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# What's Really Needed to Effectuate Resource Protection in Communities

JAYNE E. DALY<sup>1</sup>

## Introduction

There has been much discussion and attention paid to the need for a "next generation" of environmental regulations.<sup>2</sup> Those dissatisfied with the federal "command and control" regulations of the 1970s and 1980s argue that the system is no longer effective or efficient and advocate that it needs to be more conscious of cost benefit analysis, open to innovation and should consider the impacts of pollutants on ecosystems, rather than the single subject approach of the early statutes.<sup>3</sup>

Despite its detractors, this regulatory system did effectively address the most critical issues of the times, e.g. significant and harmful pollutant discharges into water, air and on land.<sup>4</sup> The more subtle and complex set of issues that arise from land development patterns and practices,<sup>5</sup> however, escaped effective regulation.<sup>6</sup> In an attempt to fill the void, during the past thirty years

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1. Jayne Daly is the Director of Programs at Glynwood Center, Inc., a non-profit organization dedicated to helping communities shape their future. She is also an attorney and mediator.

2. For a comprehensive discussion of the reforms needed to balance environmental efforts with other public needs and issues see THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Marian R. Chertow & Daniel C. Esty eds., 1997) [hereinafter "THINKING ECOLOGICALLY"].

3. Richard B. Stewart, *A New Generation of Environmental Regulation*, 29 CAP. U. L. REV. 21 (2001).

4. See generally THINKING ECOLOGICALLY, *supra* note 2. Twenty five years ago, the Cuyahoga River in Ohio was so contaminated that it caught fire, air pollution in some cities was thick enough to taste, and environmental laws focused on the obvious enemy: large American factories with belching smokestacks and pipes gushing wastes. Federal legislation has succeeded in providing cleaner air and water, but we now confront a different set of environmental problems—less visible and more subtle. *Id.* at 1-2, 232-33.

5. See Patrick Gallagher, *The Environmental, Social and Cultural Impacts of Sprawl*, 15 NAT. RESOURCES & ENV'T 219 (2001) (discussing the impact of sprawl on air quality, water quality, wildlife habitats, farmland and community).

6. See Jayne Daly, *A Glimpse of the Past - A Vision for the Future: Senator Henry M. Jackson and National Land Use Legislation*, 28 URB. LAW. 7, 8-9 (1996). Shortly after the enactment of the National Environmental Policy Act (1970), Senator

many states have enacted growth management statutes or developed smart growth legislation and policies.<sup>7</sup>

For some communities, this new focus on improved planning and the balancing of growth with environmental protection has resulted in the preservation of open space and the creation of more compact development patterns.<sup>8</sup> For others, the real focus is still on attracting development and building a tax base to support the rising cost of infrastructure, municipal services and recreation.<sup>9</sup>

There is a clear need for a “next generation” of federal and state environmental laws that are more responsive to today’s challenges. There is also evidence that smart growth policies are beneficial.<sup>10</sup> But legislation is not enough. To effectively protect natural resources, communities need more than the law. Through the use of a case study, this article will examine what happened when one municipality tried to protect a critical resource—its

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Jackson proposed the National Land Use Policy Act of 1970 (LUPA), legislation that he considered to be the logical next step in providing “a quality environment for present and future generations of Americans.” *Id.* Despite significant support from the Senate, the House of Representatives failed to approve the measure. To date, there have been no further attempts at the federal level to enact coordinated and comprehensive national land use legislation. Land use development, however, is significantly impacted by federal legislation and policies such as the Clean Air Act, the Clean Water Act and Transportation policies, among others. *Id.*

7. Patricia Salkin, *The Influence of APA’s Growing Smart on the Smart Growth Movement*, 2001 ALI-ABA 597 (Stating that since 1994, twelve states have acted by Executive Order to implement smart growth policies or legislation).

8. See *TND News in Brief*, THE TOWN PAPER, Spring 2002, at 3, available at <http://www.TNDtownpaper.com>, for examples of communities that have embraced the concept of compact development patterns that provide for mixed use and open space protection. For example, in Queen Anne’s County, Maryland, the Planning Commission has approved the concept plan for Gibson’s Grant, the first TND (traditional neighborhood development) in the county. The overall development consists of four distinct neighborhoods that are separated by a central park and main boulevard. The plan calls for a corner store and live-work units. *Id.*

9. See generally Tom Daniels, *What Does Smart Growth Mean for Community Development?*, 32 J. OF THE COMMUNITY DEV. SOC’Y 20-34 (2001).

10. See Brian Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 206 (2000) (arguing that “smart growth” and “livable communities” are convenient labels for summarizing the public’s concerns over growth and change in communities).

“The recent smart growth and livable communities laws do not represent significant departures from what has gone before. However, for a state like Wisconsin that did not have an established growth management framework, as in Maryland or the Twin Cities, the recent smart growth law is a very significant development.”

