

# **ADOPTING ZONING FOR THE FIRST TIME**

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**JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES**

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This document is intended to give general guidance.  
Local governments seeking to adopt zoning for the first  
time are encouraged to obtain legal counsel.

# CONTENTS

Introduction. ....	1
Creation of the Zoning Commission. ....	2
Performance of the Zoning Commission; Public Participation and Final Report. ....	3
Comprehensive Plan and Environmental Assessment . ....	6
Performance of the Local Governing Board; Notice and Public Hearing.. ....	8
Referral to the County and Adjoining Municipalities.....	9
Enactment Procedures; Voting and Entry Into the Minutes.....	12
Publication, Posting, Filing and Effective Date.....	13
Adopting Local Laws.....	15
Conclusion . ....	16
Local Government Publications . ....	16





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## INTRODUCTION

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Cities, towns and villages in New York State are authorized by state statutes (called “zoning enabling laws”) to regulate the use of land by enacting what is commonly referred to as “zoning.” Zoning governs the way land in a municipality is used and developed. Its goal is to carry out the municipality’s long range land use objectives. Zoning regulates the uses to which property may be devoted, the siting of development on land, and the density of development on property.

Zoning operates by dividing the whole community into separate districts, or zones--hence, the term “zoning.” These districts are shown on the municipality’s zoning map. Within each district, all properties are subject to a uniform set of zoning regulations that restrict the use and development of property.

Since New York is a home rule state, a municipality has the choice of whether or not to adopt zoning and if it does, how the zoning regulations will work in the community. Where it is most successful, zoning is written in a way that compliments the planning goals of communities and addresses the needs of residents and businesses in the municipality. Zoning protects health and safety and property values by separating potentially incompatible uses. A well-written zoning regulation permits appropriate uses in each zone and can even regulate the location of the development on the site and its building design. If applied this

way, zoning can preserve or even enhance the character of a neighborhood or community. On the other hand, if not well-tailored to the needs of the community, zoning can needlessly separate compatible mixed uses and result in monotonous patterns of development. Some landowners oppose zoning because of the restrictions it places on the ability to use their land or believe it diminishes their ability to sell the land to someone for a high price. Balanced against this concern is the recognition that zoned properties often retain their value precisely because landowners know that nearby properties can only be occupied by compatible uses.

The authority for adopting local zoning regulations is set forth in New York State’s “enabling” laws - General City Law §20(24) and (25), Town Law, Article 16, and Village Law, Article 7. For example, Town Law §261 (which is part of Article 16) provides, in part, as follows:

“For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes...”

Additionally, the Municipal Home Rule Law and the Statute of Local Governments provide independent power to adopt, amend and repeal zoning regulations via the adoption of local laws. (Statute of Local Governments §10(6), which is incorporated into Municipal Home Rule Law §10 (1)(ii)(a)(14).) This source of power may also be utilized in conjunction with the zoning enabling laws described above.

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### **Procedures to be Discussed**

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The procedures for adopting zoning for the first time differ significantly from those for subsequent zoning amendments. Before town board or a village board of trustees can adopt zoning for the first time, a zoning commission must be established and, among other duties, make recommendations for the first set of zoning regulations. Once those duties have been completed, the zoning commission goes out of existence. Thereafter the local governing board itself becomes responsible for taking action on the recommendations of the zoning commission and adopting the zoning text, map, and any other proposals.

Since all cities in New York have adopted zoning, this booklet will address only the Town Law and Village Law procedures. Town Law, Article 16 and Village Law, Article 7, set forth specific procedures which must be followed by towns and villages, respectively, that desire to adopt zoning regulations. Towns may adopt zoning by either local law or ordinance but villages can only adopt zoning regulations by local law. The term “zoning regulation” is being used here for the convenience of the reader, to refer both to zoning *ordinances* and to zoning *local laws*.

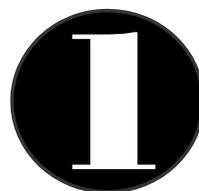
While zoning regulations are commonplace, it is important to remember that such regulations directly impact the use of private property. For this reason, the zoning enabling laws contain very specific procedures for adopting zoning which are designed to inform the public and

adjoining municipalities of the proposed regulations. These procedures must be carefully followed in order to avoid court challenges based on procedural defects, which, if successful, would result in invalidation of the enactment.

The adoption procedure for establishing a municipality’s first zoning regulations consists of the following steps:

- Step 1 - Creation of the zoning commission;
- Step 2 - Performance of the zoning commission; public participation and final report;
- Step 3 - Compliance with the comprehensive plan and environmental assessment ;
- Step 4 - Performance of the local governing board; notice and public hearing;
- Step 5 - Referral by the local governing board to the county planning agency or regional planning council;
- Step 6 - Enactment procedures; voting and entry into the minutes;
- Step 7 - Publication, posting, filing and effective date.

This publication discusses each of these steps in some detail, but the Department of State strongly recommends early consultation with the municipal attorney for legal advice relating to adoption of zoning regulations.



