

The Zoning Board of Appeals



White Plains City Hall



Larchmont Village Hall

North Salem Town House

Ossining Village Hall





WESTCHESTER MUNICIPAL PLANNING FEDERATION
ROOM 432, 148 MARTINE AVENUE WHITE PLAINS, NEW YORK 10601

The **Westchester Municipal Planning Federation** is a voluntary association of officials from Westchester’s forty-five local governments and the County of Westchester. Created in 1962, the Federation evolved from the efforts in the area of civic planning education organized by the late Hugh R. Pomeroy, Westchester’s first Director of Planning, and conducted under the Westchester County Local Planning Program in the 1940s and 1950s. The theme underlying this earlier program was formalized in the statement describing the purpose of the Federation: “To create an effective and permanent countywide organization for the exchange of information on matters of planning interest.”

The Municipal Planning Primer Series is provided as a service of the Federation in cooperation with the Westchester County Department of Planning as part of an educational program for local officials. The Municipal Planning Primer: The Zoning Board of Appeals is a revision of earlier editions and describes zoning board powers, organization and procedures, as well as the legal framework that guides zoning and planning in Westchester County.

March 1999 /Updated March 2008

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**MUNICIPAL PLANNING PRIMER
THE ZONING BOARD OF APPEALS**

Updated March 2008

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I. INTRODUCTION

This publication provides information to new members of zoning boards of appeals (ZBAs) on the role of the local board of appeals and on the legal framework that guides the work of these boards in New York State and in Westchester County. Newly appointed members will find this primer booklet to be just one of the sources to which they can turn for information on their duties and responsibilities. Other valuable sources include experienced board members, professional planners and municipal attorneys, as well as the references listed in this primer. Veteran members of boards can use this review to refresh their understanding of the rules and regulations associated with ZBAs. Non-board members, in particular other local officials and residents who may have occasion to call upon the board's judgment, should benefit from this explanation of the functions and powers of the zoning board of appeals.

This is one report in the Westchester Municipal Planning Series. Others reports focus on the role of *The Planning Board*, the responsibilities of *Design Review Boards and Historic Preservation Commissions*, the organization and operation of local *Conservation Advisory Councils and Boards* and the role and responsibilities of *The Planning and Zoning Clerk*. Each primer defines the responsibilities and functions of the particular board or position and describes techniques used in the course of work.

While the various municipal boards are often called upon to work together, the degree of development in a municipality has an effect on the workload of the planning and zoning boards. A developing community will generally have a very active planning board, while the zoning board of appeals is called upon less often. On the other hand, a fully developed community usually has more frequent occasions to call upon its zoning board.

In both instances, the design review or architectural board of review (if one exists in the municipality) may be involved, since such a board deals with the visual relationship of proposed development to its surrounding environment. The historic preservation or landmarks commission may be involved where there may be an impact on significant historic resources. The local conservation or environmental review board may be called upon to evaluate specific environmental concerns and impacts of development on natural features.

All of these boards may need to work very closely together for the coordinated consideration of certain actions pursuant to procedures of the New York State Environmental Quality Review Act (SEQR). Other laws which each of these boards may be required to comply with include:

- New York State General Municipal Law (and City, Town or Village Law)
- Westchester County Administrative Code
- Local laws and ordinances
- Open Meetings Law
- Freedom of Information Act

In New York State, cities, villages and towns, but not counties, are given the power to zone. When a municipality has a zoning ordinance or local zoning law, as all 43 municipalities in Westchester County eligible to zone do, it is required by the State of New York that the municipality establish a board to hear appeals from that zoning ordinance.

The need for a zoning board of appeals (also called a board of adjustment in some communities) arises when the strict application of the zoning ordinance results in unreasonable constraints upon a property owner's use of his land. One of the board's primary purposes is to provide an administrative appeal mechanism by which the decisions of an enforcement officer or other designated official can be reviewed at the municipal level and thus lessen the likelihood of litigation in connection with the applications of zoning regulations to private property. However, should this administrative appeal prove unsatisfactory to one of the parties involved, the matter can be taken to the New York State Supreme Court by the initiation of an Article 78 procedure as provided for under New York State Law.

The zoning board also acts as an interpreter of the ordinance and makes judgments on its meaning on specific cases. In some municipalities, the zoning board may be charged with additional responsibilities such as approving special use permits. Thus, the board's functions are both administrative and quasi-judicial. The zoning board is not, however, intended to be a policy-making body. In New York, policy rests with the elected local legislature, which is responsible for adopting and amending the zoning ordinance.

Since colonial days, land use in America has been regulated to some extent in order to control nuisances and protect the public health and safety. Early town plats laid out street patterns and the locations of certain prominent uses - churches, schools, cemeteries, parks and the like. As settlements developed into cities and land uses impinged more closely upon each other, the need for more specific regulation of land use became more evident.

The New York State General Municipal Law of 1913 first provided for municipal planning bodies in New York with the enactment of Section 12A, Chapter 699 by the state legislature. This legislation authorized the creation of planning agencies in cities and villages. (It was not until 1927 that enabling legislation for towns was adopted.) Westchester's first municipal planning body was established in the City of Mount Vernon in 1915.

In 1916, the first zoning ordinance in the country was adopted by New York City in response to fears of inner city overcrowding that would result from anticipated improvements to the transportation system. The first zoning ordinance known to have been enacted by a Westchester municipality was adopted in 1920 by the City of White Plains. A report published by the Regional Plan Association indicated that 38 municipalities had adopted zoning ordinances by 1932. In 1926, the United States Supreme Court handed down its landmark decision in the case of Village of Euclid v. Ambler Realty Co., 272 US 365, in which the validity of comprehensive zoning was upheld as a proper exercise of the police power of a municipality.

II. GOVERNMENT FRAMEWORK FOR PLANNING

Counties, cities, towns and villages comprise local government within New York State. They are corporate entities known as municipal corporations. These units of local government provide most local government services, except for some special-purpose governmental units such as sewer and water districts, and single-purpose governmental units such as school and fire districts.

Counties: Counties are creations of the state and have authority as delegated by the state. The organization of legislative and executive authority differs widely across the state. However in New York, counties do not have land use regulatory authority; these functions are specifically reserved to the cities, towns and villages through General Municipal Law and General City, Town and Village Law. There is a County Planning Board that performs countywide planning functions and plays a significant advisory role in local planning and zoning decision-making.

Cities: Cities are specially incorporated by the state legislature to provide governmental services within their boundaries. All cities have elected legislative bodies, known as councils, but the form of executive administration varies.

Towns: Towns are political subdivisions of the state and may include villages within their boundaries. They are governed by town boards, each consisting of a town supervisor (the chief elected official) and four other elected members (councilmen or councilwomen). Some towns have professional managers with administrative authority.

Villages: Villages are incorporated by local action taken in accordance with State law. Each village is governed by an elected board of trustees, headed by a mayor. Some villages have professional managers with administrative authority.

Three principal agencies at the municipal level formulate, document and implement planning policies: the local legislative body, the zoning board of appeals and the planning board. Although each body has separate functions, sound-planning practice requires interaction among these boards and with local officials including the planning staff or consultant, building inspector, municipal engineer and local advisory boards.

The three local agencies must also coordinate some activities with the County Planning Board in its role as an advisory body to the 43 cities, towns and villages within Westchester County that have land use regulatory authority. (Two towns - Rye and Pelham - do not encompass any land that is not part of an incorporated village and thus they do not exercise land use regulatory authority.)

A. Local Legislative Body

The local legislative body has direct authority over specific planning actions, such as:

- Preparation, adoption and revision of a community's comprehensive plan through the passage of a local law
- Adoption or amendment of a zoning ordinance, including the zoning map, and other special ordinances through the passage of a local law
- Adoption of a capital program to fund future improvements to community facilities
- Adoption of legislation creating advisory boards, such as the conservation advisory council and the board of architectural review
- Appointment of residents to serve on the Planning Board and other administrative and advisory boards
- Retention or delegation of authority to grant special use permits, and
- Adoption of subdivision regulations and other types of land use regulations through the passage of a local law.

B. Zoning Board of Appeals

The ZBA is both an administrative and quasi-judicial body that does not have legislative powers. The primary responsibilities of the Zoning Board of Appeals include:

- Consideration appeals from decisions of the enforcement officer in applying the zoning ordinance and granting variances in accordance with General City, Town or Village Laws, whichever is applicable
- Acting as interpreter of the zoning ordinance
- Granting special use permits, when granted such authority by the local legislature, and
- Conducting site plan review, when granted such authority by the local legislature.

C. Local Planning Board

The Planning Board is an administrative body consisting of appointed members. It does not have legislative powers. The primary responsibilities of the planning board are to:

- Review and approve subdivision plats
- Review and approve site plans, when granted such authority by the local legislature
- Review and approve special use permits, when granted such authority by the local legislature
- Prepare land subdivision regulations and recommend their adoption to the local legislature
- Participate in the preparation of a comprehensive plan, when directed by the local legislature
- Report on matters referred to it by the local legislature, including amendments to the zoning ordinance, the adoption of official maps and capital improvements
- Advise the local legislature and other boards on matters affecting a community's development, and
- Prepare other regulations relating to subject matter over which the planning board has jurisdiction and recommend their adoption to the local legislature.

For information on the role and powers of the Planning Board, refer to the publication, [Municipal Planning Primer: The Planning Board](#) (2008), available through the Westchester County Department of Planning.

D. Westchester County Planning Board

The County Planning Board is assigned specific responsibilities by the Westchester County Charter and the County Administrative Code. These responsibilities are:

- To formulate and recommend major development policies
- To aid in maintaining a high level of municipal action in planning and land use regulation
- To coordinate actions among municipalities by bringing pertinent inter-community and county-wide considerations to the attention of municipal agencies.

The principal means by which the County Planning Board carries out these responsibilities is through the mandatory referral process for certain municipal land use and zoning actions (see Chapter VII-B). In conducting these reviews, the Board is guided by the policies and strategies set forth in *Patterns for Westchester: The Land and The People*, the County's long-range land use planning policy document, expected to be updated by *Westchester 2025* in 2008. In addition, the County Planning Board provides planning assistance through planning, zoning and socio-economic studies on intermunicipal and county-wide levels.

III. ZONING AND THE COMPREHENSIVE PLAN

Zoning encompasses 1) the division of a municipality into districts or zones and 2) the regulation of the use of land and the size of buildings within each of those districts. The adoption of a zoning ordinance and subsequent amendments and legislative actions are the prerogatives of the local governing body. The governing body can enact and change the municipality's zoning law based on its own initiatives or based on recommendations it receives from a number of sources. These can include the zoning enforcement officer, the planning board, the zoning board of appeals, planning staff, municipal attorney and property owners.

Early in the history of zoning it became apparent that it would be unfair to zone one part of a community while leaving the remaining portion unzoned. Consequently, when the states passed enabling legislation giving zoning powers to municipalities, they stipulated that comprehensive coverage of all land within the municipality must be included. Gradually, the idea of basing the zoning ordinance on a comprehensive plan took root. Today's zoning ordinances are most successful when they reflect the thorough understanding of a community that comes with a carefully prepared comprehensive plan.

While zoning has frequently been enacted without the benefit of planning, it is now recognized that zoning is one of the most important tools available to a community to implement the land use policies set forth in a municipality's comprehensive plan. Therefore, a comprehensive plan should precede the enactment of a zoning map and ordinance. It is also recognized that while zoning and planning have separate and distinct purposes, neither one will be effective without the other.

The provisions for comprehensive planning by New York State municipalities were extensively revised by the State legislature in 1994 and 1995. Before July 1994, planning boards were authorized to prepare a comprehensive master plan for their city, town or village. Since that date, amendments to Town, Village and General City Law have switched the authority for adoption of a "comprehensive plan" to town boards, village boards of trustees and the legislative bodies of cities. This is a new concept as few municipal comprehensive plans prepared by Westchester municipalities prior to 1994 had been formally adopted by the elected officials serving on the town board, village board of trustees or the legislative body of cities. Typically, adoption was done by the planning board after a public hearing.

Under the new provisions, a town board, village board of trustees and the legislative body of a city may prepare a comprehensive plan itself OR it may designate by resolution the planning board or a *special board* to prepare the comprehensive plan. If the elected board or a *special board* prepares the plan, Town, Village and General City Law provide that the elected board may refer the proposed new plan to the planning board, "for review and recommendation before action" by the elected board. It is important to note that involvement of the planning board is not required.

If the elected board decides to use a *special board*, such board is defined as, “consisting of one or more members of the planning board and such other members as are appointed by the (town board, village board of trustees or legislative body of a city) to prepare a proposed comprehensive plan and/or amendment thereto.”

Town, Village and General City Law further provide that if a *special board* or the planning board prepares the comprehensive plan or amendment, that it must recommend by resolution such proposed plan or amendment to the town board, village board of trustees or legislative body of a city.

The 1994 amendments also established, for the first time, a concise definition of what is meant by "comprehensive plan" and sets forth a suggested list of contents. The comprehensive plan is now defined as a set of materials (text, graphs, maps, studies, resolutions) that, “identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development” of the town, village or city.

The potential components of a comprehensive plan that are identified include:

- Statements of goals and objectives
- Consideration of regional needs
- Existing and proposed location and intensity of land uses
- Consideration of historic and cultural resources and sensitive environmental areas
- Consideration of population, demographic and socio-economic trends
- Location and types of transportation facilities
- Location of public and private utilities
- Housing resources and needs including affordable housing
- Policies and strategies for improving the local economy in coordination with other plan topics
- Existing and proposed recreation facilities and parks and
- All or part of the plan of another public agency.

Town, Village and General City Law also now specify that the elected board, “shall provide, as a component of such proposed comprehensive plan, the maximum intervals at which the adopted plan shall be reviewed.” No specific timeframe is suggested. Typically, plans are assumed to be suitable for review - not necessarily replacement - every five to ten years depending upon development or land use activity within each municipality.

The Laws specify that one or more public hearings must be held at each of two stages - during the plan’s preparation and then prior to adoption. At the second stage, the town board, village board of trustees or legislative body of a city is required to hold a public hearing within 90 days of receipt of the planning board or *special board’s* recommendations, if the plan was prepared by such board.

In addition, Town, Village and General City Law require that the town board, village board or trustees or legislative body of a city refer the plan or amendment to the county planning board prior to adoption. If adopted, the municipality must file a copy of the adopted plan with the county planning board. These mandatory referrals to the county are new procedures.

The 1994 and 1995 amendments to Town, Village and General City Law explicitly state that it is not the intent of the legislature to require the preparation and adoption of a comprehensive plan pursuant to the new provisions. However, the Laws do state that it is the legislature's intent to *encourage* comprehensive planning.

It is important to note that if a comprehensive plan is adopted, the Laws state: "all (town, village or city) land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section."

The comprehensive plan differs from the municipality's zoning ordinance in that its focus is on long-range goals and development objectives. Zoning, on the other hand, is a legal instrument, which regulates the current use of land. The zoning ordinance reflects present municipal land use policies while the comprehensive plan sets forth the future direction of a municipality's land use policies as they are expected to evolve. A zoning ordinance should be based on the fundamentals put forth in the comprehensive plan, as it regulates the use of specific parcels. Through it a municipality may preserve the desirable features of existing development and set standards for future development. Decisions on amendments to the zoning ordinance by the legislative body, as well as the actions of the zoning board on such things as variances and special permits, should take into account the policies of the comprehensive plan in order to maintain harmony between planning and zoning.

Zoning is primarily prospective rather than retrospective in its effects, and cannot be relied upon as a major device for correcting existing conditions. Zoning allows development to happen, but does not compel it. In some cases, zoning can correct existing flaws created prior to regulation under a zoning ordinance. By adoption of zoning that restricts the type of development permitted, those existing uses not complying with the new zoning restrictions may be required to conform within a given period of time.

