Available at:

[www.governmentlaw.org/files/consol\\_coop\\_local\\_govt.pdf](http://www.governmentlaw.org/files/consol_coop_local_govt.pdf)

**Making Government Work: Intergovernmental Cooperation, Partnering and Consolidation in New York State**. State of New York Office of the Attorney General. (2003) Available at:

[www.oag.state.ny.us/press/reports/making\\_government\\_work.pdf](http://www.oag.state.ny.us/press/reports/making_government_work.pdf)

**Intermunicipal Cooperation Tools**. Pace Law School Land Use Law Center. See:

[www.pace.edu/LawSchool/landuseIntCoopTool.html](http://www.pace.edu/LawSchool/landuseIntCoopTool.html)

**Intermunicipal Agreements: The Metamorphosis of Home Rule** (Mary E. Mohnach) (1999) Available at:

[www.law.pace.edu/landuse/mohnach.html](http://www.law.pace.edu/landuse/mohnach.html)

**Intermunicipal Cooperation and Consolidation Activities in New York State: A Snapshot** (University at Albany, Intergovernmental Solutions Program, 2004). Available at:

[www.albany.edu/igsp/pdf/intermunicipal\\_cooperation.pdf](http://www.albany.edu/igsp/pdf/intermunicipal_cooperation.pdf)

**Developing Effective Regional Agreements (Issues & Opinions)**, National League of Cities, Washington, D.C. (1994).

## NOTES

1. See, <http://www.dos.state.ny.us/lgss/SMSI.html> (site visited March 2006).
2. See, N.Y. Gen. City Law § 20(24) (McKinney 2001); N.Y. Town Law § 261 (McKinney 1997); N.Y. Village Law § 7-700 (McKinney 1972).
3. See N.Y. Gen. Mun. Law § 119-u (McKinney 1995).
4. See N.Y. Exec. Law § 847-b (McKinney 1974).
5. N.Y. Evtl. Conserv. Law § 44-0107 (McKinney 1995).
6. N.Y. Gen. Mun. Law § 199-u(2)(c) (1995).
7. See N.Y. Gen. Mun. Law § 119-u (McKinney 1995); N.Y. Gen. City Law § 20-g (McKinney 1995); N.Y. Village Law § 7-741 (McKinney 1995); Town Law § 284 (McKinney 1995).
8. E.g., N.Y. Town § 284(4)(c) (McKinney 1995).
9. E.g., N.Y. Town § 284(4)(d) (McKinney 1995); See also Gen. Mun. Law § 99-c (McKinney 1956, Permitting municipalities to share building inspectors).
10. E.g., N.Y. Town § 284(4)(e) (McKinney 1995).
11. E.g., N.Y. Town § 284(4)(a) (McKinney 1995).
12. <http://www.greenburghny.com/Cit-e-Access/news/index.cfm?NID=1848&TID=10&jump2=0> (site visited March 2006).
13. <http://www.tughillcouncil.com/PlanningAccord.htm> (site visited March 2006)
14. See N.Y. Gen. Mun. Law § 239-g (McKinney 1995); City and Village Planning Commissions are authorized by Article 12-A of the General Municipal Law. N.Y. Gen. Mun. Law § 234 (1948). County Planning Boards and Regional Planning Councils are authorized by article 12-C of the General Municipal Law. N.Y. Gen. Mun. Law § 239-b et. seq.
15. See N.Y. Gen. Mun. Law § 239-g (McKinney 1995)
16. See N.Y. Gen. Mun. Law § 239-g (McKinney 1995).
17. Suffolk County Planning Federation, <http://www.co.suffolk.ny.us/webtemp3.cfm?dept=11&id=2221> (site visited March 2006); Westchester Municipal Planning Federation <http://www.westchestergov.com/planning/regionalplan/WMPF/WMPF.htm> (site visited March 2006); Rockland County Municipal Department, <http://www.co.rockland.ny.us/planning/landuse/planfed.htm> (site visited March 2006); Onondaga County Planning Agency, <http://www.ongov.net/Planning/> (site visited March 2006).
18. N.Y. Gen. Mun. Law § 119-n (McKinney 1991); see also Op. State Compt. 81-334; N.Y. Gen. Mun. Law § 239-1 (McKinney 1997).
19. Patricia E. Salkin, *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall State-wide Planning Coordination*. 13 Pace L. Rev 505, 525 (1993).
20. See Gen. Mun. Law § 119-u (McKinney 1995).
21. See N.Y. Gen. Mun. L. § 239-n.
22. See N.Y. Gen. Mun. L. § 119-o. The statute provides that the agreement must be approved by a majority of the voting strength of each municipality. "Voting strength" is defined as "...the aggregate number of votes which all the members of the local governing body of a municipal corporation or district are entitled to cast" See, Gen. Mun. L. § 119-n[e].
23. N.Y. Gen. Mun. L. § 119-o[1].
24. For more information about adopting local laws and for forms that can be used to file these local laws with the Secretary of State, see <http://www.dos.state.ny.us/lgss/pdfs/locallaw.pdf> and <http://www.dos.state.ny.us/corp/pdfs/dos239.pdf> (site visited March 2006).