### **Creation of the Zoning Commission**

When a town or village desires to adopt its first zoning regulations, the local governing board - the town board in towns and the village board of trustees in villages - is

required to appoint a **zoning commission**. (*Town Law §266, Village Law §7-710*.) The zoning commission must be appointed before the adoption of the first zoning regulations.

A zoning commission has the duty to recommend the boundaries of the original zoning districts and appropriate regulations to be enforced therein, make a preliminary report, hold public hearings and submit a final report to the local governing board before the local governing board may take action to pass a zoning local law or ordinance. The function of the zoning commission was described early on as a “precautionary measure to make sure that the zoning shall not be adopted hurriedly or impulsively, but only after careful study and consultation with property owners.” (Bassett, E.M., *Zoning* (1940), p. 34.)

The zoning commission is a separate body, set apart from the responsibilities of the local governing board and planning board. This separate status allows the commission to focus solely upon its limited mandate to prepare draft zoning regulations.

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### **Zoning Commission Membership**

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The enabling laws do not specify how many members serve on a zoning commission. In practice, a commission of fewer than 10 members has been a workable number. A commission of this size can afford a diversity of membership in terms of municipal representation, yet be small enough to guarantee ease of administration. A member of the local governing board may not serve as a member of the zoning commission. (10 Op.State Compt. 350 (1954)). However, one appellate court ruled that the unanimous vote of all zoning commission members to recommend a set of zoning regulations to the town board was not so irregular as to prevent eventual adoption of the first zoning ordinance, simply because two commission members were town board members.

There are two appointment options available to the local governing board:

- appointment of a zoning commission composed of the already-existing planning board; or
- appointment of a zoning commission, separate from the planning board. If a planning board already exists, the new zoning commission should contain at least one member of the planning board.

The presence of planning board members on the zoning commission can bridge the potential gap between the community’s past investment in planning and its concern with regulating and guiding future growth. If the local governing board appoints to the zoning commission persons who participated in the preparation of a comprehensive plan, these people can often articulate and help to implement the background decisions upon which comprehensive plan recommendations were based.

The commission’s membership can ensure representation of specific geographic areas or of population groups that may be especially concerned or affected by adoption of zoning regulations. The zoning enabling laws offer the opportunity to appoint highly-skilled and knowledgeable residents to this task, thereby taking advantage of their expertise and abilities.



### **Performance of the Zoning Commission; Public Participation and Final Report**

In order to avail itself of the zoning powers under the zoning enabling acts, the local governing board must appoint a zoning commission to “recommend the boundaries of

the various original districts and appropriate regulations to be enforced therein.” (*Town Law §266, Village Law §7-710.*) The zoning commission has task of examining the existing conditions within the locality and making appropriate zoning recommendations for regulating future development. Where a comprehensive plan has been prepared, it should be utilized as an advisory document by the zoning commission when developing the zoning regulations. (1991 N.Y. Op. Atty. Gen. (Inf) 1023.)

A zoning commission is a public body, and its meetings must be open to the public as provided in the Open Meetings Law (Article 7 of the Public Officers Law). Additionally, the zoning commission may find it useful to conduct several public information sessions as it prepares its preliminary report. The zoning commission can answer questions from the public and the public can participate in a discussion of the proposed zoning regulations. Not only will this approach be beneficial to the public, but it can also be of equal benefit to the zoning commission. The commission itself should profit from the suggestions of residents and their detailed knowledge of local conditions. In addition, public awareness of the reasoning behind certain zoning proposals should tend to decrease areas of conflict and increase public support for the zoning effort.

Public support and knowledge are invaluable as a prelude to the public hearing or hearings to be held by the zoning commission.

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### **Public Hearing**

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These zoning recommendations should be developed with the input of the general public. Accordingly, the zoning commission is required to hold at least one public hearing on its “preliminary report” before the report may be adopted and transmitted to the town board or village board of trustees. This requirement for holding a public hearing is considered

jurisdictional and is a mandatory requirement to the local governing board attaining power to adopt its first set of zoning regulations. (*Incorporated Village of Muttontown v. Friscia*, 58 Misc.2d 912, 298 N.Y.S.2d 8 (Sup. Ct. Nassau Co. 1969).

The required public hearing performs two important functions. First, it provides an opportunity for the public to be heard before government action is taken--which is an essential facet of due process. Second, the comments received at the hearing could provide the commission with additional information, resulting in a more refined set of draft zoning regulations that may not need major changes prior to adoption by the local governing board.

At the zoning commission hearing (or hearings, if more than one is held), the initial “testing” of the draft text and map begins. It is at these hearings that the public comes to be heard as part of the formal process.

New York’s zoning enabling acts contain no specific requirements relative to the zoning commission’s public hearing notice. The laws do, however, detail the *governing board’s* notice requirements in conducting its mandated hearings prior to adopting zoning regulations. (*Town Law §264; Village Law §7-706.*) It is both advisable and common practice for the zoning commission to conduct itself in an identical manner. Following this procedure, the commission must publish notice to the public in a newspaper of “general circulation” at least 10 days prior to the hearing.

The content of the commission’s public notice should give the average reader reasonable warning that land in which he or she has an interest may be affected by the regulations that will be discussed. The printed notice need not contain a portion of the proposed zoning map or text of the regulations, but it should state

the nature of the proposed action: adoption of a new zoning law. The notice should also state that the purpose of the hearing is to hear from the public.

