Local Undesirable Land Use Regulation

A Division of New York Department of State

Uses most don’t want next door…

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

Acronyms

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

- Mining & gas drilling
- Wind turbines
- Telecommunications facilities
- Adult uses
- Billboards & signs
- Manufactured housing
- Agri-tourism/agri-tainment
- Group homes
- “Monster” houses
- Landfills
- Home day care
- Backyard chickens
- Non-retail storefronts
- Large-scale retail

### Comprehensive planning

- Reduces controversy
- Legal support
- Infrastructure investments
  - Identifies areas for municipal & private investment
- Public input on controversial issues

<table>
<thead>
<tr>
<th>Municipalities with Comprehensive Plans</th>
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<tbody>
<tr>
<td>Cities 92%</td>
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<tr>
<td>Towns 71%</td>
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<td>Villages 66%</td>
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<td>All 76%</td>
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*Source: NYS Legislative Commission on Rural Resources (2008)*

### Can a use be prohibited?

#### Exclusionary Zoning

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

Examples:

- Large lot or high minimum square footage requirement
- Excluding multiple dwellings or mobile home

Most non-residential uses may be zoned out if the exclusion is supported by the comprehensive plan
Spot zoning

- Parcel can be rezoned to allow use supported by comprehensive plan
- Zoning changes must be reasonably related to legitimate public purposes

"the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . ."
Rogers v. Tarrytown, 302 NY 115, 86 NE2d 731 (1951)

Wind turbines

Distinguish between residential, agricultural or commercial turbines
- Regulate with zoning:
  - Restrict to districts or municipal-wide
  - Setbacks
  - Sound
  - Special Use Permit (SUP)
- Regulate without zoning:
  - Site plan review
  - Article X

Solar systems

- Scale
- Protecting solar access
- Comprehensive Plan
  - Policy statement
  - Resource map
- Potential adverse impacts
  - Glare
  - Neighborhood character
Residential/small solar

- Regulations & review
- Street & lot layout
- Setbacks
- Height
  - Solar setback
  - “Solar fence”
- Solar-ready construction
- Building Code or incentive zoning

Solar systems & historic resources

Design Guidelines for Solar Installations (National Trust for Historic Preservation)

- locate on non-historic buildings or additions
- minimize their visibility from the road
- avoid permanent loss of character-defining features

Commercial/industrial solar

Regulations & review
- Special Use Permit
- Industrial & agricultural zones
- Adverse impacts
- Lot size
- Screening
- Safety
- Decommissioning
Mining
Regulate with zoning:
- Restrict to districts or municipal-wide
- SUP with conditions:
  - Ingress & egress
  - Truck routes
Regulate without zoning:
- Site Plan Review

DEC mining permit process
Municipalities submit recommendations to NYS DEC:
- Setbacks from
  - property boundaries
  - public R-O-W
- Dust control
- Hours of operation
- Barriers restricting access

Solid waste facilities
Includes storage, transfer, disposal, treatment or internment:
- Landfills
- Open dumps
- Transfer stations

REGULATION
- With zoning: as of right, SUP
- Without zoning: site plan review
State: NY ECL §27-0701(1) & 6 NYCRR 360
40 CFR Part 258
Exceptions

- DEC permit & registration not needed for certain Construction & Demolition (C&D) landfills determined by:
  - Hours of operation (sunrise & sunset)
  - No fee
- Debris type:
  - Recognizable uncontaminated concrete & concrete products (steel or fiberglass reinforcing rods embedded in concrete, asphalt pavement, brick, glass, soil, rock)
  - Trees, stumps, yard waste & wood chips
  - Must originate & be disposed of on properties under same ownership or control
  - 6 NYCRR Part 360 – 7.1(b)

Cell towers as public utility

- Cell towers defined as a public utility
  - Cellular Telephone Co. v. Rosenberg (NYS Court of Appeals, 1993)
- Compelling reasons to grant use variance:
  - Necessary to provide safe & adequate service
  - Significant gaps in coverage if placed on alternative sites

Telecommunications Act of 1996

<table>
<thead>
<tr>
<th>MUNICIPALITY MUST NOT</th>
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<tr>
<td>Prohibit personal wireless service</td>
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<tr>
<td>Unreasonably discriminate among providers</td>
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<tr>
<td>Regulate based on health effects from RF emissions</td>
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<tr>
<td>Act on applications within &quot;reasonable period of time&quot;</td>
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<td>90 days for co-locations</td>
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<td>150 for others</td>
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Section 6409

Middle Class Tax Relief & Job Creation Act of 2012

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

![Diagram contrasting a single antenna configuration with DAS.]