*Id.*; see also Parris N. Glendening, *Smart Growth: Maryland’s Innovative Answer to Sprawl*, 10 B.U. PUB. INT. L.J. 416 (2001) (detailing Maryland’s accomplishments under its Smart Growth and Neighborhood Conservation program).

water supply. It will document the important role that comprehensive planning and local regulations play in protecting natural resources. In considering “lessons learned,” this article will also examine what else is needed. In addition to the law, communities also need training and financial support to effectuate natural resource protection. And, perhaps most importantly, communities need a new framework for civic discourse—one that is less reactive than the public hearing process. The new system must foster communication and education, and encourage residents to come together, at both the local and regional level, to make informed, collective decisions about their communities.

### **Protecting the Aquifer in Dover, New York**

#### *Background*

The Town of Dover is a rural community in the southeastern portion of Dutchess County, New York, about eighty-five miles north of New York City. Approximately 8,400 residents live within the Town, which is largely a residential and agricultural community. There is some commercial development and scattered industrial sites, especially extractive industries that take advantage of the area’s extensive sand and gravel resources. The Harlem Valley Psychiatric Center, the town’s largest employer, closed in 1994.

Bisected by Route 22, which runs along the eastern border of New York from Putnam County to the Adirondack State Park, Dover has experienced tremendous growth pressure during the last five years. Fueling this development are relatively low housing prices and property taxes, and the completion of the Wassaic rail line, which daily transports commuters between their homes “in the country” and New York City.<sup>11</sup>

Dover is one of seven municipalities that lie within a distinct geographic region known as “the Harlem Valley” on the eastern border of Dutchess County.<sup>12</sup> Separated from the rest of the County by the Taconic Mountains, the communities in the Valley share many special natural resources, including the Ten Mile River, the Swamp River and the wetlands complex known as the

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11. See TOWN OF DOVER, MASTER PLAN 1 (1993 & Supp. 1999) (on file with Town Clerk, Dover Plains, N.Y.).

12. About the Harlem Valley Partnership, *available at* <http://www.hvpartnership.org> (last visited Dec. 3, 2002).

Great Swamp. These river corridors provide important habitats for aquatic, bird and other wildlife species.<sup>13</sup>

The Ten Mile River and its tributaries drain a 203 square mile watershed in Dutchess County that includes the Towns of Dover and Amenia, large parts of the Town of Pawling and Northeast and fragments of several other towns including some in neighboring Massachusetts and Connecticut.<sup>14</sup> Drinking water for the Harlem Valley is supplied by two distinct aquifers: one on the valley bottom and the other in the uplands. The Valley Bottom Aquifer System underlies all valley bottom areas, and runs from Amenia, in Dutchess County just north of Dover, to Patterson, in Putnam County.<sup>15</sup>

In 1993, the Danny Fortune Company (DFC) submitted an application to the New York State Department of Environmental Conservation (DEC) to establish a construction and demolition (C&D) debris landfill at an existing sand and gravel mining operation owned and operated by Palumbo Sand and Gravel Company.<sup>16</sup> The mining operation had been in business at the site since 1952 and, at the time of application, had a valid DEC permit that allowed for reclamation with a mixture of silt and wood chips.<sup>17</sup> The new application would create a hundred-acre landfill, which would be reclaimed with up to 27,000 tons of C&D material, over a period of twenty years.<sup>18</sup>

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13. CHAZEN COMPANIES, TOWN OF DOVER, TOWN OF DOVER PROPOSED ZONING LAW AND MASTER PLAN AMENDMENTS, DRAFT ENVIRONMENTAL IMPACT STATEMENT 36-37 (1998) (on file with Town Board, Dover Plains, N.Y.). The New York State Heritage Program has also documented "the presence of several locally, regionally and nationally rare plant communities in the [Great] Swamp." *Id.* at 37. The Nature Conservancy lists the Great Swamp as one of the "Last Great Places" supporting 45 rare or threatened species and significant habitat including the federally protected bog turtle, at <http://nature.org/wherewework/northamerica/states/newyork/eastern/preserves/art1518.html> (last visited Oct. 5, 2002).

14. CHAZEN COMPANIES, TOWN OF DOVER, HARLEM VALLEY WATERSHED INVESTIGATION, DUTCHESS COUNTY 6 (1999) [hereinafter "HARLEM VALLEY WATERSHED INVESTIGATION"].

15. Letter from Russell Urban, Project Hydrologist, Chazen Environmental Services, Inc., to Alan Fuchs, NYS DEC, Region 3 1-2 (Oct. 25, 1995) (on file with author).