Reference should be made within the notice to the fact that the full, preliminary text of the regulations and map, which are the subject of the hearing, will be available for public inspection in the municipal clerk's office and possibly at other convenient locations, such as public libraries. In order to keep the local governing board informed of its work, it is a good idea for the zoning commission to send the board a copy of the draft text and map prior to the public hearing.

The zoning commission should be prepared for a lengthy hearing. The initial hearing notice may even include multiple dates and times for the zoning hearings. If a hearing does become a lengthy session, it may be best to adjourn the hearing and reconvene at the next scheduled meeting, or at another later date.

A public hearing has physical aspects which are important to consider. The commission should pay attention to the building where the hearing is to be held to assure adequate seating and that all who wish to participate will be reasonably accommodated in compliance with the Americans with Disabilities Act. (*United States Code, Title 42, Chap. 126; Title 47, Chap. 5.*)

The format of the public hearing may vary from one community to another. Generally, however, there is an introductory explanation of the commission's work and the objectives it seeks, along with a general review of the commission's proposed report. This introduction should be followed by a period for comment from the audience. The commission should make copies of the hearing agenda available for those present.

The zoning commission should establish clear and fair rules of order as a guide for public participation during the hearing. For example, it may require speakers to register. The commission should make a sincere effort to encourage participation by as many members of the audience as possible. With this announced purpose in mind, the commission chair should request individuals to limit the length of their remarks. If necessary, the commission can limit the time for a speaker to make his or her initial comments, and, if requested, grant the speaker additional time once everyone has had the opportunity to speak. Such rules of order should reasonably assure registered attendees that those wishing to speak will have an opportunity to be heard.

The zoning commission should keep a detailed record of the proceeding. It should hear persons in support of the issues under consideration as well as those who disagree. Their names, addresses and statements should be accurately recorded. All petitions should be accepted by the commission. The zoning commission should also give persons the opportunity to comment in detail with a written statement, to be entered into the record of the hearing. The commission should set a reasonable deadline for the receipt of such statements. To allow people to respond in writing to oral comments, this deadline may be *after* the close of the oral hearing.

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### **Final Report**

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Following the hearing, the zoning commission should review all of the testimony, giving it careful consideration, with the possibility of doing further study to resolve issues that may exist.

There is a need, throughout the span of the commission's labors, to provide a liaison with the local governing board. The most efficient and effective way to accomplish this is for members of the local governing board to be

present at each of the commission's meetings. But the commission should also appoint one of its members as liaison to the local governing board, and should request periodic reports from that member. Additionally, the commission may make periodic progress reports to the local governing board.

After considering the record of the public hearing, the commission prepares the final report for submission to the local governing board. The zoning commission adopts its final report and directs its submission to the local governing board by resolution. If the zoning commission plans to submit a final report which contains substantial changes from the preliminary report on which a hearing was held, the zoning commission should hold a further hearing or hearings on the amended report before submitting the final report to the local governing board. (1969 Op. Atty. Gen. No. 122.)

The zoning commission's final report is an official government document, and should therefore follow certain formalities. One format for its contents could be as follows:

- a formal transmittal or cover letter;
- a statement of membership appointments with reference to the date of the official creation of the commission and its responsibilities under the enabling acts;
- a description of the public meetings and hearings conducted by the commission, including date(s), time(s), place(s) and names of participants;
- a description of the actions taken by the commission, including descriptions of preliminary drafts/maps, as well as reasons for any changes made thereto during the course of the commission's proceedings, whether on the commission's own initiative or as the result of comments

made at public hearings;

- a copy of the recommended zoning regulations with a full explanation of their provisions; and
- a copy of the resolution by which the commission adopted the final report.

Upon adoption of a resolution by the local governing board accepting the final report, the zoning commission passes out of existence.



## **Comprehensive Plan and Environmental Assessment**

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### **The Comprehensive Plan**

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The enactment of zoning regulations must be preceded by the adoption of a "comprehensive plan". Although zoning must be accomplished in accordance with a comprehensive plan, the courts have said that a comprehensive plan "need not be contained in a single document labeled as such; indeed, it need not be written at all ( see, *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 131(1988). All that is required is that the court be able to satisfy itself, based upon a review of all available evidence, that such plan in fact exists and that the municipality is acting in the public interest in furtherance thereof." *Skenesborough Stone Inc. v. Village of Whitehall*, 254 A.D.2d 664, 666 (3<sup>rd</sup> Dept. 1998). In *Skenesborough*, the comprehensive plan was identified based on a review of the first set of zoning regulations, the zoning map, the generic environmental impact statement and the minutes of the various meetings conducted by the zoning commission and the local governing board. The State zoning enabling laws now also define the term "comprehensive plan" and provide an optional process for formally

adopting one. Once a comprehensive plan is adopted using those provisions, the zoning regulations and other land use regulations of the town or village must be in accordance with it. (*Town Law, §272-a* and *Village Law, §7-722.*) While comprehensive planning is critical to the development and adoption of zoning regulations, it is the topic of another Department of State publication, *Zoning and the Comprehensive Plan*. ([www.dos.ny.gov/LG/publications/Zoning\\_and\\_the\\_Comprehensive\\_Plan.pdf](http://www.dos.ny.gov/LG/publications/Zoning_and_the_Comprehensive_Plan.pdf))

A comprehensive plan may, after analyzing conditions in a community, recommend that portions of a community to be left unzoned. Such part-town or part-village zoning is permissible provided the comprehensive plan considers the entire community and identifies those areas where zoning is not needed. See *Connell v. Granby*, 12 A.D.2d 177, 209 N.Y.S.2d 379 (3<sup>rd</sup> Dept. 1961).