Remedies for deterioration and blight usually involve direct action by a public body, such as through the enforcement of local housing standards. Techniques available to local governments also include: acquisition of real property; public works and site improvements; code enforcement; and clearance, demolition and rehabilitation.

IV. ZONING AND OTHER MUNICIPAL CONTROLS

A. The Zoning Ordinance

An understanding of the provisions of a municipality's zoning ordinance is essential to anyone serving on its zoning board of appeals, for it is the foundation on which decisions will rest. The zoning ordinance is generally composed of three elements:

- The text, which describes the intent of the ordinance, defines the various zones and the uses allowed therein, sets forth administrative procedures and establishes definitions.
- The zoning standards, which include building bulk, height and coverage requirements and minimum dimensional requirements for lot areas and yards or setbacks for each zone.
- The zoning map, which shows the boundaries of each of the zones.

Together, these three parts form the document that controls the use and intensity of development of privately held property within a municipality.

The ordinance takes general use categories (residential, commercial, industrial, etc.) and refines them according to the desired intensity of use. A zoning ordinance can thus have several or many districts for each of these categories. For instance, it might have four different residential zones with varying densities: 1) a zone allowing single-family dwellings on one-acre lots; 2) a zone allowing single-family dwellings on one-half-acre lots; 3) a multi-family townhouse district and 4) a high-rise apartment house zone. The number of zones for each type of general use category will vary from one municipality to another, as will the level of permissible density for each zone. The determination of zones and uses is usually the result of intensive planning and the adoption of a comprehensive plan.

These different zoning districts are usually spelled out in the ordinance's text. This element of the overall document will generally contain statements describing the purposes of the ordinance ("to guide future growth..." and "to protect the public health, safety and general welfare..." etc.), brief definition of terms used throughout the ordinance (similar to those found in this primer's glossary), procedures to be followed by applicants as well as the municipality itself, and the uses permitted, or prohibited, within each zoning district. Several of the more sophisticated zoning ordinances in the county include descriptive statements of purpose for each of the zoning districts, setting forth the local legislative intent for that district and describing where the policymakers intended it to be mapped. These statements of purpose can be particularly helpful to the zoning and planning boards in deliberating on matters that are before them. The following is a hypothetical preamble to these standards for a Planned Office and Business District:

The Planned Office and Business District is intended to be a transitional non-residential district to be mapped in areas adjoining the Central Business districts and separating them from adjacent residential zones. It differs from Central Business districts in that no retail uses are permitted, but do require off-street parking for employees and visitors. It is not intended as a freestanding district, but to be a buffer between higher intensity commercial districts and residential neighborhoods. As such, its standards are drawn to permit business activities to be established in former residential structures, but it also contains standards to be applied to new structures on undeveloped or cleared parcels, which limit them to a bulk that does not exceed those of the residential structures found in adjacent areas. The zone is therefore suitable to be located in the hamlets of..

The bulk and lot regulations associated with each zone or each type of use set the parameters for construction within a district. These will specifically state such standards as the maximum lot coverage, the allowable building height, required setbacks from property lines, as well as the maximum intensity of a permitted use. Intensity and density is normally described in terms of the number of dwelling units per acre for residential districts, and total floor area for non-residential districts.

The zoning map is the third element of the ordinance. It graphically shows the zoning district designation for every property in the municipality. This is generally based on a street map that shows tax lots and identifies zoning districts by boundaries drawn over street or lot lines. The zoning map is adopted with the rest of the zoning ordinances and is legally included within the context of the ordinance. It represents the land use policy of the municipality's legislative body at a given instant in time, i.e. the date of its adoption or of the adoption of the last map amendment. It differs from the land use plan map found in the municipality's comprehensive plan, which depicts land policy recommendations. A comparison of the zoning map and land use plan would indicate the potential for change. It should be noted, however, that the zoning board has no direct role in these land use policy processes, since the responsibility for adopting a new or amended zoning ordinance rests with the municipal legislative body which considers the policy recommendations for land use as contained in comprehensive plans and depicted on the land use plan map.

As zoning ordinances have become more complex, municipalities have found it convenient to alter the form of some of the elements described above. Whereas in older ordinances the bulk and lot standards were generally found in the text describing each district and the uses allowed therein, most ordinances are now printed with separate schedules for uses and requirements. These schedules are large charts that can, in a single glance, allow the reader to find the requirements associated with any zone. This saves the trouble of having to thumb back and forth between sections of the ordinance - but it does require a good cross-referencing system as special requirements may still be listed only within the text.

Another zoning ordinance change found in newer ordinances deals with density calculations. In some of the most recently enacted ordinances, residential density, along with such items as the amount of on-site parking, is calculated by using the number of bedrooms per acre (or other unit of land area). For example, a three-bedroom apartment is more likely to have a larger number of driving age occupants than a one-bedroom apartment and consequently it will have a greater

impact on traffic generation, parking requirements, total lot coverage, etc. Bedrooms represent a common factor to quantify such impacts permitting a balancing of impacts generated by different types of the same use.

Enforcement of the zoning ordinance on a day-to-day basis is usually the responsibility of the building inspector or other official selected by the municipality's legislative body. In carrying out his duties, the enforcement officer does not have discretionary authority. It is his duty to follow the letter of the zoning ordinance. He has no power to make special exceptions or grant variances since these are functions of the board of appeals. Whenever there is doubt about the meaning of provisions in the ordinance, the building inspector should deny the permit, or in the case of an ongoing activity, cite the owner for a violation. If the owner feels the officer's action to be incorrect, he may then appeal the decision to the zoning board of appeals.

The courts have often upheld challenges to the validity of provisions in a zoning ordinance. As such, most ordinances now contain a "separability clause," which states that the invalidation of one portion of the ordinance does not invalidate the entire ordinance. While this judicial review can be a useful indicator to a municipality that an ordinance needs to be changed, the actual amendment of the ordinance is a legislative action. Amendments to the ordinance can be made by the local legislature at any time, not just upon court determination. Procedures to be followed in amending the ordinance are contained in both the State enabling legislation and the local ordinance itself.

The zoning board of appeals, while having no power to amend the ordinance, can serve a useful advisory role by advising elected officials when a zoning ordinance may be in need of revision. The granting of a high number of variances from the particular zoning ordinance requirement is often a sign that such a regulation has become outdated or is unrealistic. Legislative action amending the ordinance so as to preclude the need for many of the most commonly sought-after variances will most likely result in an ordinance that reflects the current needs, trends and land use policies in a municipality. Amendments in such situations will also reduce the workload of the board of appeals.

B. Appeals from Other Controls

The zoning board of appeals may be used as the appeal board for a variety of other local development control regulations, in addition to the zoning ordinance.

Many municipalities have adopted an official map (not to be confused with the zoning map), which serves to identify the location of present and future community facilities, such as roads, drainage systems and parks. One of the purposes of the official map is to facilitate the planning of the municipal street network by showing the location of existing and future roadways, including planned widening. It is also used to protect against any construction within the rights-of-way of proposed streets. These proposed or "paper streets" may be held as private property until the community is ready to use them, or take title to them should they be improved by the property owner. The owner's use, however, is restricted to avoid the community having to pay additional monies for improved land when it comes time for the municipality to take possession. If the land is not yielding a fair return, the owner may apply for a variance or exception in order

to build on the reserved land. It is the zoning board of appeals, which has the power to grant such a permit.

Architectural design, signs and environmental concerns such as excavation, topsoil removal and tree removal are also often the subjects of special local regulations. Depending upon local procedures, appeals from these regulations are often heard by the zoning board of appeals.

V. ORGANIZATION AND PROCEDURES

Provisions for a zoning board of appeals are usually contained within the text of the zoning ordinance or the local law creating the board. These provisions should clearly and concisely spell out the following: the specific powers to be exercised by the board; the exact limits within which those powers are to be exercised; the membership, terms and the process for the selection of the board's officers and the filling of vacancies; and the general rules governing the board's decisions, the conduct of its meetings and its appeals and hearing procedures.

A. Membership

Appointees to the zoning board of appeals should be independent individuals, willing to make up their own minds on issues, having the ability to analyze problems and being able to decide and vote on an issue based on their convictions of what is best for the community within the context of the zoning ordinance. A Board member should have a sincere interest in his or her community and be willing to give time to the board's work. Based on information obtained from a 1989 County Planning Department survey of municipal zoning board chairmen, the most frequently listed occupation of board members was that of "attorney" (28 percent of the board members of those communities responding). The next most frequently listed occupations were "business" (21 percent), "engineers" (10 percent), "finance or accounting" (10 percent), "building or construction" (10 percent), "real estate" (5 percent) and "education" (5 percent).

To ensure that all members of the zoning board of appeals are adequately prepared to carry out their duties on the board, the legislative body of the city, town or village may require that board members complete training and continuing education courses in accordance with any local requirements for the training of such members. The mayor/city manager, town board or village board may provide for removal, after public hearing, of any zoning board of appeals member for non-compliance with any minimum requirements relating to meeting attendance and training as established by the legislative body.

As a result of amendments to General City, Town and Village Law, the requirements for the number of zoning board members and their terms of office are now substantially the same for towns, villages and cities. The chart below summarizes the requirements for zoning board member appointments.

APPOINTMENT TO THE BOARD OF APPEALS

	Number of Members	Terms of Office	Appointed By
TOWNS	3 or 5	3 or 5 years	Town Board
VILLAGES	3 or 5	3 or 5 years	Board of Trustees
CITIES	3 or 5	3 or 5 years	Mayor or City Manager

Because experience is very valuable to the board, members are appointed for staggered terms with the intention that there is never a need for a complete turnover at any one time. The chairmen responding to the Planning Department survey indicated that the average length of service of zoning board members in Westchester is just over 5 years. There are no legal limits to the number of terms to which a board member may be appointed. The terms of members of zoning boards of appeal in cities and towns expire at the end of the calendar year; the terms of office of those in villages expire at the end of the village's official year.

To the greatest extent possible, the board should be kept at full strength to ensure that it has enough members to easily meet its quorum requirements. Courts have ruled that a quorum is determined based on the full-authorized membership of the board - not on the number of filled positions. As a consequence, decisions of the board must be based on an absolute majority of the board's fully authorized membership. The Planning Department survey found that 80 percent of those communities responding had a full membership of five.

Some communities in Westchester have an individual serve on both its zoning board and its planning board to encourage communication and liaison between the boards. This is possible under state law. However, many municipalities prefer that each board appoint one member to act as liaison to the other board or boards. Further discussion on the relationship with other boards and agencies can be found in another section of this report.

During the year it may also be desirable for the zoning board and planning board to have one or more joint meetings to discuss the status of development of the community in relation to the stated purpose of the zoning ordinance and the comprehensive plan. The legislative body should be included in such a meeting to hear recommendations on the need for updating the comprehensive plan or of amending the zoning ordinance.

B. Board Member Compensation

State enabling legislation authorizes local legislative bodies to compensate zoning board members for their services. Although not a common practice in Westchester, 25 percent of those communities responding to the survey stated that they do provide compensation for zoning board members. In these municipalities, the average annual compensation for ZBA chairmen (in 1989) was \$2,123 and the average compensation for other ZBA members was \$1,595.

C. Budgets or Special Appropriations

Some municipalities authorize a specific budget for their zoning board to cover the administrative and staff costs associated with ZBA business. Forty-five percent of the Westchester communities responding to the survey had a specific budget appropriation for the zoning board. The average budget amount for the 1989 fiscal year was \$20,000. There was a wide range however - \$3,000 to \$73,000. Several communities that had no ZBA budget indicated that special appropriations are authorized on occasion to cover specific expenses, such as attendance at conferences, special supplies or equipment.

D. Staff Support

A key ingredient to the successful operation of the zoning board is the technical advice and assistance provided by municipal staff at ZBA meetings or hearings, on site visits and through staff reports. All of the communities responding to the survey indicated that their zoning board receives some form of staff support. Seventy-five percent of the zoning boards responding rely on regular support from the building inspector or municipal engineer. Sixty percent of the communities provide the services of the municipal attorney or special counsel to the zoning board. Sixty percent also have the regular services of a secretary or zoning administrator. Several of the zoning boards receive technical assistance and support from the municipal planning department or planning consultant. Several communities also indicated that their zoning board requires the services of a stenographer on a case-by-case basis.

E. Incompatibility of Office and Conflict of Interest

Appointments to the zoning board of appeals should avoid situations involving incompatibility of office or conflict of interest. Incompatibility relates to a person holding two or more public offices, which are in conflict with each other. Conflict of interest questions, on the other hand, arise when a person holding public office has certain private interests that are affected by public action.

Among the most noteworthy illustrations of incompatibility of office associated with membership on a zoning board of appeals are statutory prohibitions against local legislative members serving on the zoning board and a State Comptroller's opinion noting the incompatibility of a building inspector serving as a zoning board member within the same municipality.

The basic state statute covering the area of conflict of interest as applied to the operations of local governments is found in General Municipal Law Article 18. This section of state law describes the areas of conflict of interest in municipal transactions and leaves to local governments the prerogative to enact their own conflict of interest restrictions by adopting a local code of ethics.

Section 809 of the General Municipal Law requires every applicant for a land use approval to disclose any interest in the application possessed by any state, county or local official within the jurisdiction. Applications included under Section 809 encompass those for variances, zoning amendments, site plan and subdivision plat approval and requests for exemptions from provisions of zoning and planning regulations. For opinions regarding potential conflict of interest situations, consult your municipal attorney.

F. Conducting Business

Matters that are brought before the zoning board of appeals involve the property rights of individuals and the rules set down by the community. The board decides in favor of one party. The other party, even if it is the municipality, can appeal the board's decision to the courts through an Article 78 proceeding. Consequently, careful attention needs to be paid to procedures and record-keeping so that the board may avoid having its decision nullified on the grounds of a procedural defect.

1. **BOARD ORGANIZATION:** The board is responsible for publicizing each meeting and the chairman is responsible for then running it according to the prescribed rules or order. In addition to having a chairman, it is recommended that the board have a vice-chairman to act in the chairman's absence and a recording secretary or staff secretary to keep minutes. To maintain good lines of communication with other municipal agencies, particularly the legislative body, a board should consider appointing one of its members as a liaison to the legislative body and to the planning board and the architectural board of review if the municipality has one.

2. **RULES AND PROCEDURES:** The board has the authority to adopt by-laws governing its organization and procedures. These should be written, revised periodically and made available to new board members. Nine of the 20 Westchester municipalities responding to the zoning board survey indicated that they have written rules and regulations. Applicants should be advised to meet with the board's technical staff, if there is one, to review matters of form and procedure prior to making formal submissions.

3. **MEETINGS:** The board should have regularly scheduled meetings. Monthly meetings are generally adequate; boards with long agendas often hold one or more work session between regularly scheduled monthly meetings. The board should set its own agenda in advance of the meeting and make it available to the public. Complete records should be maintained of the board's activities, especially its meeting minutes. It is important that board decisions be based on specific findings of fact and that these findings be clearly documented in the minutes. The board should conduct all of its meetings in compliance with New York State's Open Meetings Law.

4. **COMPLIANCE WITH OPEN MEETINGS LAW:** In 1976, the State Legislature enacted the Open Meetings Law, which is applicable to all public bodies, committees and similar bodies. The law asserts that every meeting of a public body shall be open to the public except when an executive session is called to discuss certain subjects that are listed in the law. A "meeting" is defined as the "formal convening of a public body for the purpose of officially transacting public business" (Public Officers Law, Dec. 92, Subd. 1). A "public body" is "an entity, for which a quorum is required in order to transact business and which consists of two or more members, performing a governmental function..." (Public Officers Law, Sec. 92, Subd. 2).