16. MALCOLM PIRNIE, INC, TOWN OF DOVER, PROPOSED CONSTRUCTION AND DEMOLITION LANDFILL & MODIFICATION OF MINING PERMIT, DRAFT ENVIRONMENTAL IMPACT STATEMENT app. Q (1998) (on file with Town Board, Dover Plains, N.Y.) (Relevant Correspondence) [hereinafter "DEIS"].

17. DEIS, *supra* note 16, at app. Q (letter from Margaret Duke, Region 3 Permit Administrator, DEC, to Palumbo Sand and Gravel (Aug. 6, 1991)).

18. *Id.* (DEC letter regarding Lead Agency Coordination Request, SEQRC Coordination Data Sheet (July 29, 1993)).

*The Quagmire of Local Review*

In 1992, the Danny Fortune Company submitted an application to the Dover Planning Board for site plan approval<sup>19</sup> to construct a new 80,000 square-foot building at the sand and gravel mine to accommodate a new C&D operation.<sup>20</sup> On July 21, 1992, the Planning Board began its review of the proposal and raised some concerns about constructing a new building on the property, as the site was zoned for medium residential use and the mine was operating as a pre-existing non-conforming use.<sup>21</sup> Questions were raised about the extent of the landfill and economic benefits to the community. During the Planning Board's discussion, the applicant's attorney stressed, "at this stage of the game we have not addressed the fine points. We are looking for a very broad conceptual exceptance [sic] of the idea."<sup>22</sup> At the end of the discussion, a Planning Board Member stated that she "wanted the applicant to know that if the board seems favorable that doesn't mean down the road there could not be some problems such as legal."<sup>23</sup>

In September, 1993, the applicant petitioned the Dover Zoning Board of Appeals (ZBA) for an interpretation of the zoning ordinance asking whether "the modified reclamation plan is considered part and parcel of the existing operations, as currently allowed by DEC Permit and the Town of Dover Zoning Regulation."<sup>24</sup> The applicant also sought an interpretation of the zoning code regarding whether the construction of a building to accommodate the C&D operation was a legal accessory use to the mining operation. The applicant proposed that the building would be temporary and would be removed upon completion of reclamation. At a Zoning Board of Appeals ("ZBA") meeting on October 24,

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19. "A site plan shows the proposed development and use of a single parcel of land consisting of a map and all necessary supporting materials." MARY MOHNACH & KATHRYN RYAN, *WELL GROUNDED: DESKBOOK FOR LAWYERS AND PLANNERS* 185 (1998).

20. DEIS, *supra* note 16, at app. Q (Town of Dover, Application for Site Plan Approval (July 1, 1992)). The application for site plan approval was submitted prior to DFC contacting DEC for a modification of its mining permit to allow C&D reclamation.

21. *Id.* (minutes from the Dover Planning Board Meeting (July 21, 1992)). A non-conforming use is "any use lawfully existing prior to and at the time of the adoption or amendment of th[e] local law or any preceding zoning law or ordinance, which use is not permitted by or does not conform with the permitted use provisions of th[e] local law for the district in which it is located." TOWN OF DOVER, N.Y., ZONING LAW art. XII, § 12.2 (1999).

22. DEIS, *supra* note 16, at 5.

23. *Id.* at 6.

24. *Id.* at app. Q (application to Dover Zoning Board of Appeals (Sept. 14, 1993)).

1993, the Chairman advised the Board that they had received an application from Palumbo asking the Board for an interpretation "without denial from the Code Enforcement Officer."<sup>25</sup> She indicated that she had spoken to the "State Department and they stated the Zoning Board of Appeals can comment on this, but cannot make an actual decision because they do not have a legal application."<sup>26</sup> The Chairman asked each member of the ZBA to submit comments on their interpretation of the code with regard to the applicant's issues.<sup>27</sup> A few weeks later, the ZBA Chairman sent a letter to DEC Region 3, Division of Regulatory Affairs, providing a "compilation of individual opinions of the Zoning Board members."<sup>28</sup> It was the opinions of the members of the Board that the "proposed temporary building constitute[d] an accessory use allowable under the zoning law and require[d] no site plan approval."<sup>29</sup>

In response to the ZBA letter to DEC, the Town Supervisor sent a letter to the agency indicating that the Town Board was in "complete disagreement with the . . . Opinion Letter of the Town of Dover Zoning Board of Appeals."<sup>30</sup> The Town Board believed that the proposed reclamation constituted an improper extension of the non-conforming use, therefore requiring a rezoning of the property.

In 1998, the Town Supervisor and new ZBA Chair provided further clarification on the local review process.<sup>31</sup> In correspondence with DEC, the boards indicated that the 1993 opinion letter from the ZBA was based on the assumption that the project was a modification of a reclamation plan, which is subject to preemption

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25. It was determined later that the reference to "State Department" was meant to indicate the New York State Department of State. *Id.* (minutes of Town of Dover Zoning Board of Appeals Meeting (Oct. 25, 1993)). Generally, the Zoning Board of Appeals only has authority to hear appeals from a ruling of the Code Enforcement Officer.