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### **The Environmental Assessment**

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An agency of government, including a local government, may not undertake, fund or approve any “action” until it complies with the State Environmental Quality Review Act (*SEQRA*; see Article 8 of the Environmental Conservation Law and its implementing regulations at 6 NYCRR Part 617.) The term “action” includes the adoption of a zoning local law or ordinance. (*6 NYCRR §617.2(b).*) The adoption of an initial zoning local law or ordinance by the local governing board is considered a “Type I” action, which means that it is an action more likely than not to require the preparation of an environmental impact statement (EIS). (*6 NYCRR §§617.2(ai); 617.4(a) and (b)(1).*)

The SEQRA regulations explain the purposes of SEQRA as follows:

“The basic purpose of SEQR is to incorporate the consideration of

environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.” (*6 NYCRR §617.1(c).*)

The SEQRA processes apply *in addition to* the adoption processes required by the zoning enabling laws.

The “lead agency” is primarily responsible for determining whether an action may have a significant adverse impact, and for preparing or overseeing preparation of an environmental assessment and/or environmental impact statement (EIS). (*6 NYCRR §617.2(u).*) Since town boards and village boards of trustees are the only “agencies” that can adopt zoning laws and ordinances, they are usually the lead agencies for such actions. SEQRA also, however, requires early consideration of environmental impact and the initial determination of potential “significance.” (See *6 NYCRR §617.6.*) Nonetheless, there is a need to consider environmental impact even at the zoning commission stage, even though the commission is not the lead agency.

Ultimately, the local governing board remains responsible for determining whether the adoption of the first set of zoning regulations would have a significant adverse affect on the environment, while still allowing for early consideration of environmental impacts as the draft zoning regulations are being prepared.

If the local government has already adopted a comprehensive plan according to the zoning enabling statutes, an environmental review

may well have already taken place. Possibly, a generic environmental impact statement will have been prepared, which could be used to contribute to environmental review of the new zoning regulations.



## **Performance of the Local Governing Board; Notice and Public Hearing**

Upon receiving the zoning commission's final report, the local governing board may accept it by resolution. The zoning commission ceases to exist when the local governing board accepts its report. (*Town Law*, §266(5); *Village Law*, §7-710(5).)

The local governing board is not constrained by the enabling laws to adopt the zoning regulations proposed by the zoning commission. But if it proposes to adopt *any* zoning regulations, whether those recommended by the zoning commission or those it has fashioned on its own, it must first hold at least one public hearing upon proper notice to the public. This hearing may not commence until after the zoning commission has prepared and forwarded its final report. Additionally, the public hearing should not be held until the DEIS has been prepared and deemed adequate, or until a negative determination of significance has been made.

The hearing notice must be published in a newspaper of general circulation at least ten days before the public hearing. (*Town Law*, §264(1); *Village Law*, §7-706(1).) Legislative bodies are advised to comply strictly with this time period. Proper notice, as to both time and content, can not be understated. In a case concerning the rezoning of a residential parcel, the court in *Vizzi v. Town of Islip* (71 Misc.2d 483 (Sup. Ct., Nassau Co., 1972)) described the underlying purposes served by notice as follows:

“The published notice is the fundamental vehicle for communicating to the public any local legislative changes which affect residential interests. It may be the only informational source that warns local property owners of zoning changes affecting their land's use and value, either adversely or beneficially, directly or indirectly. The viability of the statutory scheme of public hearing in relation to zoning changes is dependent upon proper advance notice.” (71 Misc.2d at 485.)

The notice must reasonably inform the public of the purpose of the hearing, the general character and scope of the proposed regulations, and the time(s) and place(s) where the hearing will be held. (*Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668 (1996); *Coutant v. Town of Poughkeepsie*, 69 A.D.2d 506 (2nd Dept., 1979); *2525 East Ave. v. Town of Brighton*, 33 Misc.2d 1029 (Sup. Ct., Monroe Co., 1962), aff'd 17 A.D.2d 908 (4<sup>th</sup> Dept., 1962); *Vizzi v. Town of Islip*, *supra*.) This standard does not require that the text of the proposed zoning regulations must be published in the hearing notice, although some local governments do publish the text for informational purposes. The public notice should identify the location(s) where the full text of the proposed zoning regulations may be seen. In any case, paper copies of the full text should be available for viewing at the office of the town or village clerk. In addition, the text may be posted on the town's or village's website. It is also advisable to have public notices reviewed by the municipal attorney before publication.