Any aggrieved person has standing to enforce the provisions of the Open Meetings Law. If a public body has taken action in violation of the law, a court can declare the action null and void.

The Open Meetings Law does not apply to judicial or quasi-judicial proceedings, deliberations of political committees, conferences or caucuses, or any matters made confidential by federal or state law. To ensure compliance with the Open Meetings Law, consult your municipal attorney when there is a question regarding procedural aspects of meetings or hearings.

The Committee on Open Government is responsible for overseeing the implementation of the Open Meetings Law. When questions arise, the Committee can provide written or oral advice and mediate in controversies in which rights may be unclear. If you need advice or information regarding the Open Meetings Law, you may contact the Committee on Open Government at:

New York State Department of State

162 Washington Avenue
Albany, NY 12231
(518) 474-2518

5. **GUIDELINES FOR COMPLIANCE:** The following are some guidelines for local boards to follow, based on the provisions of the Open Meetings Law:
- a. **Public Notice** - When a meeting is scheduled a week or more in advance, public notice of its time and place must be given to the news media and posted in one or more designated public location at least 72 hours before the meeting. Public notice of the time and place of all other meetings must be given to the public and the news media to the extent practicable.
 - b. **Minutes** - Minutes must be compiled for both open meetings and executive sessions. Those for executive sessions must be made available within one week; those for open meetings must be made available within two weeks. Minutes shall include a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
 - c. **Executive Sessions** - There are eight grounds for calling an executive session listed in the Open Meetings Law, which may appropriately exclude the public. The grounds for executive sessions are largely based on the harmful effects of public airing of particular issues; and are summarized as follows:
 - Matters that will imperil the public safety if disclosed;
 - Any matter which may disclose the identity of a law enforcement agent or informer;
 - Information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
 - Discussions regarding proposed, pending or current litigation;
 - Collective negotiations pursuant to Article 14 of the Civil Service Law;
 - The medical, financial, credit, or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person of corporation;
 - The preparation, grading or administration of examinations; and,
 - The proposed acquisition, sale or lease of property but only when publicity would substantially affect the value of the property.
6. **FILING OF APPEALS:** The board first learns that an appeal is being brought before it through a request for a hearing from, “any person aggrieved, or by an officer, department, board or bureau of the town.”¹ (The same provision is contained in Village Law and General City Law).
- The request is usually made by the completion and filing of an appeal form as required by local procedures, and should include the specific reason for the appeal. The appeal may be brought by a person (the property owner, lessee or option holder) aggrieved by the refusal of the building inspector or designated administrative officer to approve an action, or by a person aggrieved because another person’s proposal was approved, or by a person who has been cited for a violation of the zoning regulations. The board of appeals may simply accept

¹ Town Law, Section 267-a

the appeal or decide that a hearing is needed to determine that the person appealing is truly aggrieved. A determination that a person is not aggrieved may only be made after a hearing.

- Anyone bringing an appeal from the action of the enforcement officer is required to inform him of the appeal. The inspector will then forward his files on the matter to the zoning board for its information.
- The appeal must be taken “within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official charged with the enforcement of any ordinance or local law...” The proposed action upon which the appeal is based may not proceed during the appeal, unless the enforcement officer certifies that stay would imperil life or property.
- Upon acceptance of an appeal, the board must formally fix a reasonable time for a hearing (usually 60 days). Notice of the hearing must be mailed to the parties involved, and published in a paper of general circulation prior to the hearing. Five days notice is now required for cities, towns and villages. Some communities have ruled that notice should also be mailed to abutting property holders and/or close neighbors. The board must follow its own rules and regulations as enacted under local zoning provisions, as well as comply with the requirements of State enabling legislation.

7. **PUBLIC HEARINGS:** The purpose of the hearing before the zoning board of appeals is to gather facts and hear arguments on the matters before the board so as to provide a basis for the board’s decision. A public hearing also assures that the zoning board’s proceedings are subject to public scrutiny and are conducted in a fair and non-prejudicial manner. The board may take sworn testimony or accept pertinent informal statements from all who wish to speak. When conducting public hearings, the chairman has the responsibility to keep the meeting on course, bringing discussion to a conclusion and ensuring that the hearing is conducted in a fair manner and with decorum. To meet these objectives, the following points should be kept in mind:

- The board members should be thoroughly acquainted with the subject of the hearing. If appropriate, a field inspection should have been made to the site.
- The subject of the hearing should have been properly publicized prior to the hearing.
- There should be an explanation by the chairman at the start of the hearing describing the manner in which the hearing will be conducted. In situations where a larger than expected audience attends, the board can recess the hearing and reconvene to a larger room, or announce additional hearings. When it is expected that a large number of people will want to speak, a sign-up sheet is recommended, with people selected in the order in which they signed the sheet.
- All questions or comments should be directed to the chairman. Cross-examination may be made by the board or the parties, all of whom may be represented by counsel or an agent, but

the chairman has the responsibility to keep the hearing orderly and confined to matters of relevant fact.

- There must be a careful record kept of the proceedings of the public hearing.
- At the conclusion of the hearing, the board can reserve its decision until it has a chance to review the hearing record and the particulars of the matter at hand. The board's decision must be based on the discussion at the hearing, the facts obtained and the analysis conducted on the issue. The fact collection by the board may include a visit to the site of the zoning infringement or requested variance.

8. **DECISIONS:** The State enabling legislation specifies that a decision must be announced by the zoning board within 62 days after the close of the hearing. This timeframe may be extended by mutual consent of the applicant and the board. Several points should be considered in procedure for decision-making:

- All votes must be taken by the board at an open meeting. The vote of each member, or of his or her absence from the hearing and decision, must be recorded. A decision of the board is by a concurring vote of the majority of the authorized membership of the board.
- The written decision should include the findings of fact of the board and the conclusions of law upon which it is based. It should specifically address the required elements of proof for the particular type of application at hand. The decision must be carefully documented so that the board may avoid the charge of being arbitrary or capricious. A court reviewing the decision will have only this record to rely upon, therefore the reasoning must be within the written decision. There is a presumption of validity in favor of the board's determination. On appeal to the courts, board decisions are judged on the basis of fact and tested as to whether or not they are within the board's permissible scope of discretion.
- Town and village boards are required to file their decisions within five days in the municipal clerk's office. General City law requires that decisions must be filed in the city clerk's office (or the zoning office if there is one). In all cases, a copy of the decision must be provided to the applicant.

9. **COURT ACTION:** Decisions of the zoning board are reviewable by the New York State Supreme Court (the lowest level of the State court system) in a proceeding under Article 78 of the Civil Practice Law and Rules. It establishes a procedure through which the courts may review and grant relief from administrative action. This is essentially a writ of certiorari, a calling up of the record for review. In the class of officers and boards having a right to seek judicial review are the enforcement officer, the mayor or supervisor, the legislative body and the planning board. In addition, any other aggrieved party can bring an action to have the court review a zoning board's decision. An aggrieved party is considered to be a person or group of persons found to have a sufficient legal interest in the matter decided upon by the zoning board.

The courts will assume that the board of appeals has acted fairly and that the burden of proof to the contrary rests upon the person bringing the appeal. The courts do not usually make new, or

substitute, judgments but the courts have the power to reverse, affirm wholly or partly or modify the decision brought before them. The court will examine the record to determine whether it is complete and contains evidence to support the decision, whether required procedures were followed, whether the hearing was fairly held and if the decision made was reasonable.

The primary evidence that the court will have in determining the thoroughness with which the zoning board's decision was made and the fact that it was a fair decision will be the written decision. It is thus essential that decisions be carefully and fully written. When there is insufficient evidence to support the finding, the court may remand the matter to the board with instructions to complete the evidence. Or, the court may overrule the decision on grounds of being contrary to law or being arbitrary. If there is still dissatisfaction by either of the parties, the appeal may be carried to the Appellate Division and then to the Court of Appeals, the highest court in New York State.

G. Training Requirements

On January 1, 2007, new minimum training requirements for municipal planning and zoning officials took effect. The New York State law requires a minimum training standard of four hours each year for all members (including alternates) of county, city, town and village planning and zoning boards. Training credits in excess of four hours obtained in any given year may be carried over to meet the next year's requirement. Board members who fail to receive the required minimum training are ineligible for reappointment to their board, unless exempted by the legislative body.

The local legislative body of each municipality determines what courses, programs or other activities may meet the training requirement. Each municipality should establish a system for keeping track of training received by board members.

There are many different avenues of obtaining training. The programs offered through the Westchester Municipal Planning Federation (WMPF) are a good place to start. Each spring, WMPF offers a Land Use Training Institute that spans three evenings and provides instruction, discussion and education on board practices as well as on current planning and zoning topics. WMPF provides a certificate of attendance to registrants that can be delivered to the record-keeper in their municipality.

VI. FUNCTIONS OF THE ZONING BOARD OF APPEALS

The board of appeals may have more than one function. These functions may be of “appellate” or “original” jurisdiction.” The State enabling legislation states, “unless otherwise permitted by local law, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation or determination made by the administrative officer charged with the enforcement of any ordinance or local law....”

Two matters fall under the zoning board’s “appellate” jurisdiction. The board interprets the meaning of the ordinance where the language is unclear and the board may grant area or use variances arising out of the application of zoning controls.

In addition to hearing appeals, the zoning board may administer provisions of the ordinance that involve the granting of special permits for certain uses of land. Assignment of this responsibility to the zoning board is a decision of the municipal legislative body. This would be an example of “original jurisdiction,” an occasion where the board has direct authority and does not rely on an appeal made from a previous determination.

In handling matters with which it has original or appellate jurisdiction, board members should have a set of guidelines or procedures to follow (as discussed in Chapter V) so as to be best prepared to establish what the facts are and to ascertain a petitioner’s underlying claim. Board members should also have a knowledge of legal tests from case law (including its own prior cases) that can drawn on when rendering decisions.

A. Legal Framework

The courts have provided some clear guidelines on the limitations of the powers of zoning boards. The main points that zoning board members should be aware of are as follows:

- A zoning board cannot act on an appeal seeking an interpretation of the zoning ordinance in the absence of an action taken by the building inspector or zoning enforcement officer. (Kaufman v. City of Glen Cove) 180 Misc. 349, aff’d. 266 A.D. 870(1943). It should be noted that an appeal for an interpretation may also be taken by a third party from a permit approval or by a property owner who has been cited for a zoning violation. In neither case is a “denial of an application” necessary.
- Under case law, a zoning board cannot hear or decide on an application for a variance except on appeal from a decision of the building inspector or zoning enforcement officer. (Scott v. Quittmeyer, 200 N.Y.S. 2d866[1960]). However, amendments to the State enabling legislation have carved out exceptions to this. Under applicable sections of the State enabling legislation concerning site plan, subdivision and special permit approval, a direct application may be made to the zoning board of appeals where an area variance is required to bring a

proposed site plan, subdivision or special permit application into conformity with the zoning ordinance.

- Zoning boards are administrative bodies and do not have any legislative powers.
 - Zoning boards may not impose zoning restrictions. This is a legislative function. (Levy v. Board of Standards and Appeals, 267 N.Y. 347 [1935]). However, an exception to this rule is that the zoning board may impose conditions, as discussed later in this chapter.
 - The zoning board has no power to set aside an ordinance on the ground that its terms are arbitrary, unreasonable or unconstitutional. This is the province of the judiciary. (Cherry v. Brumbaugh, 255 A.D. 880 [1938]).
 - The zoning board does not have the authority to amend the zoning regulations or change the boundaries of the districts in which they are applicable. (Levy, above.)

The distinction between the zoning board's legitimate function to "vary" or "modify" the terms of a zoning ordinance (i.e., to grant variances) and the municipal legislative body's power to amend a zoning ordinance may, at times, seem not so clear. It helps to remember that a variance is a relief mechanism that may be used only in limited circumstances and in accordance with specific tests that have been spelled out in State law. A variance provides limited relief from zoning regulations that, as applied to a specific parcel of land, are determined to be too restrictive.

A State Comptroller's Opinion (Op.St.Compt. 65-770) discusses a number of court cases that clarify the distinction between a proper variance and an improper zoning amendment. The highlights are:

- The granting of a variance to construct a motel in a district where motels are prohibited in no way authorizes the construction of a theater or other commercial uses "equal" to a motel. The variance had simply permitted the motel use of the land. It has not amended the zoning ordinance or reclassified the land. (Schmitt v. Plonski, 215 NYS 2d 170 [1961])
- In each of the following cases, the court upheld a refusal by a zoning board to grant a requested variance, on the grounds that the transfer of a large tract of land from one classification to another actually would have constituted a zoning ordinance amendment:
 - Reclassifying as commercial a 5-1/2-acre tract that constituted an entire residential district. (Re Northampton Colony, Inc., 30 Misc. 2d 469, 219; NYS 2d 292, aff'd.; 16 AD 2d 830, 230 NYS 2d 668 [1961])
 - Reclassifying into one-acre building lots a 40-acre zoned for two-acre residential lots. (Hess v. Zoning Board of Appeals, 17M2d 22, 188 NYS 2d 1028 [1955])

B. Interpreting the Zoning Ordinance

The zoning board of appeals is the sole municipal agency with the power to interpret the zoning ordinance. The municipal attorney can only give an advisory, non-binding opinion. The zoning enforcement officer's role is to enforce the zoning ordinance as opposed to interpretation of the zoning ordinance. Appeals from the enforcement office's decisions are heard when it is alleged that he has misapplied ordinance provisions in a particular case. The board first determines the facts of the case and then decides on the meaning of the ordinance. For example, the location of a district boundary where the zoning map is ambiguous or unclear is often a matter that the zoning board is asked to clarify.

An interpretation is given only when an appeal is made and then only on the issues of that specific case. In all instances, the letter and the spirit of the ordinance must guide the interpretations, whether or not the board agrees with the content of the ordinance. The factual findings of the board are taken as final as long as adequate evidence supports them. Interpretations are, however, subject to reversal should they be appealed successfully in the courts.

C. Variances

Traditionally, zoning is characterized as the uniform application of adopted standards and regulations to all properties assigned to a specific zoning district. While all lands in a zoning district are theoretically subject to the same rules, the fact that no two parcels of land are the same will occasionally call for the modification of zoning regulations as they apply to a specific site.

The most common way of providing relief from the provisions of a zoning ordinance is through the granting of a variance. This is an authorization to use land or to construct or maintain a building in a way that would otherwise be prohibited by the zoning ordinance. It is also used to give relief from, or permit reduction of, one or more requirements of the ordinance as applied to a particular site.

Traditionally, variances are given only on appeal; that is after the zoning enforcement officer has denied a proposal. However, as a result of changes in the State enabling legislation, variances in connection with site plan, subdivision and special permit applications may be directly taken to the zoning board of appeals. (See e.g. Town Law §§ 274-a (3), 274-b(3) and 277 (6).) Moreover, where a proposed special use permit contains features that do not comply with the zoning regulations, an area variance is required. (Town Law §274-b (3); General City Law §27-b; Village Law §7-725(b) (3); see also Dennis v. Zoning Board of Appeals of Village of Briarcliff Manor, 637 N.Y.S.2d 266 (Sup. Ct. Westchester Co. 1995))

The authority of a zoning board to extend a previously granted variance will often depend on the wording of the initial variance and the local law of the particular community. With regard to the revocation of a previously granted variance, it has been held that a board could only revoke a variance as specifically provided by the local zoning ordinance. In Tohr Industries Corp. v. Zoning Board of Appeals of City of Long Beach, 74 N.Y.2d 575 (1989), the Court of Appeals decided that since the local code only authorized revocation when a condition imposed by the board had been violated, the board lacked power to revoke that particular variance.