26. *Id.* The proper procedure would have been to deny the request for an interpretation of the ordinance until an application had been submitted.

27. *Id.*

28. DEIS, *supra* note 16, at app. Q (letter from Jeane Lane, Chairman, Dover Zoning Board of Appeals, to Richard Speidel, NYS DEC (Nov. 8, 1993)).

29. *Id.*

30. *Id.* (letter from S. Bruce Grecke, to Richard Speidel, NYS DEC (May 6, 1994)).

31. Supervisor Jill Way was elected in 1996 after the letter from former Supervisor Grecke had been sent to DEC. Prior to becoming Supervisor, Ms. Way served as a councilwoman for two years, from 1993 to 1995. Ms. Kendall was appointed to the Zoning Board of Appeals in 1997, and became its chairperson on December 30, 1998, after the earlier letter from the ZBA had been sent to DEC.

provisions of the Mined Land Reclamation Law.<sup>32</sup> Subsequently, the DEC had ruled that the proposed project required more than a modification of the existing mining permit.<sup>33</sup> The essence of the project was to develop a new solid waste management facility, which requires a new permit under DEC regulations.<sup>34</sup> Since the project was no longer a modification of a mining permit and thereby preempted by state law, but rather a new application, the Dover Town Board and ZBA asserted that the applicant would require several local approvals including rezoning of the property, a special use permit, site plan approval, area variances and an erosion and sediment control permit.<sup>35</sup>

### *State Review of the C&D Application*

At the time of its application to modify its mining permit to allow for reclamation with C&D debris, DFC claimed that there was an inadequate supply of wood chip and silt mixture available in the region due to the downturn in residential construction and land clearing.<sup>36</sup> The applicant proposed that using C&D to fill the excavated areas would be more expeditious and beneficial to the region.<sup>37</sup> As stated above, DEC ruled that the applicant must first obtain a permit to operate a C&D landfill, in addition to modifying his permit for reclamation.<sup>38</sup> Upon the issuance of the 360 permit, the mining permit would be modified and the reclamation requirements waived in lieu of landfill closure.<sup>39</sup>

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32. N.Y. COMP. CODES R. & REGS. tit. 6, § 420 (1976).

33. Petitioners' Memorandum of Law at 3, *Danny Fortune Co. v. Town of Dover* (N.Y. Sup. Ct.) (No. 99/4052) (on file with author). "The DEC has finally acknowledged that in addition to an application for a solid waste management facility pursuant to Part 360, a modification of petitioners' mined land reclamation plan would be required." *Id.*

34. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-1.5 (1988).

35. DEIS, *supra* note 16, at app. Q (letter from Barbara Kendall, ZBA Chair, to Margaret Duke, Region 3 Permit Administrator, DEC (Mar. 17, 1998)); see also *id.* at app. Q (letter from Jill Way, Supervisor, DEC, to Margaret Duke, Region 3 Permit Administrator, DEC (Mar. 19, 1998)). Since the C&D reclamation plan was deemed a solid waste management project, the applicant would have to appear before the Town Board for the rezoning; the ZBA for the special use permit and area variances and the Planning Board for the site plan approval.

36. DEIS, *supra* note 16, at 2-1.

37. *Id.*

38. *Id.* N.Y. COMP. CODES R. & REGS. tit. 6, § 360 (1988) governs permits for C&D landfills.

39. DEIS, *supra* note 16, at 2-1.



In 1993, DEC declared itself lead agency under New York's State Environmental Quality Review Act (SEQRA).<sup>40</sup> In 1995, the agency forwarded to the applicant a "Final Scope of Issues," which identified all relevant information and issues that must be evaluated in the Draft Environmental Impact Statement (DEIS).<sup>41</sup> Among the issues identified for study was "the existence of and potential for a principal and/or sole source aquifer under the project site."<sup>42</sup> DEC asked the applicant to also discuss whether the aquifer meets New York State DEC criteria as a classified primary or principal aquifer.<sup>43</sup> New York regulations prohibit the development of a C&D landfill over a principal aquifer.<sup>44</sup> The applicant's hydrological report indicated that the site was not located over the aquifer and that the aquifer did not meet the criteria for principal aquifer status.<sup>45</sup>

In response to public demand, the Town commissioned its own engineering study that identified the existence of "a distinct valley bottom aquifer system composed of glacial sediments and a geographically distinct carbonate bedrock formation," which met all criteria for designation as a principal aquifer.<sup>46</sup> This issue was particularly important because the aquifer supplies water to over 20,000 people<sup>47</sup> and represents the only significant source of water for Eastern Dutchess County.<sup>48</sup> This report and other pertinent information that was gathered by the Town's consultants were forwarded to DEC for consideration and review.