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## FROM THE FEDERAL COURTS

### Second Circuit Finds No Property Right to Non-arbitrary Government Enforcement of Regulations.

After a local government issued a cease and desist order to the appellant airport for trimming trees on property located in a land trust, the appellants claimed that the order violated its substantive due process rights alleging that order "denied them of a landowner's property right to be from the arbitrary and biased government enforcement of regulations against them" and they filed a §1983 suit. The Second Circuit Court of Appeals stated that there is "no support for the principle that there is a 'property right' to nonarbitrary government enforcement of regulations." Since a property right is required to bring a successful substantive due process claim, the Court upheld the District Court's summary judgment for the government. *Goodspeed Airport, LLC v East Haddam Land Trust, Inc.*, 2006 WL 197463 (2<sup>nd</sup> Cir. 2006).

### Second Circuit Determines that Where Adult Business Uses are Restricted to "Light Industrial" Zones and as a Result, 0.04% of the Land in this City is Available for Such Use, this Satisfies the

### Requirement for "Reasonable Alternative Avenues of Communication."

A nightclub operator who sought to exhibit topless dancing challenged the constitutionality of the City of New Rochelle's zoning ordinance on First and Fourteenth Amendment grounds, alleging that the City failed to afford reasonable alternative avenues for such a use. The Circuit Court upheld the lower Court's denial of the Operator's motion for a preliminary injunction to enjoin enforcement of the zoning law for failure to demonstrate likely success on the merits. In explaining that zoning ordinances that limit adult entertainment uses to particular locations are constitutional so long as they leave open "reasonable alternative avenues of communication," the Court said that a determination of reasonableness is made by reviewing the "totality of evidence" to determine what areas remain available for these businesses. In this case, the Court found that there were six lots available for adult business uses, comprising about 2.74 acres in a Light Industrial zone (and that this was 2.77% of the land zoned for light industrial), representing 0.04% of the total land area in the City. The Court noted that the Operator "failed to show that the demand for sites in New Rochelle that could be used for adult entertainment businesses exceeds this supply." Therefore, the Court concluded that the Operator's claim was not so much that there were no reasonable alternatives, but rather that the Operator preferred to use its current site which was not zoned for such use. *Casanova Entertainment Group v City of New Rochelle*, 2006 WL 238434 (2<sup>nd</sup> Cir. 2006).

### **Second Circuit Finds that the Coastal Zone Management Act Does Not Create Private Right of Action.**

Citizens challenged the granting of permits for a fence by the New York City Department of Buildings on the grounds that the fence obstructed a public right of access to a beach and that the fence was approved without the City conducting a review of the environmental impact of the fence in violation of public and private rights under the federal Coastal Zone Management Act. Following the U.S. Supreme Court's ruling in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), the Second Circuit noted that private rights of action to enforce a federal law must be created by Congress. Finding nothing in the text of the Act that would make the municipality liable to the plaintiffs for granting the building permit without reviewing the project to determine whether it was consistent with the coastal zone, and determining based on a structural review of the Act that there is no right of private enforcement, the Second Circuit adopted the holding of the Third Circuit and Western and Eastern District Courts in New York in holding that the Act does not create a private right of action. *George v NYC Department of City Planning*, 436 F.3d 102 (2<sup>nd</sup> Cir. 2006).