In Gina Petroleum. Inc. v. Zoning Board of Appeals of Wappinger, 127 A.D.2d 560 (2d Dept. 1987), the Appellate Division held that where a zoning ordinance provided for termination of a variance in the event the applicant failed to initiate construction within one year, it was within the power of the board to refuse an extension, without prejudice to a new variance application and to consideration of an extension of time in connection with such an application. It should be noted, however, that the courts have held that unless there is some change of circumstances, upon application for an extension or a renewed application for a variance, the board has limited authority to deny the application. (See Matter of Dil-Hill Realty Corp. v. Schultz, 53 A.D.2d 263 (2d Dept. 1976) and American Red Cross, Tompkins County Chapter v. Board of Zoning Appeals of City of Ithaca, 161 A.D.2d 878 (3d Dept. 1990))

Variations are permanent and run with the land (not limited to the particular owner) and should be viewed as a derogation of the zoning ordinance. For this reason they should be granted sparingly and under circumscribed conditions. Variations may be conditioned on the performance of certain stipulations set by the board, such as the provision of landscaping or the inclusion of some other design feature that would mitigate the effect of the variance upon the neighborhood. On the other hand, zoning boards may not impose unrelated conditions or conditions which relate to the landowner rather than to the use of land.

It should be emphasized that the protection of the character of a neighborhood is of the utmost importance in the granting of a variance. The imposition of conditions upon variations can go a long way toward assuring such protection. Long recognized by New York courts, the authority of the zoning board of appeals to impose reasonable conditions and restrictions, as are directly related to and incidental to the proposed use of the property, has now been codified by the New York legislature. (See Town Law §267-b(4); Village Law §7-712-b(4); General City Law §81-b(5); see also St. Onge v. Donovan, 71 N.Y.2d 507 (1988))

The zoning board of appeals must be aware that its decisions establish precedence. Unless subsequent cases can be distinguished on a significant factual basis, the board will be required to adhere to its prior decisions under similar circumstances. (See Knight v. Amelkin, 68 N.Y.2d 975 (1986)) In addition, it should be recognized that the cumulative effect of numerous variations could undermine the zoning ordinance and municipal comprehensive plan. While there will probably be unique features in each application, similar types of appeals will occur. For a board to continuously grant variations will result in a land use pattern that will not necessarily be in keeping with the municipality's adopted zoning ordinance or comprehensive plan and may establish precedents upon which future appeals may be based. It bears repeating that the zoning board of appeals must exercise great care to ensure that its rulings do not, in effect, amend the zoning ordinance. Carrying out the "spirit of the ordinance" is one of the most difficult duties of the board.

However, it is important to note that where a zoning board is considering a variance application by a public utility, such as a gas company or wireless telephone company, there is a relaxed standard. (See, e.g., Consolidated Edison Co. of New York, Inc. v. Hoffman, 43 N.Y.2d 598 (1978); Cellular Telephone Company d/b/a Cellular One v. Rosenberg, 82 N.Y.2d 364 (1993)) In Hoffman and Rosenberg, the New York Court of Appeals held that since utilities such as Con

Edison and Cellular One are required by law to provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable, an applicant must be granted a variance if the proposed use is necessary for the applicant to render such safe and adequate service. The Court further found that customer needs were to be considered and, “where the intrusion or burden on the community is minimal, the showing required by the utility shall be correspondingly reduced.” Finally, the Court made clear that a zoning board may not exclude a utility from a community where the utility has shown a need for its facility.

Presented next are discussions of the two types of variances: the area variance and the use variance. The former deals with the application of the zoning district's bulk and lot requirements, while the latter concerns those uses permitted in a district. As set forth below, specific criteria for the granting of these variances are now codified in New York law.

1. **AREA VARIANCE:** An area variance is defined as “the authorization by the zoning board of appeals for the use of land in a manner, which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.” Town Law §267(1); Village Law §7-712(1); General City Law §81-b(1)(b).

Until recently, the basis of the granting of the variance was on the grounds of “practical difficulty”, meaning that the owner could not comply with the regulations because of a constraining physical feature of the land. However, with the 1995 case of Sasso v. Osgood, 86 N.Y.2d 374 (1995), the New York Court of Appeals clearly announced that the “practical difficulties” test is dead.

The test for granting an area variance, as codified by statute and confirmed by Sasso, is now as follows:

In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall consider:

1. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
2. Whether the benefit sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance;
3. Whether the requested area variance is substantial;
4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
5. Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Town Law §267-b(3); Village Law §7-712-b(3); General City Law §81-b(4).

Finally, carrying the balancing concept further, the statute provides that when granting area variances, the board of appeals “shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.” Town Law §267-b(3)(c); Village Law §7-712-b(3)(c); General City Law §81-b(4)(c).

It should be noted that the statutes expressly allow the board of appeals, when granting an area variance, to impose reasonable conditions and restrictions directly related to and incidental to the proposed use of the property, which shall minimize any adverse impact the variance may have on the neighborhood or the community. Town Law §267-b(4); Village Law §7-712-b(4); General City Law §81-b(5).

2. USE VARIANCE: A use variance is defined as “the authorization by the zoning board of appeals for the use of land for a purpose, which is otherwise not allowed or is prohibited by the applicable zoning regulations.” Town Law §267(1); Village Law §7-712(1); General City Law §81-b(1)(a).

Early in the legal history of zoning it was decided that use variances could only be granted in cases of “unnecessary hardship.” In 1939, the New York State Court of Appeals, in the case of Otto v. Steinhilber, 282 N.Y. 71, established a three part test for granting use variances:

“The record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.”

This case law test has now been codified into the New York statutes as follows:

“No [such] use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,

1. The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
2. That the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
3. That the requested use variance, if granted, will not alter the essential character of the neighborhood; and
4. That the alleged hardship has not been self-created.”

Town Law §276-b(2)(b); Village Law §7-712-b(2)(b); General City Law §81-b(3)(b).

Finally, in granting a use variance, just as in granting an area variance, zoning boards must grant the minimum variance necessary and must at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community. Town Law §267-b(3)(c); Village Law §7-712-b(3)(c); General City Law §81-b(3)(c). Moreover, just as in granting an area variance, the board, when granting a use variance, is expressly allowed by statute to impose reasonable conditions and restrictions directly related to and incidental to the proposed use of the property, which shall minimize any adverse impact the variance may have on the neighborhood or the community. Town Law §267-b(4); Village Law §7-712-b(4); General City Law §81-b(5).

D. Non-Conforming Uses

When a use was lawfully in existence prior to the adoption of a zoning ordinance or zoning amendment, that use may be continued even though it does not conform to the new requirements of the zoning ordinance. The terminology frequently used to identify such conditions is a “non-conforming use.” The property owner has a vested right in that use of structure for the duration of its useful life. Westchester County was first settled in the 17th century and many communities have numerous old uses in buildings and on land parcels that were in existence before zoning was introduced. Questions involving the conformance of both uses and structures arise very frequently. They are brought before the zoning board for review and a determination.

A building may be non-conforming with regard to size or placement upon the land, while its use is in conformity with the ordinance. These properties are often identified as being “non-conforming other than use,” “non-conforming structures” and “dimensional non-conformities”. A community’s need to control and diminish non-conforming uses is much greater than its need to control and diminish dimensional non-conformities. To begin with, most communities have many more dimensional non-conformities than non-conforming uses and most of the dimensional non-conformities consist of undersized yard setbacks.

When zoning was first devised, non-conformities were expected in time to wither away as they became obsolete or were destroyed by fire or other causes. Time has shown this not to be the case; in particular, dimensional non-conformities have not gone away. Zoning boards are continuously presented with requests for variances to allow changes in the use of a non-conforming structure, as well as for the expansion, rebuilding or repairing of these buildings that pre-date the current zoning ordinance. Zoning ordinances differ greatly in their provisions with regard to non-conforming uses. The character of the non-conformities is equally varied. The conditions under which the board may grant variances for non-conforming uses are spelled out in each ordinance. In addition, there is a body of case law for zoning boards to consider in arriving at decisions on non-conforming uses.

Some Westchester communities have taken a more active role to reduce the number of non-conformities and have embarked on programs for, “amortization of non-conforming uses.” Local communities with some method of eliminating non-conforming uses include the villages of Ossining, Pleasantville and Port Chester, the cities of Mount Vernon and Peekskill, and the towns of Greenburgh, Harrison, Lewisboro and North Castle. The non-conformities are formally identified by the municipality as existing at a point in time and specific regulations, including time periods, are set in the municipality’s zoning ordinance by which the owner is required to bring the property into conformity or provide modifications to minimize the non-conforming use’s impact on the surrounding area. The procedure can also be used to require the elimination of non-conforming signs and billboards.

In general, a legal non-conforming use may not be enlarged or moved. Once a non-conforming use has been voluntarily discontinued by some overt act for a length of time specified in the zoning ordinance, it may not be resumed. Dimensionally non-conforming buildings may be maintained and repaired, but when substantial damage through fire or natural causes has occurred, rebuilding is governed by rules found in the ordinance.

Frequently, the zoning board is called on to make findings of fact to determine which provisions of the ordinance should be applied and how. Zoning ordinances usually specify that in order to rebuild, the damage must amount to no more than one-half of the assessed value of the structure. The zoning board enters the picture when the rebuilding requested is greater than that specified amount. Using assessed value may pose a problem as building costs have risen dramatically faster than revaluation of assessments. Rebuilding costs may be higher than half of the assessed value, especially and usually when the latter was calculated years before. In such a case, the courts may consider the denial of a variance unreasonable when based on a standard not factually correct. Usually there are also time limits within which rebuilding must commence and be completed for the non-conforming use to be continued.

Variations for non-conformities are more difficult to obtain than other variations because they are subject to an additional set of requirements. First, the appellant must meet the statutory test for a use or area variance and then show how he meets the regulations covering non-conformities. The holder of a non-conforming use who seeks a use variance must show not only that he cannot derive a reasonable return from any permitted use, but also from the non-conforming use itself (Crossroads Recreation v. Bronx, 4 N.Y.2d 39 [1958]).

E. Special Permits

There are some land uses that are useful and necessary to a community but are significantly different from the primary uses permitted within a district. The establishment of such uses often requires “special” evaluation. When provided for in the zoning ordinance, these “special uses” are permitted by right, subject to a demonstration that certain conditions, also specified in the zoning ordinance, can be met.

The State enabling legislation defines the term “special permit” as “an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to conditions imposed by such zoning ordinance or local law to assure that the proposed use is in harmony

with such zoning ordinance or local law and will not adversely affect the neighborhood if such conditions are met.” (Town Law 274-b, General City Law 27b and Village Law 7-725-b)

Uses requiring a special use permit are identified in the ordinance for each zoning district in which they are allowed. Standards used to grant a special use permit are provided, although they may vary greatly in their degree of specificity from ordinance to ordinance. The specificity of the standards and criteria is of critical importance as the decision to allow a special permit use must be based on such standards and no others. If the required criteria and standards are complied with, approval of the special use must be granted.

Historically in Westchester County, the zoning board of appeals has been empowered by the municipal legislative body to issue special permits. In recent years, as zoning ordinances have been updated, this assignment of responsibility is increasingly shifting to planning boards. In some instances, the legislative body has reserved for itself the right to grant special permits. The shift away from zoning boards reflects the fact that the issuance of special permits is an administrative activity, something quite different from the zoning board’s customary quasi-judicial and relief role as discussed above.

The uses regulated by special use permits have often been those which could be troublesome, either because they have the potential for adversely affecting surrounding properties, or because they themselves need protection from neighboring uses. In some of the more recent ordinances, the flexibility of the special permit process has been used to regulate density and intensity of use in cases which would further public policy.

An illustration of a typical special permit use is a private school located in a residential zone. Under some conditions, the school could function compatibly with the surrounding residences, but in other circumstances it might be disruptive. To assure that the former is the case, special standards are outlined in the zoning ordinance. It is the duty of the zoning board, when empowered, to determine whether or not the proposal meets those standards. Similarly, churches, hospitals, nursing homes, cemeteries, museums and a variety of recreation uses are often controlled by special permits because of the noise and traffic associated with these uses. More recently, the creation of accessory apartments has been permitted under special permit procedures. Uses that pose safety hazards, such as gasoline stations, power stations and airports, are also frequently the subjects of special permits as well.

The task of determining whether to not to grant a special use permit is considerably simplified when the ordinance supplies a checklist for the board’s guidance. Exits and entrances for traffic, access for fire and police protection, parking, service areas, intensity of use, noise, glare, screening, availability of utilities and the provisions of yards and open space are frequently listed as matters to be examined. When these factors are examined, they should be made part of the record by being reflected in the meeting minutes of the board’s deliberations.

Some communities have imposed a time limit within which an authorized special permit use must be initiated or set a time limit on the use once it is established. This then requires that a new application be submitted and the special permit process undertaken once again. The rationale is that the surrounding environment may have changed in a developing community and thus a use

allowed by special permit at one time may be unacceptable at a later date. This allows the utilization of land for a desired use over a period to time but reserves the ability of the municipality to determine that changing circumstances warrant a change in use. The legality of such provisions, however, has been questioned.

Key points about special permits to keep in mind:

- Special use permits are referred to by a variety of terms. Terms that may be found in various zoning ordinances include special exception uses, special permit, conditional use permits and special exceptions. The NYS statutory term is special use permit.
- Once a special use permit has been issued, it is not personal to the applicant, but affixes to, and runs with the land.
- If a proposed special use contains one or more features that do not comply with the area requirements of the zoning ordinance, an applicant may apply for a variance directly to the zoning board of appeals without first having to go to the building inspector or zoning enforcement officer.
- Municipalities may require additional means of notification including the mailing of notices to property owners within a locally selected distance from the perimeter of the property proposed to be subdivided. Be sure to check local regulations.
- The local legislature may empower the approving body to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of special use permits. Any such waiver, which shall be subject to appropriate conditions set forth in the zoning law or other local law, may be exercised in the event any such requirements are found not to be requisite in the interest of the public health, safety or general welfare or inappropriate to a particular special use permit.

VII. RELATIONSHIP WITH OTHER BOARDS AND AGENCIES

A zoning board is often required to interact with other agencies, whether they are part of the same municipal government or those of a neighboring community, or at the County, State or Federal level. Some of these relationships have already been mentioned; further general discussion is presented below, but variations will occur among communities due to local laws and practices.

A. Local Boards

The zoning board of appeals has a limited relationship with the mayor or supervisor, city manager or legislative body in connection with the appointment of its members. The board may communicate with the legislative body, which has the authority to amend the zoning ordinance, to recommend zoning ordinance changes based on the experiences which the zoning board has with such matters as appeals for variances, questions of ordinance interpretation and the processing of special use permits.

Interactions with the municipal planning board are usually more frequent, since in all of its work the zoning board of appeals must take note of the long-range objectives and development policies of the community. As these are also a major focus of the planning board, communication between these boards is vital. In some communities, notice of zoning board hearings must be sent to the planning board, as well as other boards, to elicit comment or to keep everyone posted on agenda items. Referrals to the architectural board of review are usually limited to projects involving new construction or building additions. Although the zoning board is not bound by the opinions of other boards, the comments received are often an important and helpful part of the evidence collected. Where there is a professional staff, the zoning board often seeks their advice.

The zoning board usually has continuing contact with the building inspector or enforcement officer, since most of the appeals brought to the board's attention deal with appeals being made by this official's actions. He or she usually attends zoning board meetings and furnishes records when an appeal is being made from decisions. In some communities, the building inspector's office furnishes secretarial services to the board. The municipal attorney may also attend zoning board hearings, on a regular or special case basis. The attorney also may represent the board in Article 78 proceedings.