On March 12, 1996, DEC issued a determination that in its opinion, the Palumbo site did not overlie a principal aquifer.<sup>49</sup> The reasons cited by the Agency were that the ground water re-

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40. N.Y. ENVTL. CONSERV. LAW § 8-0111 (Consol. 2002).

41. DEIS, *supra* note 16, at app. Q (letter from NYS DEC, to Anthony Palumbo (July 21, 1995)).

42. *Id.* (Letter from NYS DEC, to Anthony Palumbo (July 21, 1995)).

43. A primary aquifer is defined as a highly productive aquifer system used heavily for public water supply. Principal aquifers are of similar value, but not yet as heavily used as primary aquifers. DEC, FINAL UPSTATE NEW YORK GROUNDWATER MANAGEMENT PLAN IV-19 (1987).

44. N.Y. COMP. CODES R. & REGS. tit. 6, § 360-7.4(a)(5)(i)(a)(1) (2002).

45. DEIS, *supra* note 16, at 3-7.

46. Letter from Russell Urban, Project Hydrologist, Chazen Environmental Services, Inc., to Alan Fuchs, NYS DEC, Region 3 1-2 (Oct. 25, 1995).

47. HARLEM VALLEY WATERSHED INVESTIGATION, *supra* note 14, at tbl. 1.

48. Memorandum from the Town of Dover, to the State of New York Department of Environmental Conservation 29 (NYSDEC Project No. 3-1326-00031/00003) (on file with author).

49. DEIS, *supra* note 16, at app. D (letter from Alan Fuchs, DEC Solid Waste Engineer, to Anthony Palumbo (Mar. 12, 1996)).

sources are under a confined condition, not vulnerable to contamination from land surface activities and that the productivity yield from the wells fell below the agency's guidelines.<sup>50</sup> The Town, through their attorneys, continued to argue that the agency's guidelines allowed for designation of bedrock aquifers under certain conditions and that the DEC decision was in error.<sup>51</sup>

Over the next several years, the applicant prepared a Draft Environmental Impact Statement for the project. It contained a review of the natural, cultural and economic resources in Dover, an analysis of the project's environmental impacts on those resources and proposed mitigation measures.<sup>52</sup> In 1998, DEC conducted two SEQRA hearings on the applicant's DEIS. In 1999, DEC staff determined that a public hearing on the application was also necessary and forwarded the matter to the Office of Hearing in Albany for the scheduling of a Legislative Hearing and an Issues Conference.<sup>53</sup>

### *Town of Dover Develops a Smart Growth Strategy*

At the time of DFC's application to construct a C&D landfill, there were already five existing and six proposed Part 360 recycling or landfill facilities located in Dover. There were an additional eleven active mining permits for thirty-three mined locations and twelve inactive, abandoned or unregistered mine locations. Leaders in the Town believed that Dover had become the focus for mine operators because of the presence of copious sand and gravel deposits, the existence of a major transportation corridor and the recent enactment of watershed rules and regulations<sup>54</sup> that severely restrict or prohibit development, mining and

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50. *Id.*

51. The Town of Dover petitioned for party status in the adjudicatory hearing that was scheduled upon completion and acceptance of the applicant's environmental impact statement. At the Issues Conference, the Town argued that the issue of Principal Aquifer designation was subject to adjudication because it met the requirements of N.Y. COMP. CODES R. & REGS. tit. 6, § 624.4(6) as being both "substantive" and "significant." The issue was never decided as the permit application was withdrawn. Memorandum from the Town of Dover, to the State of New York Department of Environmental Conservation 2 (NYSDEC Project No. 3-1326-00031/00003) (on file with author).

52. DEIS looked at many issues including water (groundwater and surface water) and air quality (odors, fumes and dust), visual impacts, noise, community character and economic impacts. See generally DEIS, *supra* note 16.

53. Letter from Michael Merriman, Deputy Regional Permit Administrator, DEC, to DFC (Mar. 26, 1999) (on file with author).

54. For a discussion of the NYC watershed regulations see Jayne Daly, *The Protection of New York City's Drinking Water*, 1995 PACE L. REV. 63.

landfills in areas that supply water to New York City.<sup>55</sup> The issues raised through the scoping and DEIS process for the C&D permit made the Town realize that whether or not this permit was issued, the Town needed a more comprehensive approach to protecting its community character and natural resources, particularly its drinking water supply.