The local governing board must serve written notices of the public hearing to certain public bodies. Service may be made either personally or by mail. The notices must be served on the officers or persons identified in the enabling laws when the proposed zoning regulations will affect property within 500 feet of: the property of a housing authority; the boundary

of a city, village, town or county; or the boundary of a state park or parkway. (*Town Law*, §264(2); *Village Law*, §7-706(2).) These entities are given a right to be heard at the public hearing, but are not given a right to judicial review. (Other bases for judicial review could, however, apply. For example, the Westchester County Charter accords the right to judicial review in this instance.)

The same considerations regarding space requirements and the need for multiple hearing dates and rules of order, apply as well to the zoning commission's public hearing as to the hearing conducted by the local governing board.

Must a local governing board hold yet another public hearing, upon renewed notice, when changes are made to the proposed zoning regulations *after* the initial public hearing is held? Perhaps. It is common for changes to be made at this point, since the public hearing provides the opportunity for new information and various points of view to be presented to the local governing board. The question of whether a new public hearing is required will hinge on whether the change was embraced within the original public notice. Changes made after the public hearing that make the proposal substantially different from the one originally noticed will require new notice and opportunity to be heard:

“When events subsequent to the publication of notice lead to an amendment that is substantially different from that which was noticed, new notice and opportunity to be heard may be required....However, where the amendment as adopted is embraced within the public notice, the notice has satisfied its purpose of alerting the public to potential and contemplated revisions of the local ordinance, and the notice will generally be deemed sufficient...” (*Gernatt Asphalt Products, Inc. v. Town of*

*Sardinia*, *supra*, 87 N.Y.2d at 679; see also *Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7 (1976); *Coutant v. Town of Poughkeepsie*, *supra*.)

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### **Referendum on Zoning?**

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The question often arises whether a local governing board may seek to gauge public opinion on the proposed zoning regulations by holding a referendum. There is, however, no statutory provision authorizing the submission of zoning to a referendum, regardless of whether the regulations are adopted via ordinance or local law. (*Elkind v. City of New Rochelle*, 5 Misc.2d 296 (Sup. Ct., Westchester Co., 1957), *aff'd* 4 AD.2d 761 (2<sup>nd</sup> Dept., 1957), *aff'd* 5 N.Y.2d 836 (1958); 1959 Op. Atty. Gen. 127.) These decisions have held that, under New York law, a referendum may **only** be conducted if a state statute authorizes it; otherwise, a referendum cannot be held.



### **Referral to the County and Adjoining Municipalities**

Under certain circumstances, zoning enactments must be reviewed at the county or regional level before they can be put into effect. General Municipal Law §239-m requires that the local governing board must refer any proposed zoning law or ordinance to the county planning agency for review and recommendation, if the proposal would affect real property lying within 500 feet of the boundary of

- any city, town, or village;
- any existing (or proposed) county or state park or other recreation area;
- any right-of-way of any existing (or proposed) county or state parkway,

- thruway, expressway, road or highway;
- any existing (or proposed) right-of-way or any stream or drainage channel owned by the county or for which the county has established channel lines;
- any existing (or proposed) boundary of any county or state-owned land on which a public building or institution is situated;
- a farm operation located in a designated agricultural district.

If there is no county planning agency in existence, the proposal must instead be referred to the regional planning council having jurisdiction within that county. As any new, first-time zoning law or ordinance will necessarily affect real property falling within 500 feet of the municipal boundary, it follows that such an enactment must be referred under GML §239-m for this, if for no other, reason.

The referral must be in the form of a “full statement”. In the case of a new zoning law or ordinance, this must include:

- the complete text of the proposed local law or ordinance;
- the text of any existing provisions to be affected by the proposal, if those existing provisions are not already in the possession of the county (or regional) planning agency;
- a completed environmental assessment form;
- any additional material required by the local governing board to make its determination of significance under SEQRA (see Section 3 above).

Alternatively, the statutes allow the county or region and the referring body to agree as to what constitutes a “full statement”. (*General Municipal Law §239-m(1)(c).*) For example, a mutual agreement could require inclusion of local background materials that explain the reasons for adopting the proposed zoning regulations, such as the comprehensive plan or

the zoning commission’s final report.

Within 30 days after receipt of the “full statement”, or such longer period as may have been agreed to between the two entities, the county or region must report its recommendations to the local governing board. The local governing board has no jurisdiction to act on the proposal until it either receives the county’s or region’s recommendation, or the required review period expires, whichever occurs first.

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### **Review Considerations**

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When it reviews proposed new zoning regulations, the county or regional agency must consider several factors. These factors are all set forth in General Municipal Law §239-l. They are:

- the compatibility of various land uses with one another;
- traffic-generating characteristics of various land uses:
  - in relation to the effect of such traffic on other land uses, and
  - in relation to the adequacy of existing and proposed thoroughfare facilities;
- the impact of proposed land uses on existing and proposed county or state institutions or other uses;
- the protection of the community character as regards:
  - predominant land uses, and
  - population density;
- the relationship between residential and non-residential areas;
- community appearance;
- drainage;
- community facilities;
- official development policies, municipal and county, as may be expressed through comprehensive plans, capital programs or regulatory measures; and
- other such matters as may relate to:
  - public convenience,

- governmental efficiency, and
- achieving and maintaining a satisfactory community development.