Zoning boards may be allotted a budget and be in a position to hire a full- or part-time secretary who sends required notices, keeps the hearing records and files findings. Should an applicant require a verbatim transcript of a hearing, he or she must bear its costs. In some municipalities, the secretary to the planning board also serves the zoning board. This arrangement has the advantage of providing a regular, though informal, channel of communication between the two boards.

B. Referrals to the Westchester County Planning Board

Specific planning and zoning actions must be referred to the County Planning Board and to abutting municipalities. The requirements that establish which actions at what locations must be referred are set forth in the Westchester County Administrative Code and New York State General Municipal Law. Court decisions have found that the provisions of both laws apply in Westchester and that where there is a conflict, the County Administrative Code takes precedence. If a decision is challenged through legal action, a failure to make the required referral could result in a planning or zoning action being found invalid.

The purpose of the referral requirement is defined by the Westchester County Administrative Code as “to aid in maintaining a high level of effectiveness of municipal action...and in coordinating such action...by means of procedures for bringing pertinent inter-community and county-wide considerations to the attention of such municipal agencies.” NYS General Municipal Law has a similar statement and lists specific topics that should be considered by the County. These include compatibility of land uses, traffic generating characteristics, adequacy of roads, impact on state and county uses, impact on drainage, protection of community character and relation to official municipal and County development policies.

In this context the Westchester County Planning Board considers that its primary responsibilities are to protect the public interest and investment in State and County facilities and to alert decision-making boards to the intermunicipal and areawide impacts that a land use decision may have. The framework for this review is set forth in the County Planning Board’s own land use policy plan, *Patterns for Westchester*, adopted in December 1995. *Patterns* establishes three *elements of review*:

- Density of development
- Relationship to surrounding development, and
- Visual impact.

The County Planning Board encourages the environmental reviews of major development and rezoning proposals to address these elements as well as include an assessment of the broader issues that are a part of *Patterns*.

The County Planning Board anticipates adopting updated policies in 2008 under the *Westchester 2025* planning initiative. To review them and to see the latest information on *Westchester 2025* and new planning tools, go online to www.westchestergov.com/2025.

Not all submissions to the County Planning Board receive the same level of attention. In December 2003, the County Planning Board acted to pre-determine that certain categories of planning and zoning actions do not raise intermunicipal or areawide concerns. Although the law continues to require that referrals of these actions be made, the County Planning Board has simplified the process to permit notification by e-mail without the submission of any supporting materials. Based on recent experience, approximately 45% of all referrals qualify for this abbreviated procedure.

Table 1 lists actions that continue to require the referral of complete applications. Table 2 lists actions that qualify for the “notice only” procedure. A standard submission form is available for e-mail use at www.westchestergov.com/planning.

For actions listed on Table 1, materials sent to the County Planning Board should include the complete application package submitted to the local board with an accurate location map; municipal tax map designation; a complete description of the action; a site plan, subdivision plat or sketch plan (as appropriate to the application); and environmental assessment forms.

When a “complete application” referral arrives at the County Planning Department, staff makes an initial classification. On occasion, a municipality will submit an action for which no referral requirement exists; these submissions are set aside and no response is prepared. If the referral qualifies for the “notice only” procedure, the referring board is notified that the referral requirements have been met and that the matter is for local determination only. Some of the complete application referrals, once reviewed, are placed in the category of “actions for local determination.” These submissions are determined not to raise issues of County interest or of intermunicipal concern, based on the thresholds established in *Patterns*. A response letter is sent to the municipal agency stating that the action is a matter for local determination in accordance with the community’s established planning and zoning policies.

The replies to all other referrals, representing about 37% of all actions sent to the County Planning Board, include some level of comment or recommendation by the Board. Those comments may be limited to informational or procedural topic that relate to planning standards or to compliance with the NYS Environmental Quality Review Act.

For more information or assistance on the referral process or to view *Patterns* and *Westchester 2025*, go online to www.westchestergov.com/planning or contact the Planning Department at 914.995.4405.

C. Referrals to Adjacent Municipalities

The Westchester County Administrative Code Section 277.71 and NYS law (as of July 1, 2006) require that a municipal board provide notice to an adjacent municipality when a public hearing will be held on certain planning and zoning actions that affect property within 500 feet of that adjacent municipality. This notice must be given by mail or electronic transmission to the municipal clerk of the abutting municipality at least ten days prior to a public hearing. The chart below identifies the actions subject to this requirement.

Section 277.71 is reprinted in its entirety below:

277.71 Rights and Duties of Neighboring Municipalities in Planning and Zoning Matters

Each city, village or town in the county shall give notice of any hearing scheduled in said municipality in connection with: 1) the proposed adoption or amendment of a zoning ordinance or the issuance of a proposed special permit or use permit changing the use classification of property located within five hundred feet of any abutting municipality in the county; 2) a subdivision plat relating to land within five hundred feet of any abutting municipality in the county; or 3) the proposed adoption or amendment of any official map,

relating to any land within five hundred feet of any abutting municipality in the county, to such municipality. Such notice should be given at least ten days prior to any such hearing by mail to the clerk of said abutting municipality affected. Such mailing shall be deemed sufficient service under this or any other law requiring notice of any such hearing.

Such abutting municipality may appeal and be heard at such hearing and may file thereat a memorandum of its position. If such abutting municipality disapproves the proposal on which the hearing is held, or recommends changes or modifications thereof, the municipal agency having jurisdiction shall not act contrary to such disapproval or recommendation except by the adoption of a resolution of the municipal agency, which action shall be subject to judicial review pursuant to the law providing for review of acts of such municipal agencies, commenced within thirty days of its adoption. (Formerly #452, added by Laws of 1961, Ch. 823, Code Recodified in 1979.)

Required Referrals to Abutting Municipalities 10 Days Before Hearing

TYPE OF PLANNING/ZONING ACTION	LOCATIONAL TRIGGER FOR REFERRAL
SPECIAL USE PERMIT	Affecting land within 500 feet of municipal boundary.
USE VARIANCE	Affecting land within 500 feet of municipal boundary.
SUBDIVISION PLAT	Affecting land within 500 feet of municipal boundary.
SITE PLAN	Affecting land within 500 feet of municipal boundary.
ZONING ORDINANCE OR MAP Adoption or amendment	Affecting land within 500 feet of municipal boundary. (Westchester County municipalities only)
OFFICIAL MAP Adoption or amendment	Affecting land within 500 feet of municipal boundary. (Westchester County municipalities only)
ZONING VARIANCE	Not required.
COMPREHENSIVE PLAN Adoption or amendment	Not required.

D. Notice to Parks Commission

An archaic provision of state law establishes a requirement that if the application before the zoning board of appeals affects property located within 500 feet of a state park or parkway, notice must be provided to the state park commission at least five days before the public hearing. Notice can be mailed to the attention of the director at: New York State Office of Parks, Recreation, and Historic Preservation, Taconic Region, P.O. Box 308, Staatsburg, NY 12580.

**TABLE 1: ACTIONS THAT REQUIRE
REFERRAL OF COMPLETE APPLICATIONS
TO THE WESTCHESTER COUNTY PLANNING BOARD**

Submission should include complete application material as submitted to local board or full text/map of zoning code and comprehensive plan amendments.

TYPE OF PLANNING/ZONING ACTION	LOCATIONAL TRIGGER FOR REFERRAL
COMPREHENSIVE PLAN Adoption or amendment.	Affecting land anywhere in municipality.
ZONING ORDINANCE OR MAP Adoption or amendment.	Affecting land anywhere in municipality.
SUBDIVISION PLAT	Where new street or drainage line will connect directly into state or county road or county drainage channel.
SITE PLAN¹ Proposing 5,000 square feet or more of new or renovated floor area or 10,000 square feet or more of land disturbance.	Affecting property within 500 feet of: <ul style="list-style-type: none"> • The boundary of a city, town or village • The boundary of an existing or proposed state or county park or any other state/county recreation area • The right-of-way of an existing or proposed state or county road • An existing or proposed county drainage channel line • The boundary of state- or county-owned land on which a public building/institution is located or • The boundary of a farm located in an agricultural district.
SPECIAL USE PERMIT/USE VARIANCE Changing use classification of property and proposing 5,000 square feet or more of new or renovated floor area or 10,000 square feet or more of land disturbance.	Affecting land anywhere in municipality.
OFFICIAL MAP Adoption or amendment.	Affecting streets or drainage lines connecting directly into state or county road or county drainage channel.

¹Additional requirement of NYS General Municipal Law; notice to be provided 30 days prior to agency action.

**TABLE 2: ACTIONS THAT REQUIRE
NOTIFICATION ONLY
TO THE WESTCHESTER COUNTY PLANNING BOARD**

Notification should consist of e-mail to muniref@westchestergov.com stating: type of action, title of action, address and statement that action falls within County Planning Board category that requires “Notification Only.” An e-mail acknowledgement will be sent at receipt. (FAX communication may be substituted.) A standard submission form is available at www.westchestergov.com/planning.

TYPE OF PLANNING/ZONING ACTION	LOCATIONAL TRIGGER FOR REFERRAL
<p>SITE PLAN¹ Proposing less than 5,000 square feet of new or renovated floor area and less than 10,000 square feet of land disturbance.</p> <p><i>(Exception – actions that have been given a Positive Declaration pursuant to SEQR must be referred as complete application.)</i></p>	<p>Affecting property within 500 feet of:</p> <ul style="list-style-type: none"> • The boundary of a city, town or village • The boundary of an existing or proposed state or county park or any other state/county recreation area • The right-of-way of an existing or proposed state or county road • An existing or proposed county drainage channel line • The boundary of state- or county-owned land on which a public building/institution is located or • The boundary of a farm located in an agricultural district.
<p>SPECIAL USE PERMIT/USE VARIANCE Changing use classification and proposing less than 5,000 square feet of new or renovated floor area and less than 10,000 square feet of land disturbance.</p> <p><i>(Exception – actions that have been given a Positive Declaration pursuant to SEQR must be referred as complete application.)</i></p>	<p>Affecting land anywhere in municipality.</p>
<p>ZONING VARIANCE Decreasing front yard setback. Decreasing minimum street frontage. Decreasing average width.</p>	<p>Affecting property abutting state or county road or park.</p>

¹ Additional requirement of NYS General Municipal Law; notice to be provided 30 days prior to agency action. These tables are provided for convenience. The statutes must be checked to determine which actions to refer.

VIII. STATE ENVIRONMENTAL QUALITY REVIEW ACT COMPLIANCE (SEQR)

The New York State Environmental Quality Review Act (SEQR), Article 8 of the Environmental Conservation Law is both a law and process that requires the consideration of environmental factors early in the planning stages of actions that are directly undertaken, funded or approved by local and state agencies of government. This legislation is intended to ensure that environmental factors will be given the same consideration as social and economic factors in the decision-making process and provides a means of formal coordination among governmental agencies, as well as with the private sector.

SEQR, enacted in 1975, implemented in 1978, amended in 1987, and again in 1995, sets up a very systematic approach for this “consideration” that is geared toward identifying means to modify proposed actions so as to avoid or mitigate adverse impacts on the environment. The rules and regulations that implement SEQR are known as Part 617 of 6NYCRR. Some municipalities have adopted their own local version of SEQR. The NYS Department of Environmental Conservation, Division of Regulatory Affairs monitors the implementation of the State law.

What does SEQR mean to a zoning board of appeals? It means that the board must make a determination under SEQR before taking action on applications that comes before the board. Therefore, every zoning board member should have an understanding of SEQR procedures and objectives.

The SEQR process involves a number of steps, timelines and actions that must be followed in order to ensure full compliance with the law. For complete information on SEQR, go online to <http://www.dec.ny.gov/public/357.html>. The full process is fully described in *The SEQR Handbook*, published by the State Department of Environmental Conservation and distributed to all local governments. This document should be consulted for specific procedures and timelines. It is available online at the above website or call 518.402.9167. Assistance in understanding SEQR can also be obtained from the County Department of Planning 914.995.4400.

A brief outline of key points of SEQR follows.

A. Actions

All actions are not treated the same under SEQR. What a zoning board must do is to consider each action under SEQR and determine what processing steps are required. For example, SEQR pre-defines some actions or classes of actions as not having a significant impact on the environment. These actions, known as **TYPE II**, require no special paperwork or action by the zoning board once they are identified as falling under a Type II umbrella. Type II actions include setback variances, construction of most accessory structures, and as defined by some local governments, lot line changes and two-lot subdivisions.

Still other actions are classified as **EXEMPT** and require no review; these include maintenance and repair projects, emergency actions and actions of the state legislature.

Actions that require special processing pursuant to SEQR are either **TYPE I** or **UNLISTED** actions. Type I actions are presumed likely to have a significant effect on the environment. They include disturbance of 10 or more acres of land, construction of 100,000 square feet of commercial space and establishment of 50 lots on individual septic systems. (The thresholds are lower if a site is substantially contiguous to parkland or if a local government has acted by local law to lower them.) Unlisted actions fall in the wide, middle range, typical of applications before a planning board rather than a zoning board – they do not meet the thresholds of Type I yet are clearly not Type II or Exempt.

B. Agency

SEQR classifies agencies into two categories:

- An “Involved Agency” has jurisdiction by law to fund, approve or directly undertake a given action. One action, such as a subdivision, may require the approval of several involved agencies (i.e., planning board, County Health Department, NYS Department of Transportation).
- A “Lead Agency” is one of the involved agencies for a proposed action that has been designated to coordinate the environmental review of the action. Planning boards are often placed in the role of Lead Agency and become responsible for ensuring SEQR procedures are followed.

Designation of a lead agency is only necessary when a “coordinated” review is to be conducted. Coordinated reviews are mandatory for Type I actions and optional for Unlisted actions. The noble purpose of a coordinated review is to permit all involved agencies to participate in a single environmental review so as to promote cooperation and lessen the bureaucratic burden on an applicant.

C. Determination of Significance

After the receipt of a complete application and the designation of Lead Agency, the Lead Agency must make a “determination of significance.” An Environmental Assessment Form (EAF) is designed to assist the Lead Agency in making this determination which can be one of two alternatives:

- A “negative declaration” which means it can be determined that approval or implementation of an action will not have a significant adverse impact on the environment.
- A “positive declaration” which means that the proposed action has potential for significant adverse impact on the environment. Once a positive declaration is made, an application cannot be further processed until an Environmental Impact Statement is prepared.

SEQR provides for a third outcome – a conditioned negative declaration. The SEQR Handbook should be referenced for an understanding of this alternative.

D. Environmental Impact Statement

An environmental impact statement (EIS) is a document that impartially analyzes the significant environmental effects of a proposed action and identifies how those effects can be avoided or minimized. The EIS is intended to be integrated into an agency's normal review process.

Before an EIS is prepared, "scoping" is encouraged by SEQR. Scoping is a process to identify the important environmental issues, alternatives and mitigating measures that should be addressed in the EIS. It is intended to narrow the subject matter of the EIS to those topics that are important to the decision-making process. The draft EIS is prepared as guided by the scope. It should describe:

- The proposed action
- The existing setting of the action
- The probable environmental impacts and the manner by which they may be minimized, and
- The reasonable alternatives to the action proposed.

E. Notice of Completion, Public Comment and Hearing Procedures

After the Lead Agency has accepted the draft EIS as complete, it must file a **notice of completion** and circulate the draft EIS for review to all other involved agencies. The draft EIS must also be made available for public review. The review period must not be less than 30 calendar days from the filing and circulation of the notice of completion. At this time, the Lead Agency must decide if a public hearing is to be held on the draft EIS. If a hearing is held, the Lead Agency must prepare and file notice of the hearing. The notice can be contained in the notice of completion of the draft EIS. The notice must be published in a newspaper of general circulation in the area of the action at least 14 calendar days before the hearing. The public hearing can take place between 15 and 60 calendar days after the filing of the notice of completion. When a public hearing is held, the public comment period must remain open at least 10 days after the close of the public hearing.