In 1991, the Town of Dover Planning Board had appointed a Master Plan Committee (MPC) comprised of Dover residents, including members of the Planning Board and Conservation Advisory Commission, to revise the Town's Comprehensive Plan, first developed in 1966. As the first step, the MPC conducted a survey to determine the residents' needs and aspirations for the future. The survey was intended to provide a foundation for the master planning process. Residents' responses to the survey indicated that Dover's environmental features and natural beauty were "very important." In addition, protecting stream corridors, preserving wildlife areas, maintaining the Town's rural character and preserving wetlands were "important issues" to be considered when making land use and development decisions.<sup>56</sup> Residents were clear in their views on mining, quarrying and industrial development. Respondents expressed an interest in limiting mining, quarrying and heavy industries to the greatest extent possible and subjecting existing activities to strict regulation.<sup>57</sup>

After the survey was complete, preliminary goals and objectives were outlined and an early public workshop was held to solicit ideas and opinions from residents.<sup>58</sup> The Town also conducted an extensive inventory and analysis of its natural resources and concluded that "accommodating anticipated growth while preserving a healthy environment clearly demands thoughtful and innovative planning strategies that produce development that is compatible with the land. Local land use regulations should employ such techniques as clustering, performance standards, storm water infiltration policies, aquifer protection zones, conservation easements, erosion control plans and development density limits based on groundwater features to foster well-de-

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55. Letter from Jill Way, Supervisor, Town of Dover, to Gary Spielmann, Executive Deputy Commissioner, DEC (Feb. 6, 1996) (on file with author).

56. TOWN OF DOVER, MASTER PLAN, *supra* note 11, at 6.

57. *Id.* at 7, 10.

58. *Id.* at 2.

signed development in [resource] sensitive areas.”<sup>59</sup> The Dover Planning Board adopted its revised Master Plan in 1993.<sup>60</sup>

Financial constraints put the preparation of a new zoning code to implement the recommendations of the Master Plan on hold for several years. However, in May 1998, the Town Board commissioned the preparation of a new code and also proposed amendments to the 1993 Master Plan on issues of mobile home parks, soil mining, rock quarrying, reclamation of mines with solid waste and solid waste management facilities.<sup>61</sup> The proposed modifications were deemed a Type 1 action under SEQRA and the Town Board decided to conduct public scoping to identify issues of public concern relating to the potentially harmful impacts of the action.<sup>62</sup> The final scoping document was accepted on July 24, 1998 by the Town Board. Several public workshops were conducted and three hearings were held to consider the Draft Generic Environmental Impact Statement on November 18, December 3 and December 21, 1998.<sup>63</sup>

The proposed zoning amendments impacted several sections of the code and included provisions for clustering development to preserve open space and establishing resource conservation zones to discourage intensive development in significant natural areas.<sup>64</sup> The new code also established four overlay districts: 1) a Floodplain Overlay District that applies to the 100-year floodplain of certain streams and rivers as defined by the Federal Emergency Management Agency; 2) a Stream Corridor Overlay District that includes all land lying within 150 feet of the mean high-water line of the Ten Mile River, the Swamp River and other streams; 3) an Aquifer Overlay District that includes the valley bottom aquifer system and the upland aquifer system where runoff flows towards the valley bottom system; and 4) a Mixed Use Institutional Con-

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59. *Id.* at 36.

60. *Id.* at Res. no. 1.

61. TOWN OF DOVER, PROPOSED ZONING LAW AND AMENDMENTS TO THE MASTER PLAN app. A (1998) (on file with Town Clerk, Dover Plains, N.Y.) (Town of Dover Final Scoping Document 1).

62. *Id.*; see also N.Y. COMP. CODES R. & REGS. tit. 6, § 617.8 (2002) (outlining the process for public scoping).

63. See Official Transcripts of the Minutes for the Public Hearing before the Town Board (Nov. 18, 1999); Transcripts of the Minutes for the Special Meeting & Public Hearing before the Town Board (Dec. 3, 1998); Official Partial Minutes of the Special Meeting of the Dover Town Board (Dec. 21, 1998).

64. See generally TOWN OF DOVER, PROPOSED ZONING LAW AND MASTER PLAN AMENDMENT, DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT (1998) (on file with Town Clerk, Dover Plains, N.Y.) [hereinafter “TOWN OF DOVER DGEIS”].

version Overlay District that applies to the grounds of the former Harlem Valley Psychiatric Center.<sup>65</sup>

The proposed zoning law specifically prohibited certain uses under all circumstances, including

heavy industry, soil mining that requires a permit from DEC, underground mining, asphalt plants, blasting and rock crushing facilities, new mobile home courts, facilities for the disposal of hazardous and radioactive material, all classes of ECL Part 360 solid waste management facilities not owned or operated by the Town, and the use of solid waste or material that has previously been part of the solid waste stream . . . as fill or reclamation material for surface or underground mining.<sup>66</sup>