### **Northern District of New York Holds that the Doctrine of Impossibility Prevents a Tribe from Asserting Immunity from State and Local Zoning Laws and Regulations.**

The Seneca Cayuga Tribe of Oklahoma, responding to a request to the Court by the Towns of Aurelius and Montezum and the County of Cayuga to lift a stay following the 2005 decisions in *City of Sherrill v Oneida Indian Nation of New York*, 544 U.S. 197, and *Cayuga Indian Nation of New York v Pataki*, 413 F.3d 266 (2<sup>nd</sup> Cir), alleged, among other things, that it had sovereignty and immunity against state or local zoning and land use regulations regarding their activities or their property. In lifting the stay, the Western District noted: "The Nation's efforts to avoid dismissal in light of City of Sherrill are undermined by the Supreme Court's focus on the disruptive nature of exemption from taxation by local government. If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive." The Court held that the "Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the everyday administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations." Therefore, the Court concluded that the doctrine of impossibility barred the Tribe from asserting immunity from state and local zoning law and regulations. *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, N.Y., 233 F.R.D. 278 (N.D. N.Y. 2006).

### **Western District of New York Holds that an Eminent Domain Proceeding is Not a Land Use or Zoning Law for Purposes of Triggering Protections Afforded Under the Religious Land Use and Institutionalized Persons Act (RLUIPA).**

In 2000, the Town of Brighton updated its Comprehen-

sive Land Use Plan, which recommended, among other things, that the Town acquire a 66-acre parcel of land owned by Groos ("Groos parcel") to permit expansion of the adjacent 49-acre Town Park. In 2003, the Faith Temple, desirous of building a larger facility, entered into negotiation with Groos for purchase of the 66-acre parcel, and in January 2004 the Faith Temple announced that it had executed a purchase contract for the Groos parcel. In April 2004, the Town announced its intention to condemn the Groos parcel and annex it to the Park. Faith Temple challenged the Town's decision to condemn the land on a number of grounds including that such action violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and sought an injunction to bar the Town from pursuing eminent domain proceedings concerning the parcel. During the pendency of the litigation, Faith Temple completed the purchase of the property, becoming the titleholder. In looking to the language of RLUIPA, which applies when a government imposes or implements a land use regulation, the Court quoted the Act's definition of "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land..." The Court determined that eminent domain proceedings are neither a landmarking law nor a zoning law, and that given the differences between zoning and eminent domain it is "unlikely that Congress assumed that courts would interpret RLUIPA's reference to zoning laws as including eminent domain proceedings as well." In looking to legislative history, the Court noted that "Congress was primarily concerned about conflicts over zoning, and that eminent domain abuse was not perceived to be a cause for concern in drafting RLUIPA."

Faith Temple also argued that the Town's attempt to condemn the Groos parcel constituted an "application" of a zoning law under RLUIPA because the condemnation was being made to implement the Town's Comprehensive Plan. Faith Temple asserted that the comprehensive plan is a type of zoning system. The Court determined that the connection between the condemnation action and local zoning laws was too attenuated to constitute an "application" of zoning laws, and concluded that "the Town's employment of eminent domain to obtain the land is simply too far removed from any zoning regulations to fall within the purview of RLUIPA." *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D. N.Y. 2005).

## **FROM THE STATE COURTS**

### **Second Department Holds that a Mayor's Veto of a City Council Resolution Granting a Special Use Permit is an Administrative Act Subject to Article 78 Review.**

The Mayor of the City of Yonkers vetoed a resolution of the City Council approving a special use permit for a rock crushing facility that had been granted by the Zoning Board of Appeals. In challenging the Mayor's veto, the petitioner alleged that the Mayor had no authority to veto a resolution approving a special use permit and that even if the Mayor did possess such authority, in this case its exercise was arbitrary and capricious. While finding that pursuant to the City Charter, no resolution of the City

Council can be effective without the written approval of the Mayor, the Court did not agree with the Mayor's assertion that the exercise of the mayoral veto is beyond judicial review. The court said that "effectively denying a special exception use permit, is a quintessentially administrative act that is subject to judicial review pursuant to CPLR article 78." Since the action to approve the special use permit, even by a legislative body, is subject to judicial review, the Mayor could not avoid review of the veto by characterizing the veto as a "legislative" act. Because the Mayor's veto was based solely on concerns expressed by the facility's neighbors without any basis in the record, the Court held that the veto was arbitrary and capricious and ordered the permit approval. *Juda Const., Ltd. v. Spencer*, 21 A.D.3d 898, 800 N.Y.S.2d 741 (2d Dep't 2005).