Typically, involved agencies and members of the public will review the draft EIS and submit written comments to the Lead Agency on the adequacy of the review of the potential impacts. If substantive questions are raised during this review, the Lead Agency must prepare or cause to be prepared a final Environmental Impact Statement within 45 calendar days of the close of any hearing or within 60 calendar days after the filing of the draft EIS, whichever occurs later. (These timeframes are frequently extended with mutual consent of the Lead Agency and the applicant.) As with the draft EIS, when the final EIS is completed, a notice of completion must be prepared, filed and published.

A final EIS need not be prepared if the proposed action has been withdrawn or, on the basis of the draft EIS and comments made thereon, the Lead Agency can determine that the action will not have an adverse impact on environment. A negative declaration must then be prepared, filed and published.

F. Findings Statement

Before the Lead Agency can complete the SEQR process and make a decision concerning the proposed project, it must give the public and other agencies a reasonable time period in which to consider the final EIS. The SEQR regulations provide that a reasonable time period is no fewer than 10 days. After that period, and within 30 calendar days after the filing of the final EIS, the

Lead Agency must prepare and adopt a written findings statement. The findings statement certifies that the action, as may be modified in the findings statement, avoids or minimizes adverse environmental impacts to the maximum extent practicable.

No agency can make a final decision on whether to undertake, fund or approve the proposed action until 10 days have passed from circulation of the final EIS. Each involved agency must prepare and adopt its own findings statement. The decision on the application and the adoption of a findings statement can be made together.

The purpose of the “Findings Statement” is to make public that the lead agency considered all available information and public comments and tried to reach a reasonable solution that balances social, economic and environmental factors. The findings are kept on file as part of the record of the SEQR process. This is the final step in the SEQR process.

G. EIS Posting on Internet Website

A state law effective February 26, 2006 requires municipalities to post on an Internet website all draft and final environmental impact statements (EIS). The posting of the final EIS must include all public comments made on the draft EIS. Further, notices of filings and of the availability of an EIS must include the website address where the EIS can be accessed. The law provides that the Internet provisions may be waived where impracticable.

The new law will undoubtedly serve to increase public access to public documents. However, to avoid more cumbersome work at the local level, municipalities may want to consider amending local subdivision regulations and site plan regulations to accommodate this new requirement by requiring that applicants submit documents digitally in a form ready to be posted on a website, in addition to the routine hard copy versions.

IX. RECENT TRENDS IN ZONING

Zoning has come under increasing fire for a number of reasons. The time-consuming procedures which must be followed to take a proposed development through all of its necessary approvals are criticized for imposing delay and high costs on the public and on the land developer. In an industry where “time is money,” these in turn are passed on to the ultimate consumer, raising both acquisition and rental and sale costs. Zoning has also been called unfair in social as well as economic terms, as it has been charged with being a ready means for the exclusion of poor people and racial minorities from many places. Critics point out that rigid controls have led to the destruction of beautiful and valuable historic and environmental resources. Others feel that the quality of development is not as high under present zoning as it might be with more flexible controls. This is believed to be due to the fact that imaginative site and building designs are more difficult to carry out under the less flexible traditional controls.

Several recent zoning approaches that attempt to respond to such criticism are described below. Many of the new techniques rely heavily upon a process of negotiation between the developer and the community, through both the planning board and the legislative body. The flexibility permitted by these and other new zoning techniques will often eliminate the need for variances to be granted by the zoning board of appeals. All of the new controls, however, need to be based on a comprehensive plan so that municipal policies and goals are clear.

Planned residential development (PRD): In 1982, the City of Peekskill adopted a flexible planned residential development (PRD) zone. It has since been utilized on several large undeveloped tracts, including the former St. Peter’s, St. Mary’s, and Mount Saint Florence school properties. Upon issuance of a special permit and site plan approval, residential development of any type (excluding high-rise apartments), to a maximum parcel density of 11 dwelling units per net acre, is permitted. For the purposes of computing net parcel acreage, the following lands are excluded from the gross area of the development: 20 percent for rights-of-way; bodies of water (streams, ponds, swamps); rock outcroppings and lands with greater than 20 percent slope.

Floating zone: The floating zone is a district in which requirements are fully described in the text of the ordinance but which is itself unmapped. The decision as to where the zone will be anchored can only be made after a developer has asked to have the zone applied to a site. The floating zone is similar in effect to a special permit but it affords somewhat more flexibility because it is not limited to specific zones and because it requires an amendment to the zoning ordinance. Examples of the use of floating zones in Westchester County include: planned unit developments (Village of Pleasantville), planned executive parks (City of Yonkers), cluster developments (Cities of New Rochelle and Rye), multi-family residential developments (North Castle, Somers and Bedford) and elderly housing (Bedford).

Planned unit development (PUD): The PUD allows the unified, and hence potentially more desirable and attractive, development of a large area according to a comprehensive site plan. It

permits the planning of a project and the calculation of densities over the entire development, rather than on an individual lot-by-lot basis. It is processed in much the same way as a site plan review, in which the municipality has considerable involvement in determining the nature of the development. While the PUD has most commonly been used for housing, it can also be applied to shopping centers, industrial parks or mixed uses. Half of the communities in Westchester County have provisions for some form of planned unit development in their zoning ordinances.

Performance standards: Performance standards are a means by which land use is controlled according to the effect it has upon its environment. The standards set limits upon air pollution, noise, glare and other effects that can be measured. Generally, they are a means of regulating industrial use and have been adopted in at least ten Westchester communities. A refinement of performance standards is impact zoning, which sets fiscal and environmental standards to be met by new development. The process relies heavily on a detailed analysis of existing conditions, an analysis of the impact of the proposed development on the community and may require sophisticated computer techniques.

Transitional use zones: Transitional zones are utilized by some Westchester's municipalities in an attempt to soften the interface between markedly different land use types or zoning districts. A transitional area or site is one which is located between two or more land use areas or zoning districts of significantly different existing or potentially different character, such as between commercial and residential areas. As applied in the Town of Mount Pleasant, the transitional use zone is actually a floating zone which has been mapped on numerous sites to date. Special conditions are established by the Town Board and the use and density permitted are regulated by special permit and site plan review procedures. In addition, special conditions concerning such items as landscaping and architectural treatment can be imposed by the planning board. The transitional zoning concept has successfully resulted in both small-scale office building projects and residential townhouse developments on transitional sites in Mount Pleasant.

The Town of New Castle has adopted a different approach for transitional areas between transitional and non-residential districts. Transitional zones have been established at the perimeter of all business and industrial districts. Within transitional areas of business and industrial districts, the reviewing agency (whether it be the planning board or the zoning board of appeals) may require limitations on the types of uses permitted, the type, intensity and location of exterior lighting, the storage of refuse, the loading and unloading of trucks, the location of signs and other similar factors, to the extent determined necessary to minimize impacts on adjacent residential areas. These limitations may include the authority to prohibit certain special permit uses entirely within such transition areas if the reviewing agency determines that the potentially adverse impacts of such uses cannot be sufficiently mitigated by other means. In general, transitional zoning techniques can make it possible to develop these sensitive and often difficult sites in a viable way, yet with little or no negative impact on the adjacent and oftentimes disparate land uses.

Transfer of development rights (TDR): TDR is one of the new techniques that are aimed at defining the trade-offs that may occur between the municipality and the developer. TDR means the process by which development rights are transferred from one lot, parcel or area of land in any sending district to another lot, parcel or area of land in one or more receiving districts. (See

Town Law 261-a, Village Law 7-701, and General City Law 20-f). It is a zoning technique that allows the development rights of a parcel of land to be transferred to another property, so that the first parcel (or a portion of it) remains generally undeveloped. In exchange, the density of the second parcel can be increased. Under recent State enabling legislation, municipalities in New York are now authorized to provide for the transfer of development rights in their zoning ordinances. A TDR system may be established only in accordance with the municipality's comprehensive plan. Once sending and receiving districts are designated, they are mapped as overlays on the zoning map. Through TDR, community-wide goals of open space preservation and protection of environmentally sensitive areas can be achieved, while providing compensation for property owners of land where development has been restricted or prohibited. The Town of North Castle, the Village of Ossining and the City of White Plains are the only Westchester communities that have adopted any kind of TDR provision in their zoning ordinances.

Incentive zoning: Incentive zoning is a system by which specific incentives or bonuses are granted on condition that specific physical, social or cultural benefits or amenities would inure to the community (see Town Law 261-b, Village Law 7-703, and General City Law 81-b). This is in contrast to zoning's traditional, more negative, effect of limiting or restricting development. Bonuses granted are usually in the form of higher permitted densities, which would make the development more profitable. Examples of amenities provided in exchange for greater densities include plazas, open space and certain site design modifications. The device has also been used to promote the development of low and/or middle-income housing. The Town of Yorktown enacted a local law that establishes a special permit procedure to encourage the construction of "affordable housing units." Under this regulation, the Town Board can grant density bonuses of up to 50 percent in residential development where more moderate priced housing is provided by the developer. The Town of Lewisboro, in its R-MF (Multi-Family Residence) district, has included density bonuses for the development of middle income housing. Similarly, the Town of New Castle employs bonuses in its MRF-C (Multi-Family Residence District - Chappaqua Hamlet) district, allowing up to 100 percent increase beyond the basic permitted density on non-wetlands areas. The incentive segment of the New Castle ordinance is presented below in its entirety so as to provide an understanding of the numerous bonuses that can be granted:

60-417.212 Incentive density. Where an applicant for approval of a multi-family development within a MRF-C District agrees to provide certain special features, facilities and/or use restrictions of the types listed below and where the Planning Board determines that the provision of such will serve to further the purpose and intent of this chapter and of the Town Plan, the density within such development may be increased up to 100 percent beyond the basic permitted density or by so much thereof as determined appropriate by the Planning Board based upon a consideration of the number and combination of incentive features, facilities and/or use restrictions proposed, the need for them at that time, the nature and extent to which the applicant intends to provide them, the appropriateness of the location of the proposed site and the environmental suitability of the site and the proposed development design to accommodate such an increased density. In each such case, the applicant must obtain a special use permit from the Planning Board pursuant to the relevant standards and requirements of #60-430 of this chapter.

60-417.2121 Non-wetlands areas. For that part of the basic permitted density attributable to the non-wetlands portion of any proposed multi-family development site, the types of special incentive features, facilities and/or use restrictions and the maximum permitted density increase which the Planning Board may grant for them are as follows:

INCENTIVE FEATURE	MAXIMUM PERMITTED INCREASE BEYOND THE BASIC PERMITTED DENSITY ON NON-WETLAND AREAS
1. Apartments designated for and limited in occupancy to low/moderate income families	2% for each 1% up to a maximum increase of 30%, and 1% for each 1% thereafter, up to a maximum total increase of 50%
2. Senior citizen apartments	1% for each 2%
3. Apartments designed for and limited to handicapped persons	2% for each 1% up to a maximum increase of 10%
4. Rental apartments	1% for each 4%
5. Underground or underbuilding parking, including maneuvering areas	2% for each 5% of the gross number of required off-street parking spaces provided underground under principal buildings
6. Recreation facilities, including, without limitation, swimming pools, tennis courts, community centers, etc.	15%
7. Substantially increased setbacks or special buffer screening techniques, including, without limitations, earth berms, masonry walls, etc.	10%
8. The construction of related off-site improvements, including, without limitation, the improvement of neighboring access roads, drainage facilities, etc.	15%
9. The dedication of land and/or facilities for a public purpose, provided that the Town Board agrees to accept such dedication	15%
10. Such other special design features of facilities as may be requested or approved by the Planning Board	15%

As a condition of the granting of any density increase for incentive features 1,2,3 or 4 above, initial and, where determined appropriate by the Planning Board, continued eligibility priority for sale or occupancy of any such special units shall be on the following basis:

- i. Persons employed in the Town of New Castle
- ii. Residents of the Town of New Castle, in order of length of residence in the town and
- iii. All others.

However, the eligibility priorities for any such special units shall apply only among persons who offer the same gross purchase price or monthly rent to the seller or lessor of such unit.

Clustering: Open space or conservation development, known as clustering, is a process through which lot size and/or setback regulations may be reduced as buildings are grouped in one area on a site. This, in turn, enables the preservation of open space, which can be kept in either a natural or improved state. The overall density of the property must remain the same as it would have been if conventionally subdivided.

The current cluster provisions found in Section 278 of Town Law, Section 7-738 of Village Law, and Section 37 of General City Law are similar in nature in that they empower the local legislative body to authorize the planning board to modify the provisions of the municipal zoning ordinance simultaneously with its approval of a subdivision plat. In 1981, 27 of Westchester's municipalities had some type of cluster provisions. By 1988, the number of communities with cluster provisions had risen to 35. Although clustering is associated with the subdivision approval process, there are instances where it is implemented through a special zoning district. For example, both the City of White Plains and the Town of Harrison handle clustering through specific conservation zoning provisions in their zoning ordinances.

The Town Law does not limit application of the authority to cluster to residential development; it may be used for clustering any type of development permitted by the zoning ordinance. The Village Law is specifically limited to residential developments. The General City Law provisions appear to contain limited authority for mixing uses (i.e., residences, stores and offices) in a clustered development.

Municipal governing bodies throughout New York State are empowered to mandate clustering, i.e., require a developer of any subdivision to cluster the units in his development. See Town Law Section 278, Village Law Section 7-738 and General City Law Section 37 so as to authorize mandatory clustering. The City of Rye, Villages of Briarcliff Manor and Rye Brook, and the Towns of Bedford, Lewisboro and North Salem have adopted mandatory clustering provisions.

Overlay zoning: Additional controls may be provided to effect some community purpose through the use of overlay zoning. The underlying zoning still applies, but extra protections are given to an area mapped with an overlay zone. Height restrictions, for instance, may be overlaid upon the zoning in order to protect approaches to an airport, as in the Village of Rye Brook's ordinance. Historic districts are used to protect historically significant community resources and yet allow their use in accordance with the zoning district regulations applying to the property. The Town of Bedford has an overlay historic district to protect the Bedford Village Green and the surrounding buildings dating from the Revolutionary period. The Town pioneered in drafting a historic district zone that controls exterior alterations to the buildings, trees and plantings. Bedford has another overlay zone in its Aquifer Protection Zone, which is intended to prevent groundwater contamination in its sensitive aquifer areas.

X. GLOSSARY

ACCESS: The place of entry to an established public road from a lot.

ACCESSORY APARTMENT: A dwelling unit that is subordinate to a permitted principal one-family residence use in terms of size, location and appearance, and located on the same lot therewith.

ACCESSORY USE: A use that is customarily incidental and subordinate to the principal use on the same lot. Examples include off-street parking, signs, tennis courts and accessory apartments.

AERIAL PHOTOGRAPH: Photographs taken from an airplane or satellite that may be used or interpreted for map making, land classification, analysis, etc.

AMORTIZATION OF NON-CONFORMING USES: A zoning requirement that a non-conforming use either be discontinued or be made to adhere to ordinance provisions after a specified length of time.

AREA VARIANCE: The authorization by the zoning board of appeals for the use of land in a manner that is not allowed by the dimensional or physical requirements of the applicable zoning regulations.

ARTERIAL: A road classification that defines highways carrying primarily through traffic. Two arterial subgroups are limited access highways (interstates) and major through streets (thoroughfares).

ARTICLE 78 PROCEEDING: The principal method of securing judicial review of administrative actions relating to zoning and planning matters in New York State, governed by Article 78 of the New York Civil Practice Law and Rules. The proceeding may take the form of a certiorari or mandamus action against a public officer or body.