The Town Board adopted the proposed zoning code and master plan amendments on April 28, 1999.<sup>67</sup> The result of this action was to effectively prohibit DFC from obtaining a rezoning of the property to construct the C&D landfill, regardless of whether it obtained a DEC part 360 permit. On August 25, 2000, DFC withdrew its application for a 360 permit and one month later filed an Article 78 proceeding alleging that the Town of Dover had acted improperly in enacting its Zoning Law.<sup>68</sup>

On July 11, 2000, eight years and ten days after DFC initially approached the Dover Planning Board for its "conceptual approval," the court upheld Dover's Zoning Law.<sup>69</sup> In dismissing DFC's petition, the court found that although the Town had made minor errors in its SEQRA notifications, it did not consider these omissions to be fatal, requiring nullification of the entire environmental review process.<sup>70</sup> The court also found that the Town had taken a "hard look" and made a reasoned determination in compliance with SEQRA.<sup>71</sup> Finally, the court held that petitioners were not entitled to invoke the doctrine of equitable estoppel based on their reliance on the 1993 Planning and Zoning Board's responses to their inquiries. The court found that the petitioner chose to ignore subsequent letters sent to them in 1994 and 1998 and that

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65. *Id.* at 23-25.

66. *Id.* at 25.

67. TOWN OF DOVER ZONING LAW (Apr. 29, 1999) (on file with Town Clerk, Dover Plains, N.Y.).

68. *See* DFC v. Town of Dover, No. 99/4052 (N.Y. Sup. Ct. 2000).

69. *See* DFC v. Town of Dover, No. 99/4052, *Decision and Judgment* (N.Y. Sup. Ct. 2000).

70. *Id.*

71. *Id.* (citing *Jackson v. NYS Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986)).

petitioner's purported reliance on the earlier letters was misplaced.<sup>72</sup>

### **Lessons Learned**

A review of Dover's struggle to protect its community character and environmental integrity suggests several powerful lessons for elected officials, policy makers and citizens considering the issues of resource protection, sprawl and smart growth.

First, given the complexity of legal and natural systems, there is a tremendous need for strong, dedicated and educated local leaders. However, in many communities today, there is a serious lack of volunteers to serve in elected or appointed positions. The reason most often cited for the lack of civic engagement is "no time". In many families, both spouses work, often commuting long distances and/or working long hours.

In most rural communities, the position of Supervisor or Mayor is a part-time job and provides only supplemental income to these elected officials. The demands of the position, however, are full time. Most board members serve as uncompensated volunteers. Small communities in New York often do not have professional staff to assist them. The lucky ones have enough money to keep planners, engineers and lawyers on retainer and engage them in controversies at key points.

Additionally, New York State does not require that elected or appointed officials receive training prior to or during their tenure in office. Some counties and municipalities have enacted local regulations that mandate personnel and appointed board members attend at least a basic course during their first term in office.<sup>73</sup> However, even basic training is often insufficient, for example, to adequately prepare a board member to conduct a review of a complex environmental impact statement or hydrological report.

In the end, the "next generation" and smart growth legislation must address the need to develop knowledgeable local leaders if the proposed legislation and model ordinances are to have the intended impact. There must be financial support and strong encouragement for regular training of town, planning and zoning

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72. *Id.* at 16.

73. See, e.g., TOWN OF DOVER, EMPLOYEE HANDBOOK OF PERSONNEL POLICIES AND PROCEDURES 12 (2000) (on file with author). Dover employees and board appointments are required to attend one 12 to 15 hour course on planning and zoning.

board members. The health, safety and welfare of the residents depend on their competency.<sup>74</sup>

The second lesson that can be drawn from the Dover case study is the enormous fiscal impact of fighting local development proposals. The DFC application cost the community approximately three-quarters of one million dollars to challenge. With only 8,400 residents and a budget of \$2 million annually, this constitutes a tremendous drain on the Town of Dover's fiscal resources.<sup>75</sup> Given that there were six other mining applications pending before DEC at the time of the Palumbo application, if the Town of Dover needed to contest or simply provide educated responses to those applications, it could go bankrupt.

Another lesson from Dover is that natural resources must be protected at the regional/eco-system level. The Town of Dover may have won the battle, but the verdict is still out on the war. In order to adequately protect the Harlem Valley aquifer, the other municipalities in the region must adopt regulations that are similarly restrictive. For example, if Amenia, the municipality directly to the north of Dover, allows C&D reclamation of existing mines over the aquifer, it will not matter how successful Dover was in protecting its resource. The contamination will flow through the aquifer, regardless of political boundaries.