### **Second Department Affirms that Zoning Boards Must Suggest Measures to Accommodate Religious Uses.**

The Appellate Division, Second Department reiterated that while religious institutions are not exempt from local zoning laws, great flexibility is required when reviewing an application for a religious use as opposed to another use, and that every effort must be made to accommodate that use. Where the zoning board made no effort to suggest measures that would enable an accommodation of the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible, the Court annulled the Board's determination, finding that the Board's denial was arbitrary, capricious, and an abuse of discretion. *St. Thomas Malankara Orthodox Church, Inc., Long Island v. Board of Appeals, Town of Hempstead*, 23 A.D.3d 666, 804m N.Y.S.2d 801 (2d Dep't 2005).

### **Second Department Holds that a Town Attorney May be Designated as the "Proper Local Authority" under Town Law § 268 (2) to enforce zoning provisions.**

Although a Town Board resolution may have been insufficient under Town Law § 65 to vest with the Town Attorney certain authority to commence actions on behalf of the Town, the "Board's delegation to the Town Attorney of the authority to prosecute violations of the town's local law...was sufficient to designate the Town Attorney as the 'proper local authorit[y]' to commence civil actions to enjoin such violations under Town Law § 268(2). *Town of Brookhaven v. Duraio*, 21 A.D.3d 1083, 802 N.Y.S.2d 181 (2d Dep't 2005).

### **Third Department Rules That Failure to Comply with Referral Requirements in the General Municipal Law Constitutes a Jurisdictional Defect.**

Petitioner, who is engaged in the business of outdoor advertising, obtained a building permit from the Village to erect a billboard adjacent to a four-lane interstate highway. After construction began, a stop work order was

issued because the size and height of the billboard violated the local zoning ordinance. Following an unsuccessful attempt to have the stop work order vacated, the petitioner applied for and was denied an area variance. When the petitioner challenged the denial, the trial court annulled the determination and remanded the matter on jurisdictional grounds because the zoning board acknowledged that it failed to refer the area variance application to the county planning board as required by General Municipal Law § 239-m. *Lamar Advertising of Penn, LLC v. Village of Marathon*, 24 A.D.3d 1011, 805 N.Y.S.2d 495 (3d Dep't 2005)

## **RESOURCES OF INTEREST**

In March, the *New York City Planning Department* released a new and richly illustrated *Zoning Handbook*. This edition contains photographs, innovative graphics and plain-English explanations of New York City's Zoning Resolution. As the first revision of the *Handbook* in 16 years, its much-anticipated release coincides with the most far reaching revision of the city's zoning since 1961. The *Handbook* details and illustrates recent changes to the zoning, including mixed-use districts and new contextual zoning districts that have been developed to manage growth and preserve the character of neighborhoods; and it clearly describes new special districts, such as Hudson Yards, with enhanced inclusionary zoning to help promote construction of affordable housing. The new edition of the *Handbook* is a handy reference. With new color photos and graphics to illustrate building types permitted in the city's different zoning districts as well as an expanded glossary and other useful information, the *Handbook* helps explain some of the complexities of the city's Zoning Resolution. Information on ordering the new *Handbook* is available at <http://www.nyc.gov/html/dcp/html/pub/zonehand.shtml>.

The *American Farmland Trust* has published a *Guide to Local Planning for Agriculture in New York*. This technical assistance booklet is designed to assist communities to engage farmers and rural landowners in the planning process, to help with assessing current policies, and to explain the range of tools available to municipalities desiring to support local farm uses. The written guide is accompanied by a CD that contains dozens of publications, state laws, and sample local plans and ordinances. This information is available at no cost at <http://www.farmlandinfo.org>. It can also be purchased at <http://farmland.org>.

The *New York State Energy and Research Authority* has published a *Wind Energy Toolkit* available at <http://powernaturally.org/programs/wind/toolkit.asp>. Included in the toolkit is a series of technical papers on the siting of wind farms, including a discussion of comprehensive plans, model local ordinances or provisions in zoning laws, and information about environmental issues that may arise.

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