ASSESSMENT: An estimated value set on property for purposes of taxation.

BOARD OF APPEALS OR ADJUSTMENT: An appointed board composed of three to seven members empowered to interpret the zoning ordinance, to grant area and use variances from applicable zoning requirements in cases of demonstrated unnecessary hardship or practical difficulty, and, in some instances, to issue special use permits.

BOARDING HOUSE: A house or building in which paying guests are given board that may or may not include meals.

BUFFER AREA/STRIP/ZONE: An area established to protect, separate or screen one type of land use from another or from a public road, which may also minimize negative influences and improve the attractiveness of a community. The area usually contains landscaping, fencing or berms.

BUILDING CODE: A legal document that sets forth requirements to protect public health, safety, and welfare as they relate to the construction of buildings and structures.

BUILDING LINE: A line, usually fixed parallel to the lot line, beyond which a building cannot extend under the provisions of the zoning ordinance. It is equivalent to the setback or yard line.

BUILDING PERMIT: A permit that a municipal agency or officer, most often the building inspector, must issue before such activities as construction, alterations or expansion of buildings or structures can legally take place. Building permits may be issued for demolition of buildings, i.e. demolition permits.

BULK REGULATIONS: The combination of controls in a zoning district that govern the size and location of a building on a lot or parcel of land. Minimum lot coverage, maximum height, maximum floor area ratio and minimum yard requirements are common bulk regulations.

CENSUS: An enumeration of a population, generally including socio-economic data such as income, occupation, housing, characteristics, etc. Usually refers to United States National Decennial Census.

CENSUS BLOCK: The lowest geographic level for which selected census information is available. Usually a well-defined section of land bounded by streets or natural features, comparable to a city block in more urbanized locations.

CENSUS TRACT: An area used in census enumeration consisting of many census blocks, containing between 2,500 and 8,000 inhabitants, with an average population of 4,000.² Census tracts do not cross municipal boundaries and are useful in defining neighborhood areas.

CERTIFICATE OF OCCUPANCY: A document issued by a municipal government upon completion of a building or structure to indicate that it is ready for occupancy and in compliance with municipal building and zoning codes and approved site plans.

CENTRAL BUSINESS DISTRICT (CBD): The traditional business core of a community, characterized by a high concentration of activity within a relatively small area. The CBD is usually the retail and service center of a community. Because of its compactness, there is usually an emphasis on pedestrian traffic in the CBD.

²Based on criteria promulgated by the U.S. Department of Commerce, Bureau of the Census: [Guidelines for Delineating Census Tracts and Block Groups](#) (June 1985).

CLUSTER SUBDIVISION: An arrangement of buildings or lots on the land in which the required lot size or setback regulations are reduced so as to establish areas of permanent open space without an increase in the number of lots that would be permitted in a subdivision designed to meet the required standards. Also known as open space or conservation subdivision.

CODE ENFORCEMENT: Enforcement of the locally adopted zoning, building and other codes through the municipal enforcement officer, usually the building inspector.

COLLECTOR: A road classification that defines streets carrying about an equal combination of through and local traffic.

CONDEMNATION: Exercise of the public right under eminent domain to acquire private property for a public purpose; also, a declaration that a structure is unsafe for use and must be demolished.

CONDITIONAL USE PERMIT: See SPECIAL USE PERMIT.

CONDOMINIUM: An ownership arrangement in which the interior of a housing unit is individually owned (fee simple), while the exterior, including land and common elements, is owned by all homeowners in the development. The owner has title to the individual dwelling and a shared interest in the common elements. Condominiums may take various forms - duplex units, town houses, garden apartments, high-rise apartments and single-family units. While originally applied almost entirely to residential units, this form of ownership is now used for office and other types of commercial development.

CONSERVATION SUBDIVISION: See CLUSTER SUBDIVISION

COOPERATIVE: An ownership arrangement under which a person has a shared interest in a residential building complex. Under this type of ownership both the individual unit and common elements are owned by the cooperative and are covered by one mortgage. As with condominiums, cooperative ownership can take a variety of building forms.

COVERAGE: The percentage of the lot area covered by the combined area of all buildings on the lot (BUILDING) or the percentage of the lot area covered by the combined area of all buildings on the lot plus parking and other impervious facilities (LOT).

CUL-DE-SAC: A street closed at one end and having a configuration that permits traffic to turn around without backing up. Also called a "close" or "dead end."

CURB CUT: A privilege granted by the owner of a street or road to an adjacent property owner permitting a driveway or road connection to the street or road.

DEDICATION: Under subdivision regulation, the transfer of property from private to public ownership. Most often this relates to roads, common open space, recreation areas and utility right-of-ways. Municipalities may not require developers to dedicate new roads but may set standards for their construction. New York courts have ruled that municipalities cannot require a

developer to dedicate land for park purposes (Kamhi v. Planning Board of Yorktown, 1982). The requirement that may be imposed is that the plat show a "park or parks suitably located for a playground or other recreational purposed." See FEE-IN-LIEU OF RESERVATION

DEMOGRAPHY: The collection of economic and social statistics including age, racial makeup, growth density and distribution of a given population; an essential base for planning studies and policy formulation.

DENSITY: The ratio of persons, households or volume of building or development to an area of land.

DENSITY BONUS: Allowance for an applicant to increase the floor area ratio or number of dwelling units in a proposal in exchange for providing plazas, arcades, affordable housing or other specified amenities or community objectives. Also referred to as incentive zoning.

DESIRE LINES: In transportation planning, a series of lines on a map connecting the origin and destination of a trip; the most direct route between two points. A tool used to suggest where transportation service should be provided.

DEVELOPMENT RIGHTS: A property owner's right to develop his land, as may be restricted by the zoning ordinance. See TRANSFER OF DEVELOPMENT RIGHTS

DWELLING UNIT: A unit of housing that includes kitchen facilities and has direct access from the outside or through a common hall; also called a housing unit.

EASEMENT: An authorization from a property owner for the use of his property by another for a specific purpose. Vehicular access to a land-locked parcel, for example, is often obtained through an easement.

EMINENT DOMAIN: The right of a government to take, or to authorize the taking or, private property for public use or purposes, with just compensation being given to the landowner.

ENVIRONMENTAL ASSESSMENT FORM (EAF): The form used by government agencies to assist them in determining the environmental significance of a proposed action. The EAF (Short or Full) is the principal tool used to assess the potential impacts of proposed actions.

ENVIRONMENTAL IMPACT STATEMENT (EIS): A written document prepared in accordance with the NYS Environmental Quality Review Act (SEQR) analyzing the specific effects of a proposed development, project or action on the environment and identifying alternative methods of lessening and mitigating potential adverse impacts.

EUCLIDEAN ZONING: The division of land within a municipality into districts with each district limited to specific uses including the distinct separation of residential and non-residential uses. The term takes its name from the 1926 U.S. Supreme Court zoning case, *Euclid v. Ambler Realty Co.*, which held that communities have the right to regulate the private use of land through zoning.

FAMILY: A definition included in the zoning ordinance usually for the purpose of establishing maximum population density per dwelling unit.

FEE-IN-LIEU OF RESERVATION: Payments authorized in subdivision regulations when requirements for reservation of park recreation land cannot be met because of physical conditions of the site or other reasons.

FLOATING ZONE: A zoning district established in the text of a zoning ordinance that may be applied, upon application by a property owner, to a specific tract of land that is determined by the legislative body to meet pre-established criteria. Development of land so designated is usually subject to site plan approval by the planning board.

FLOOD PLAIN: An area on the sides of a stream subject to flooding. The extent of the flood plain is dependent on soil type, topography and stream flow characteristics.

FLOOR AREA RATIO (FAR): The gross floor area in square feet of all buildings on a lot divided by the area of such lot in square feet. Maximum permitted floor area on a lot is calculated by multiplying the maximum FAR specified for the zoning district by the total area of the lot. Floor area ratio regulates the overall bulk of buildings, beyond the traditional height and setback zoning requirements.

FRONTAGE: The extent of a lot along a street.

GRADE: The degree or percentage of slope, as of a road. Or, to make level or evenly sloping, as a lawn or highway. Or, the officially established elevation of a street center line.

GRID: A checkerboard network on intersecting streets and avenues forming the basic layout of a city or town.

GROUP HOME: Sometimes used instead of the more generic term "community residence" or "residential care facility," for any group living arrangement for a special population, such as the disabled, handicapped or elderly. Strictly defined, group home refers to a residence operated by public or private non-profit child-caring agency that is licensed by the New York State Board of Social Welfare with an occupancy limited to not more than 12, nor less than 7 children between 5 and 21 years of age.

HOME OCCUPATION: An occupation of a service character accessory to and customarily incidental to the use of a "dwelling unit" by a resident. A home occupation should not change the character of the structure as a residence nor have any exterior evidence of such accessory "use."

HOUSEHOLD: A domestically autonomous person or group of persons, often defined as a group who both eat at the same table and sleep under the same roof.

INFRASTRUCTURE: The facilities that are necessary to support development within a community, including water and sewer, transportation, communications and power facilities.

INTERIM ZONING (STOP GAP ZONING): A device to freeze or severely restrict development for a short period, during which a comprehensive plan for an area or a new set of zoning regulations is prepared. See **MORATORIUM**.

LAND USE: The utilization of any piece of land. Generally used categories of land use include vacant, agricultural, residential, commercial, industrial, open space and institutional.

LEAD AGENCY: Under the provisions of the State Environmental Quality Review Act (SEQR), the agency principally responsible for implementing, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required.

LOCAL WATERFRONT REVITALIZATION PROGRAM (LWRP): Under New York State's Coastal Management Program, communities have the opportunity to develop local coastal management programs, known as LWRPs. Specific land and water uses and regulatory mechanisms are identified as essential to implementation of key coastal management policies. Local governments that elect to prepare a coastal management program must address each of 44 State coastal management policies, determine how they apply on a local level, give them appropriate local specificity and implement them through appropriate local actions. Upon approval of the LWRP by the Secretary of State and the U.S. Department of Commerce, all state and federal actions in that community's coastal zone, i.e. direct action, funding of a project, or granting of a permit, must be consistent with the local program.

LOT: A tract, plot or portion of a subdivision or other parcel of land considered as a unit, for the purpose, whether immediate or future, of transfer of ownership or for building development.

MANDAMUS: Where administrative action is withheld unlawfully by either a person, officer or board, judicial relief may be sought through an Article 78 proceeding in the nature of mandamus requiring an action to be taken. See **ARTICLE 78 PROCEEDING**

MORATORIUM: A temporary ban on an activity, such as new construction, enacted in response to rapid growth that exceeds the capacity of water or sewer services or existing roads, or the updating of the municipality's master plan, zoning ordinance or subdivision regulations. In many instances, a moratorium is only partial and thus provides for interim development controls that permit limited development, particularly in hardship cases. Courts in New York State have generally upheld moratoriums, as long as they serve a reasonable purpose, are set for a reasonable time period and are enacted under the proper procedural requirements for such ordinances.

MULTI-FAMILY HOUSING: Structures that provide dwelling units for multiple households, usually distinct from two-or three-family houses.

NON-CONFORMING STRUCTURE: A structure that does not meet the bulk requirements of the zoning ordinance or standards of the building code. These structures generally predate the zoning ordinance or building code and are thus allowed to stand. Once demolished, however, a new structure usually must meet current specifications.

NON-CONFORMING USE: A use of a building or of land that does not conform to the regulations for the district in which it is located. Such uses usually predate the zoning ordinance and are permitted to continue without change or expansion.

OPEN SPACE: Land that is either undeveloped and free of buildings and structures, regardless of ownership or recreational value.

OVERLAY ZONE: An overlay zone is a mapped zoning district that imposes a set of requirements in addition to those of the underlying zoning district. In an area where an overlay zone is established, property is in two zones and the land may be developed only under the conditions and requirements of both zones.

PERFORMANCE STANDARDS: Standards in the zoning ordinance, typically governing industrial uses, which establish performance measurements to control permitted uses. These standards may include smoke, noise, glare and odor emission.

PLANNED UNIT DEVELOPMENT (PUD): A special provision or zoning district that regulates development of large tracts of land, usually permitting a combination of residential and non-residential land uses developed as a "unit." Differs from clustering since it can involve mixed land uses and an increase in density.

PLAT: A drawing or drawings indicating the proposed manner or layout of a subdivision plan submitted to the planning board for consideration.

PUBLIC HOUSING: Housing owned by a public agency.

PUBLICLY ASSISTED HOUSING: Housing with some form of government subsidy, either to the developer or to the tenant.

RESIDENTIAL CARE FACILITY: A community-based residence under public, voluntary non-profit or proprietary sponsorship and regulated by an agency of the state or federal government. It provides care and support services, other than 24 hour nursing care, for approximately five- to twenty-five persons with disabilities that may be developmental, emotional, physical or social in origin. RCFs are known by a number of names, including agency-operated boarding home, group home, group residence, family care home, hostel and halfway house.

RIGHT-OF-WAY: A strip of land over which roads, railroads, utility lines, etc. pass.

SCALE: Unit of measure on a map, plat or plan, showing the ratio or measured distance on the document to the actual dimension of the subject.

SETBACK: The required minimum distance from a property line that a structure may be built upon a lot.

SIGHT DISTANCE: The measurement of a straight line with an unobstructed view of a required distance; used in relation to design standards for roads and intersections.

SITE PLAN: A detailed plan showing the location of structures, parking areas, lighting, landscaping, drainage and other development features for the development of a parcel of land; distinct from a plat in its greater degree of detail and limitation to one lot.

SPECIAL USE PERMIT: An authorization of a particular land use which is permitted in a zoning ordinance or local law subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such ordinance or law and will not adversely affect the neighborhood if such requirements are met.

SPOT ZONING: The process of rezoning a parcel of land for a use classification totally different from that of the surrounding area in a manner not consistent with community planning principles. The effect of this action is to provide special benefit to the owner of such property and to permit a use that will have an adverse impact on surrounding properties. If the zoning action is in accordance with the comprehensive plan, it may not be considered "spot zoning" even if a single parcel is involved. Variances, non-conforming uses and special use permit uses are not considered "spot zoning" since a formal amendment to the ordinance is not involved in these actions.

STREET: A public or private right-of-way that provides the principal means of access to abutting properties.

SUBDIVISION REGULATIONS: Locally adopted laws governing the division of land into smaller lots and the provision of necessary improvements such as roads, storm drainage and utilities. Subdivision regulations are intended to ensure the orderly conversion of vacant land to developed land and the compatibility of new development with surrounding areas. Subdivision regulations also govern lot and street layout, provision of utilities and establishment of recreation areas.

SUBSTANDARD LOT: A parcel of land, the area, frontage or depth of which does not meet the minimum zoning dimensional requirements of the district in which the parcel is located.

TAX INCREMENT FINANCING: A means of financing redevelopment projects in which a blighted area is improved with the proceeds of a bond issue stated to be repaid by the additional taxes the new development is expected to generate. The cost of public improvements, such as streets, water and sewer facilities, etc., needed to support the development in the designated area is financed by the tax revenues received from the development projects within the tax increment financing district. Those revenues are earmarked to retire the bonds for the public improvements

rather than going into the community's general revenue fund. Upon retirement of the bonds, all taxes from the district become part of the community's normal tax base.

TOPOGRAPHY: Land features including elevations, slopes and drainage patterns. When illustrated in map form provides a graphic representation of a property's physical characteristics as they presently exist or are proposed to be changed.

TRANSITIONAL USE ZONE: A zoning technique intended to soften the harsh interface between markedly different land use types or zoning districts. A transitional area or site is one that is located between two or more land use areas or zoning districts of different character, such as between commercial and residential, between institutional and industrial, between new development and property for restoration, or combinations of such.