Dish antenna (1m or less)

Over-the Air Reception Devices (OTARD) Rule

Municipality cannot:
- Delay or prevent signal use
- Unreasonably increase cost of dish installation

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

![Image of dish antenna installation.]

Adult uses

- Cannot prohibit (1st Amendment Protection)
- Regulate with zoning
  - Must provide viable locations
  - Definitions must be clear
- Aim regulations at secondary effects

![Image of adult use regulation.]

www.fcc.gov/mb/facts/otard.html
Billboards
- Can't regulate content (1st Amendment protection)
- Can regulate size & location:
  - State Uniform Code
  - Zoning
  - Site Plan Review
  - Local Permit
- NYS DOT regulates signs along interstate & primary highways
  - Municipality may be more restrictive than DOT

Temporary signs
- Regulate physical characteristics:
  - traffic safety, aesthetics, property values
- Regulation should be content neutral:
  - size, height & location:
    - ban all signs on public property
  - Permits: apply to all signs
  - Duration: apply evenly
  - Fees: relate to administrative costs

Manufactured homes
- Federal: Construction & Safety
- State:
  - Uniform Code
  - Manufacturer’s Manual
  - NYS Dept. of Health:
    Mobile home parks with 5 or more homes (Sanitary Code Part 17)
Manufactured homes

- Health, safety & general welfare of the public
- Zoning
  - Limit to certain districts
  - Lot size & setbacks
  - Special Use Permit
- Site Plan Review
- Cannot exclude completely
  - *Town of Pompey v. Parker*
- Cannot exclude based on age of home

Managed homes

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

Group homes for the disabled

- Will facility result in a concentration of similar homes to the extent that community character is altered?
- "A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances."
- *(Mental Hygiene Law § 41.34)*
Religious Land Use & Institutionalized Persons Act (RLUIPA)

- Religious uses are not exempt from land use regulations
- Municipalities may not:
  - Place “substantial burden”
  - Zone out of residential districts
  - Prohibit if impact similar to other allowed uses
- Regulate characteristics influencing physical environment: lot coverage, parking, signage

Doggie day care

- Often not addressed in zoning
- Allow in more districts
- Define
  - How many dogs per day, no overnights
- Address potential impacts
  - Noise
  - Parking
  - Staff
  - Spaces per dog
  - Drop off area

Nonretail uses in retail districts

- Nonretail uses in “storefronts”
  - Reduces critical mass of retail shopping district
- Zoning Tools:
  - Exclude residential on first floor
  - Minimum percentage street-level retail
  - SUP for nonretail
  - Exclude all or some non-sales tax generating uses
  - Minimum separation between non-sales tax generating uses
  - Pedestrian-Oriented Shopping overlay
Defending Your Decisions

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

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

Adopt moratorium law to:
• Update comprehensive plan to consider new uses
• Update regulations to prevent:
  • hasty decision
  • unplanned & inefficient growth
  • construction inconsistent with comprehensive plan

Wrong reasons for moratoria:
• Slow development hoping developer will go away
• Halt development while municipality considers buying land

Positive press for controversial issues

Bad press usually results from ignorance, not bias:
• Inaccurate, or wrong conclusions from facts
• Accurate, but unfavorable tone
• Overly selective or unbalanced reporting
• Blurred lines between fact and opinion

Remedy ignorance with non-confrontation
• Be prepared to correct false assumptions
• Response plan: phone, press release, news conference
• One spokesperson controls message

The Record

Materials in the record tell the story of the application & typically include:
• Application & supporting documentation
• Newspaper notices
• Meeting minutes
• SEQR materials
• Public hearing testimony
• Written submissions from public
• Expert opinion
• Decision, conditions, findings
Findings

- Describe application’s reasons for denial or approval & may support:
  - Why a condition was imposed
  - Decision if challenged in court
  - Conclusory statements are not “Findings”
    - “The standards were not met.”
  - A decision based on conclusory statements is:
    - Not supported by factual information in the record
    - Will be struck down in the courts

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