Under GML §239-m the county or regional planning agency must make one of four recommendations to the local governing board:

- Approval;
- Modification;
- Disapproval;
- Report that the proposed action has no significant county-wide or inter-community impact.

In its report, the county or regional agency must include reasons for its recommendations. While there is no required structure for the drafting of these reasons, the following are some suggested bases for disapproval of a proposed zoning law:

- establishment of incompatible development across municipal boundaries, such as a heavy industrial zoning district adjacent to an abutting community's single-family residential zone;
- the ignoring of regional housing needs and demands; or
- allowing high-intensity development to conflict with a proposed county or state facility, or with a scheduled improvement to an existing facility, such as a highway relocation or widening.

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### **Benefits of Referral**

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Referral is an important aid to the local planning and zoning process. Here are just a few examples of the broader benefits of referral:

- local planning and zoning bodies are provided with advice and assistance from professional county and regional staff;
- zoning actions are coordinated among

municipalities, aiding in the recognition of inter-community considerations;

- local tax dollars may be saved in cases where deficiencies in the referral, overlooked by the municipal body, would, among other things, have resulted in expensive litigation, or in unanticipated infrastructure improvements;
- other planning agencies (county, regional and state) can better orient studies and proposals for solving local as well as county and regional needs; and
- other levels of government are made aware of, and made sensitive to, the types of problems facing local legislators.

Referral can be a two-way street. Review can assist the county or regional agency in determining potential growth areas, enabling it to anticipate facilities and service expansions to provide for future development demands.

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### **Overriding the County or Regional Recommendation**

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If the county or regional planning agency sends a timely response and recommends approval, or reports no significant county-wide or inter-community impact, the local governing board is free to act on the proposal by a simple majority vote. If, on the other hand, the county or regional agency recommends either *disapproval* or *modification*, then the local governing board may approve the proposal in its original, referred form, only by a vote of a *majority plus one* of all of its members (commonly known as a “supermajority”). (*General Municipal Law, §239-m(4)(b), §239-m(5).*)

If the 30-day response period elapses with no recommendation having been received, the local governing board is, again, free to take any action it desires by a simple majority vote. But even where the response period expires, a late response by the county or regional

planning agency will still trigger the “supermajority” rule if:

--the local governing board has not yet acted;

--the recommendation is received *more than two days prior* to the date of the local governing board’s vote; and

--it is a recommendation of disapproval or modification. (*General Municipal Law, §239-m(4)(b).*)

Within 30 days after taking final action, the local governing board must file a report of the final action it has taken with the county or regional planning agency. A local governing board that acts contrary to a recommendation of modification or disapproval of the proposed zoning regulations must set forth the reasons for the contrary action in this report. (*General Municipal Law, §239-m(6).*)



## **Enactment Procedures; Voting and Entry into the Minutes**

Upon complying with the requirements of county and inter-municipal referral, the local governing board enters the last phase of the zoning adoption procedure. As with the taking of any official action, zoning may be adopted by the local governing board only at a duly-constituted meeting at which a quorum of members is present. (*General Construction Law, §41; Public Officers Law §102.*)

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### **Voting and Recording the Vote**

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Both town and village local governing boards may adopt zoning regulations by an affirmative vote of a majority of the board’s total membership. Total membership of the board is the full number of board members,

counting vacancies and absences. (*General Construction Law §41.*) Remember, also, that if a “supermajority” is needed, it is a “supermajority” of this *full* membership.

Failure to adopt by a proper vote will result in invalidation of the zoning law or ordinance upon successful court challenge. As a bulwark against such possible challenge, it is vital that the record of each board member’s vote be entered in the minutes of the local governing board’s meeting. (See *Home Depot USA, Inc. v. Baum, 243 A.D.2d 476 (2<sup>nd</sup> Dept., 1997); Pub. Off. Law §106(1).*)

Exclusive of the zoning map, every zoning ordinance or local law adopted must be entered in the minutes of the local governing board. (*Town Law, §264(1); Village Law §7-706(5).*) The minutes must “describe and refer” to any map adopted in connection with a zoning ordinance or local law. In towns, the town clerk must maintain a separate file or filing cabinet for each map adopted in connection with a zoning ordinance or zoning amendment. (*Town Law §264(1).*) The Village Law merely requires that the village clerk maintain the zoning maps. (*Village Law, §7-706(6).*)

The municipal clerk must be careful and diligent when entering the zoning ordinance or local law. The clerk need not hand-copy the entire regulations into the minutes of the board’s adoption. Printed copies are sufficient.

The purpose of these requirements is to ensure that an official copy of the zoning regulations, every amendment to them, and an updated zoning map, be available at the local clerk’s office where it can be readily accessed. Village and town clerks generally have responsibility to record and maintain custody of all village or town local laws or ordinances. (*Town Law, §30; Village Law §4-402.*)

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## Map Quality and Maintenance

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The map must clearly and definitively show the zoning district boundary lines. Imagine the citizen, reading the restrictions set forth in new zoning district regulations, then examining the zoning map, only to find that she cannot determine whether her property falls within the new district--or even if she is in any way affected by the regulation.