TRANSFER OF DEVELOPMENT RIGHTS (TDR): A technique in which the development rights of a parcel of land are transferred to another property in order that the first parcel may not be further developed, while increased development is permitted on the second parcel.

TRIP: A single or one-direction vehicle movement with either origin or destination inside the study area.

UNNECESSARY HARDSHIP: The circumstances under which General City, Town and Village Law define a zoning board of appeals may grant a use variance.

USE VARIANCE: The authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.

VARIANCE: Administrative relief from the literal and strict application of zoning provisions. Granted in cases of demonstrated practical difficulty or unnecessary hardship by the zoning board of appeals after public hearing. See AREA VARIANCE, USE VARIANCE and UNNECESSARY HARDSHIP.

WATERSHED: The area of land drained by a river or river system, synonymous with term "drainage basin."

WETLAND: Fresh water wetlands, commonly recognized as marshes, swamps and bogs that support aquatic plant life, have a permanent or periodic high water table. Tidal wetlands are similar, but are inundated by tides, instead of being associated with high water tables and flooding from rivers and streams.

WETLAND REGULATIONS: At the State level, a document that sets forth requirements necessary to implement the New York State Wetlands Act. At the local level, an ordinance or law providing regulations for the protection, proper maintenance and control within the municipality of wetlands, water bodies, watercourses and flood areas.

ZERO LOT LINE: Zero lot line provisions permit houses to be sited on one side lot line or on the rear or front lot line. Some communities allow zero lot line housing to be sited on common side lot lines, as with duplexes. When common lot line siting is not permitted, and zero lot line units must be sited on alternate lot lines, the zero lot line development can look very much like conventional, detached housing. In either case, siting units on their lot lines allows larger side yards that are easier to maintain than the narrow side yards that are often the case in conventional small lot developments.

ZONING DISTRICT: A division of land within a community into zones or districts that have specific land-use restrictions and controls regulating existing and future development within those areas.

XI. MAPS, PLANS AND GRAPHIC RESOURCES



Planning board members are presented with a wide array of maps, plans and graphic materials that accompany subdivision and site plan proposals and other planning activities. These materials include planimetric and topographic maps; aerial photographs; community base maps; comprehensive plan maps; subdivision and site plan maps; architectural plans; and visual analysis drawings. This section discusses what these materials are and how they are used to better understand a project and its impacts.

Maps are necessary planning tools that communicate a wide range of spatial information regarding natural and man-made features. They afford the user a comprehensive view of a piece of property or larger area that cannot be conveyed by words alone. A map is a generalized representation of an area in which selected features, such as roads, boundaries, rivers and waterbodies, are symbolized in a graphic format. Map elements (*see page 63*), essential to a map's legibility, include its scale, legend, orientation, source and title.

Planimetric and Topographic Maps

Planimetric maps indicate the location of common man-made and natural features in a flat (plane), two-dimensional format without regard to topography or ground elevation. Topographic maps incorporate the elements of a planimetric base and show contour lines which connect points of equal ground elevation above or below mean sea level, representing the terrain of an area. Topographic maps present an approximation of a property or an area in its three dimensions, and are used in evaluating drainage patterns, slope steepness, and general suitability of land for development.

The United States Geographical Survey (USGS) 1:24,000 quad map, pictured at right, have long been the standard topographic map of choice but are too small-scale for site specific analysis. Large-scale topographic maps of development sites are readily produced with Geographic Information Systems (GIS).



Geographic Information Systems

Geographic Information System (GIS) is a powerful tool for visualizing and analyzing geographic information and has greatly enhanced the way planners see, map, and interpret our surrounding environs. GIS allows users to map and display every conceivable geographic feature from man-made items such as roads, bridges, buildings, parcel and municipal boundaries, to natural features such as wetlands, streams, lakes, steep slopes and forested areas. Planners use GIS for a wide variety of applications ranging from very specific site analysis to regional analyses of land use patterns for environmental, transportation and related initiatives. Most local governments in Westchester utilize or are developing GIS capabilities

Aerial Photography

Aerial photographs are indispensable planning resources with a wide range of uses. With GIS and color digital photographs, aerial photography is more accessible and useful than ever before.

Aerial photos are used to analyze land use patterns and track changes over time, conduct natural resource inventories, and to plan the locations of new roads, trails and facilities. Westchester County maintains historical air photo prints in 5-10 year intervals dating back to 1925. Private firms that specialize in aerial photography can be contracted to provide updated coverage of specific areas for special projects.



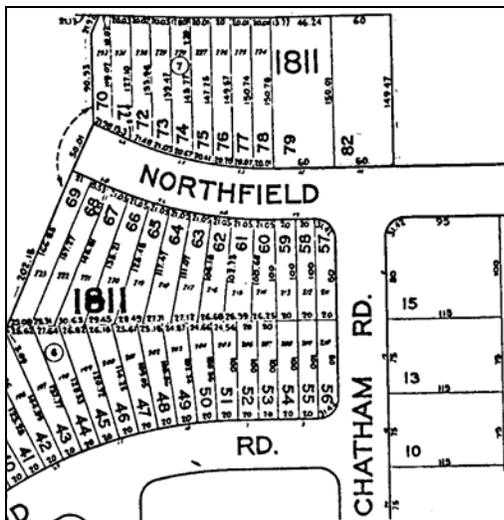
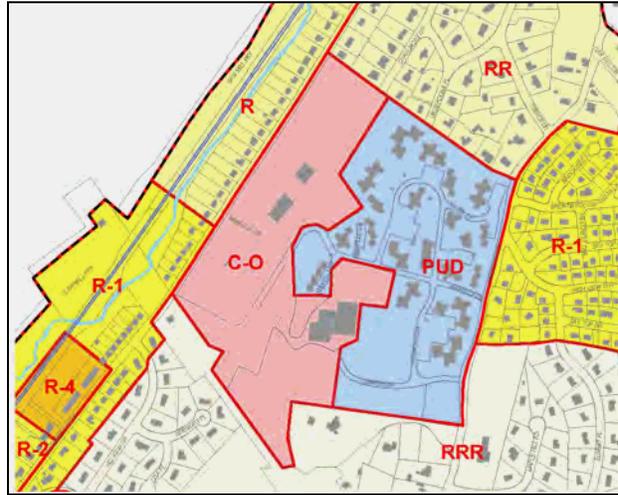
This color aerial view was produced from the County's 2004 digital orthophoto base which covers the entire county and provides a high level of detail of ground features. In the example at left, text labels and a red dashed line representing a trail were added to the photo using GIS.

Community Base Maps

Community base maps include a community's official map, zoning, and tax maps.

An **Official Map** is a formal document, adopted by a municipal legislature that indicates the location and width of both existing and proposed streets, highways, drainage systems, and parks.

The **Zoning Map** shows the boundaries of residential and non-residential zoning districts within a community, and is usually incorporated with an existing base map of a community. Zoning maps usually include parcel lines as shown in the example at right.



Tax Maps show the location, boundaries and dimensions of individual land parcels. Each parcel is assigned a number, usually related to a section, block and lot designation, which links its information to the municipal tax rolls regarding ownership, assessed value, and land use. Most Westchester municipalities have digital parcel boundaries as the basis of their GIS systems. All Hard-copy tax maps are generally large in scale requiring many sheets to cover a community, and are usually maintained in atlas format. They are kept in a locality's tax assessment office as well as in the County Clerk's Division of Land Records.

Land Use maps show how land is being used in a community and is often depicted at the parcel level. In the example at right, parcels are color coded to represent varying levels of residential development (e.g. from single family to multi-family densities) as well as different types of commercial and open space uses, including vacant undeveloped lands. Land use maps usually form the basis for creating a comprehensive plan map representing desired land use.



Comprehensive Plan Maps

Comprehensive plan maps are those maps contained in a community's comprehensive plan. These include specialized maps that illustrate a community's land use plan, transportation/circulation plan, and a community facilities plan. This thematic information is usually presented with color patterns and/or symbols that are overlaid on a base map of a community. Comprehensive plans usually present an assortment of other useful maps, depending on the planning issues particular to a community. These include historic preservation districts, central business districts, and environmentally sensitive areas. A comprehensive plan mirrors the developmental policies and objectives of a community, the maps featured in them can serve as a useful source for comparing projects with the community's comprehensive planning objectives.

Subdivision and Site Plan Maps

Planning board members review subdivision and site plan proposals to ensure consistency with subdivision regulations, zoning provisions, and comprehensive plan objectives.

Subdivision review: This process usually involves two stages, the preliminary and final stages, in which maps or "plats" are submitted. The preliminary plat shows existing site conditions, layout of the lots, approximate dimensions, topography, roads, drainage details, open space areas, and structures proposed for the subdivision. The final plat is a revised version of the preliminary plat that incorporates any changes required by the planning board, and includes more engineering details on drainage, utilities, and grading.



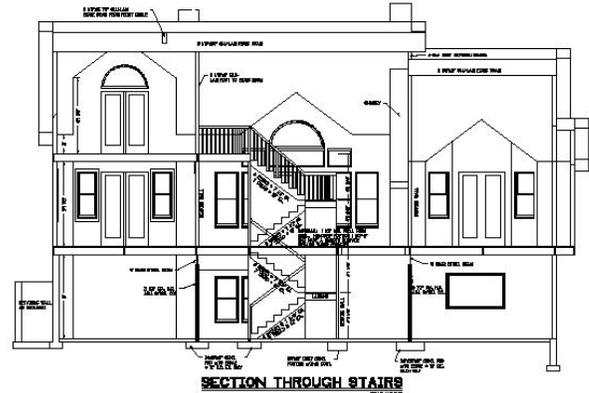
Site plan review: The site plan is a detailed development plan that illustrates both the existing conditions of a site and the details of a proposed development. A site plan incorporates many of the same elements of a subdivision plat, but also provides greater detail on the location of principal and accessory structures, parking areas, access points, and other design features. Often included with site plans, especially for large projects, are individual maps depicting the grading, landscaping/tree preservation, drainage, and utility aspects of a construction project.

Architectural Plans

Architectural plans often accompany site plans and provide information on a construction project's architectural details. These are useful tools in understanding a project's physical features and its relationship to surrounding properties. Architectural plans include **elevations**, **cross-sections**, **floor plans**, **perspective drawings**, and **architectural models**.



Elevations are scaled drawings of the view of one side of a structure that indicates the location and details of doors, windows, materials, and other exterior features.



Cross-sections are a representative “slice” through a structure taken at a point that illustrates many elements of interior construction and architectural treatment, such as walls, floors, and structural components.

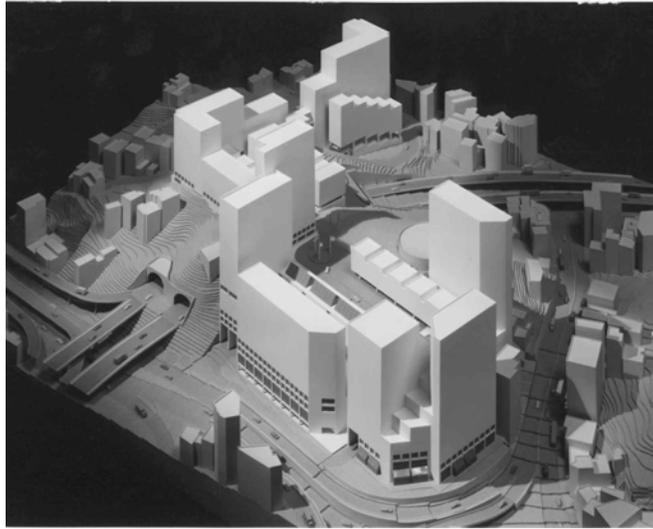


Perspective drawing or rendering is a three-dimensional view of the structures and landscape of a proposed development. They are often colored for presentation purposes, and include drawings of people to illustrate the project's scale.



Floor plans are scaled diagrams of a floor area of a building as seen from above. Floor plans illustrate the layout of rooms, and indicate door and window openings, and the location of stairs, closets and other interior features.

Architectural models are scaled-down, three-dimensional representations of a development. Models are generally limited to large developments or building complexes, and are used to provide easily understood visual presentations.

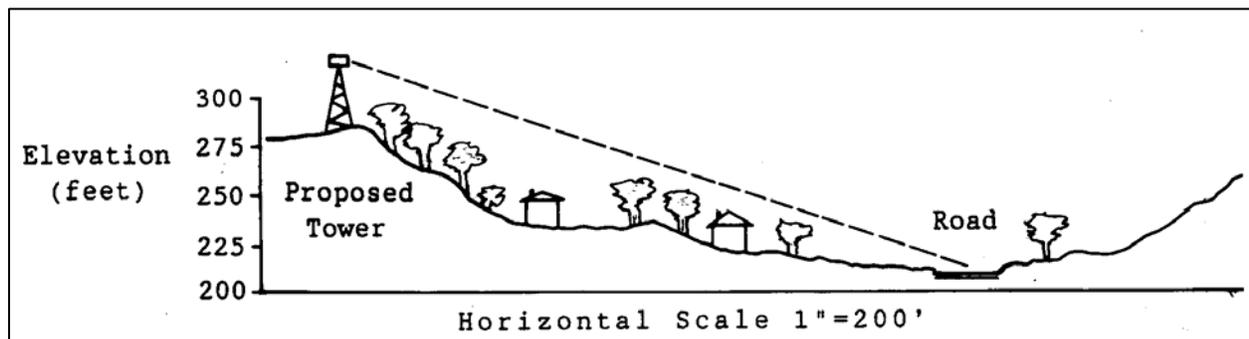


Visual Analysis Drawings

All projects have some degree of visual impact on a surrounding area. When a proposal is deemed to have a significant visual impact, a visual analysis that includes **a view-shed map** and **line of sight diagrams** could provide a valuable tool for assessing its actual impact.

View-shed maps center on a project's site and indicate potential viewpoints or locations that are likely to be within view of the project, taking into account the intervening topography, buildings, and vegetation.

Line of sight diagrams (below) are cross-section drawings that demonstrate whether a visual line exists between a potential viewpoint and the project.



Map Terms

Scale indicates the relationship of a measured distance on a map to the actual ground distance represented by the map. **Scale** determines how large an area a map can cover, and the level of detail that can be shown. In relative terms, a large scale covers a smaller area, but shows a higher level of detail than a small scale map. **Scale** can be expressed as a ratio, e.g., 1:24,000, in which one inch on the map equals 24,000 inches on the ground, or it can be presented in verbal or written form, e.g., “one inch equals two thousand feet,” Scale can also be shown graphically so that distance calculations may be made by directly measuring the distance on a bar scale. One advantage of the bar scale is that it remains consistent with a map when reduced or enlarged.

Legend or Map Keys contain descriptions of the various symbols, patterns, or lines used to represent features on a map.

Orientation or compass direction is expressed by a **North Arrow**. By convention, the north arrow usually points to the top of the sheet on which a map is shown.

A map’s **Source Note** provides useful information regarding the materials, date and methods used in the map’s compilation.

Governmental Sources for Maps and GIS Data

Community based maps can be obtained through municipal clerks, assessors, and engineers (DPW) offices. Local planning departments or consultants are good sources for obtaining a wide variety of planning-related maps, comprehensive plans, environmental impact statements, and site plans. Maps and planning related documents are often available at municipal websites, which sometimes include GIS mapping interfaces.

The Westchester County Department of Planning is a source for hard-copy aerial photographs and maps covering a wide range of themes including environmental, transportation, land use and zoning, and census maps. To see a list of these materials go to www.westchestergov.com/planning and click on the maps & publications link.

Westchester County’s GIS program provides an online mapping interface at their website <http://giswww.westchestergov.com> and also provides full range of digital mapping data free for download.

For more information:

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