There will be changes to the text of the regulations as the zoning ordinance or local law is amended over the years. Changes to the regulations may alter zoning district boundaries, or may insert additional zoning districts with specific requirements. Such amendments usually depend on the zoning map for their delineation and clarification. The local governing board will therefore need to make complementary amendments to the zoning map. It is essential that the zoning map be kept current.

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## SEQRA Findings

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If an environmental impact statement has been prepared accompanying the new zoning, the town or village local governing board must make a written findings statement at the time of, or before adoption of, the new zoning regulations. (6 NYCRR §617.11(c).) The findings must show that all potential, significant environmental impacts identified in the EIS have, to the maximum extent practicable, been avoided or minimized. (6 NYCRR, §617.11(d).)



### **Publication, Posting, Filing and Effective Date**

Once the zoning regulations have been adopted by the local governing board, the enabling statutes require the municipality to

provide general notice of their adoption to the community through publication and posting.

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## Post- Adoption Publication

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In the case of both towns and villages, the enabling statutes require that a copy, summary or abstract of the newly-enacted zoning regulations must be published at least once in a newspaper. The Town Law and Village Law differ to a degree on this issue. The Town Law specifies that publication be made in a newspaper published in the town, or in a newspaper published in the county and having town-wide circulation, and that is designated by the town board. (*Town Law* §§264(1) and 64(11); see also *General Construction Law* §60 and *Public Officers Law* §70-a.) The Village Law requires publication in a newspaper designated by the village board as its “official” newspaper. (*Village Law* §7-706(5); *General Construction Law* §60 and *Public Officers Law* §70-a.). The post-adoption publication requirements are mandatory and if the local government fails to publish the summary or abstract following passage of the zoning, the zoning enactment can be invalidated. *Barry v. Town of Glenville*, 8 N.Y.2d 1153, 209 N.Y.S.2d 834 (1960)

To reduce publication costs, many towns and villages opt to publish a summary or abstract, rather than a copy of the entire text, of the zoning regulations. Summaries should be carefully written, and reviewed by the municipal attorney, prior to publication.

An affidavit of publication, routinely provided by the newspaper publisher, must be filed with the municipal clerk. (*Town Law* §§133 and 264(1); *Village Law* §7-706.)

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## Posting

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Village Law, §7-706(5) requires that both the text of the zoning law and a summary or

abstract of the zoning map must be posted conspicuously near the main entrance to the office of the village clerk. An affidavit of posting must be filed with the village clerk. There is no requirement of posting in towns.

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**Filing with the Secretary of State**

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When the zoning regulations are adopted as a local law, the town or village clerk must file a copy of it, including any zoning map which is part of it, with the Secretary of State's office within 20 days of its adoption. (*Municipal Home Rule Law §27.*) The filing must be made in the manner prescribed by the Secretary of State's regulations for filing local laws. These regulations can be found on the Department of State's website, noted at the end of this publication, and can also be found in the Department's publication *Adopting Local Laws in New York State*.

The clerk will receive an acknowledgment letter from the Secretary of State's office verifying that the local law has been filed. This letter serves as proof of filing, and should be maintained by the clerk.

Filing with the Secretary of State applies only to *local laws*, not to *ordinances*.

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**Effective Date**

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The effective date of a zoning enactment differs depending upon whether it is adopted by local law or ordinance.

When a town adopts zoning by local law, the zoning law must be filed with the Secretary of State and will become effective on the twentieth day after its adoption, unless a different date is prescribed in the local law. When a village adopts a zoning local law, it becomes effective immediately upon its filing with the Secretary of State. (*Village Law, §7-706(7).*) In no case, however, may a local law

become effective until it is filed with the Secretary of State. (*Municipal Home Rule Law, §27(1).*)

When a town adopts zoning using its ordinance power, the zoning ordinance will become generally effective ten days after newspaper publication of the ordinance or the summary thereof, as described above.

The only exception to these time and filing rules is that the effective date of the local law or ordinance can be accelerated by "personal service" on the individual(s) involved. This requires the direct "service" of the local law or ordinance, accompanied by the clerk's certification of adoption, showing its date of passage and entry into the minutes. (*Town Law, §264(1); Village Law, §7-706(7).*)

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**Availability to the Public**

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Local laws and ordinances are public records that must be made available to the public. Zoning regulations have a broad impact on town or village residents, and are frequently consulted by real estate professionals, builders, architects, homeowners and attorneys, among others. Because of this, many local governments have current copies of their zoning regulations readily available at the office of the clerk or zoning enforcement officer or on their official websites.

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## ADOPTING LOCAL LAWS

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This publication has focused on how the zoning enabling statutes in the Town Law and the Village Law direct that zoning regulations be adopted. The New York Municipal Home Rule Law and the Statute of Local Governments also give local governments in New York the power to adopt local laws on a wide variety of topics. Among these, for cities, towns and villages, is the power to adopt zoning by local law. These statutes have been utilized directly by many local governments to address land use regulation issues not specifically identified in the zoning enabling laws (e.g., aesthetics, architectural review, or historic preservation).

The Municipal Home Rule Law also empowers towns to adopt local laws regarding any matter which they have been given the specific power to address via ordinance. This includes zoning. Finally, towns and villages are accorded limited power to *supersede* the Town Law or Village Law, respectively, unless otherwise prohibited by law. (*Municipal Home Rule Law* §§10(1)(ii)(e)(3) for villages and 10(1)(ii)(d)(3) for towns.) The courts have upheld the use of the “supersedure power” in certain land use contexts. (*Sherman v. Frazier*, 84 A.D.2d 401 (2<sup>nd</sup> Dept., 1982); *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423 (1989); *North Bay Associates v. Hope*, 116 A.D.2d 704 (2<sup>nd</sup> Dept., 1986); *Walker v. Hempstead*, 84 N.Y.2d 360(1994).)

Because the powers it grants are broad and strong, the Municipal Home Rule Law is frequently used by local governments that seek to remove any doubt as to the underlying power to regulate in the manner proposed. This is especially true where a new or innovative type of zoning regulation is being considered. In addition, the home rule power *must* be used where the Town or Village Law is being superseded.

The Municipal Home Rule Law also provides the procedure for adopting local laws. This procedure applies to *all* local laws, regardless of topic. Towns or villages that adopt zoning by local law, using either the authority given to them in the zoning enabling statutes *or* the authority of the Municipal Home Rule Law, will still look to Municipal Home Rule Law Article 3 for the procedure to adopt the zoning local law. Local officials may also wish to consult the Department of State publication *Adopting Local Laws in New York State* for these procedures.

Local governments seeking to adopt zoning for the first time should consult their municipal attorneys early on to determine what source of authority they will be using to enact zoning, as well as to determine the appropriate procedures for adoption. Case law has indicated that since the Municipal Home Rule Law provides an alternative procedure for adopting zoning, local zoning laws may be enacted using its procedures alone. (*Pete Drown Inc. v. Town Board of the Town of Ellenburg*, 229 A.D.2d 877 (3<sup>rd</sup> Dept., 1996); *Kamhi v. Town of Yorktown*, *supra*; *Yoga Society of New York, Inc. v. Town of Monroe*, 56 A.D.2d 842 (2<sup>nd</sup> Dept., 1977), app. disp., 42 N.Y.2d 910 (1977); *Village of Savona v. Soles*, 84 A.D.2d 683 (4<sup>th</sup> Dept., 1981); *Kasper v. Town of Brookhaven*, 142 A.D.2d 213 (2<sup>nd</sup> Dept., 1988); but see *Stone v. Village of Baldwinsville*, 138 Misc. 2d 164 (Sup. Ct., Onondaga Co., 1988).)

Any town or village that seeks to adopt zoning under the Municipal Home Rule Law, and at the same time dispense with any procedure set forth by the Town Law or Village Law, should carefully consider the underlying authority and method, particularly as to whether supersedure provisions must be employed. (In particular, see *Turnpike Woods, Inc., v. Town of Stony Point*, 70 N.Y.2d 735 (1987) regarding use of the supersedure power.

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## CONCLUSION

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This publication has attempted to clarify the initial zoning adoption and enactment process by describing seven linked steps. When each step is performed according to law, the likely result will be a validly-instituted municipal zoning ordinance or local law.

At the completion of the adoption procedure, it will be necessary for the local governing board to provide for the enforcement and interpretation of the zoning ordinance or local law by appointing an enforcement officer and a board of appeals. The zoning enforcement officer bears the primary responsibility in handling individual inspection, and enforcement against violations. The zoning officer's decisions are subject to appeal to the zoning board of appeals, and ultimately to the courts.

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## LOCAL GOVERNMENT PUBLICATIONS

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Some of the Department of State's publications available to local officials are:

***Guide to Planning and Zoning Laws of New York State.*** This publication for municipal officials, attorneys and planning boards is continually revised to include relevant statutory changes. It has the complete text of the State zoning enabling laws, including the statutes referred to in this publication.

***Adopting Local Laws in New York State.*** This booklet combines legal analysis of the home rule power with a plain language, step-by-step guide to drafting and adopting a local law. It is invaluable for the municipal clerk or attorney.

***Zoning Board of Appeals.*** This booklet explains the legal framework surrounding the powers and duties of zoning boards of appeals.

***Zoning Enforcement for Towns and Villages.*** This booklet explores the zoning enforcement process, including options for enforcement and sample forms.

***Record Keeping Tips for Zoning Administration.*** Tips on managing zoning-related paperwork. Sample forms.

***Zoning and the Comprehensive Plan.*** This publication describes and explains the essential relationship between the community's zoning regulations and its comprehensive plan.

Contact the Department of State at the address listed on the inside cover for a complete list of publications you can order. Many of the Department's publications may also be downloaded from the Department of State's website.

The web address is:  
<http://www.dos.ny.gov>

Local law filing instructions and forms can be accessed at:

<http://www.dos.ny.gov/forms/corporations/0239-f-1.pdf>