The Town of Dover recognized that without the State's designation of its water supply as a primary or principal aquifer, it needed to work with its neighboring municipalities to create a regional protection strategy. In 1998, with funding from the Hudson River Valley Greenway Communities Council and the Dutchess County Water and Wastewater Authority, the Towns of Amenia, Dover, North East, Pawling and the Villages of Millerton and Pawling developed a Harlem Valley Water Resource Protection Plan and model ordinance. The Plan advocates a variety of techniques for assuring long-term water quality, ranging from public education on the use of non-toxic chemicals and proper maintenance of septic systems, to prohibiting certain land uses and practices over priority aquifers, including solid waste man-

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74. The Supervisor of Dover credits her ability to understand the issues related to enacting a new zoning ordinance and amending the comprehensive plan to training she had received through the Community Leadership Alliance, a leadership development program conducted by the Pace Land Use Law Center and Glynwood Center. The program offers participants 24 hours of instruction over four days on innovative land use techniques and consensus building.

75. See TOWN OF DOVER, 2002 BUDGET (adopted by the Town Board, Nov. 7, 2001).

agement facilities, disposal of hazardous waste by burial, land application of septage and sludge and storing heating fuel tanks underground.<sup>76</sup> Many people in the region anticipated that the intermunicipal protection strategy would be in place by the end of 2000,<sup>77</sup> but to date, not all municipalities in the Harlem Valley have adopted the necessary regulations.

There has been significant debate on the ability of local governments to effectively cooperate at the regional level to achieve resource protection. Some commentators argue that local governments are too parochial in their interests to work regionally and advocate mandated regional planning as the path to smart growth.<sup>78</sup> Others see this approach as simply "alter[ing] boundaries to internalize the external effects of local action[s.]"<sup>79</sup> To be effective, these newly established regions would then need to be completely independent of all other regions or they simply become larger advocates for bigger parochial interests. Other proponents of regionalism assert that a third party, a "neutral" entity, be engaged to review and approve or reject local decisions.<sup>80</sup>

New York's approach to regionalism is a bottom up coalition building paradigm that encourages municipalities to work together on a variety of issues. Since as early as 1974, municipalities in New York have taken advantage of the authority granted them under the General Municipal Law to work together cooperatively on issues of common concern. Communities are authorized to come together through intermunicipal agreements that act as contracts, defining the objectives of the participants and the roles and responsibilities of the parties.<sup>81</sup>

Recently, the state has become involved in the regional planning debate and legislation has been proposed to create "compacts".<sup>82</sup> Compacts would apply to "geographic regions or areas

76. HARLEM VALLEY WATERSHED INVESTIGATION, *supra* note 14, at 39–48.

77. See generally *Aquifer Plan Good for Area*, POUGHKEEPSIE J., Aug. 4, 2000.

78. See Frank Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 540 (2000).

79. Clayton Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 197 (2001).

80. *Id.* at 198.

81. See, e.g., Mary E. Mohnach, *Intermunicipal Agreements: The Metamorphosis of Home Rule*, 17 PACE ENVTL. L. REV. 161 (1999). This comment provides a detailed description of the legal authority that municipalities have been given to enter into intermunicipal agreements and examples of 17 intermunicipal agreements.

82. Patricia Salkin & Paul Bray, *Compact Planning Offers a Fresh Approach for Regional Planning and Smart Growth: A New York Model*, 30 REAL EST. L. J. 121, 124 (2001).



based on environmental, economic and social factors.”<sup>83</sup> Once a compact area has been established, a Compact Board would be designated and charged with the responsibility of developing a compact plan.<sup>84</sup> This compact planning process is similar to that used by the Hudson River Valley Greenway Communities Council, which is charged with developing a regional plan for the ten counties that line the Hudson River from New York City to Albany.

The discussion of regional planning and the need to work cooperatively toward resource protection leads to the fourth and final lesson from the Town of Dover case study. Local leaders must learn how to effectively engage others in the local decision-making process and build consensus. This must be done at both the local and regional level if the municipalities are to be truly successful in developing protection measures that are enforceable and have strong public support. This civic dialogue must encourage citizens to become educated about the issues in their community, foster a cooperative sense of democracy, a belief that all opinions will not only be heard, but listened to, and provide residents with a true stake in their community.

There are many benefits to public education and consensus building. If the Town of Dover had not educated its citizens about the hydrogeology of the region, the value of the Harlem Valley aquifer and the potential effects of contamination to the water supply, it would not have had the public’s support to challenge the C&D application and allocate the substantial municipal revenue required. Additionally, the Town’s ongoing efforts to educate residents—since 1991 with the development of the new Master Plan—allowed the Town to propose, consider and adopt new zoning regulations within one year.<sup>85</sup>

According to a recent poll of 330 top federal government officials conducted by the Pew Partnership for Civic Change, “the idea that citizens can make an important contribution to the public work of our nation’s neighborhoods and communities is not a widely accepted notion.”<sup>86</sup> This sentiment was shared by local officials “who publicly endorse citizen participation but privately

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83. *Id.* at 127 (quoting A. 130, 1999-2000 Reg. Sess. (N.Y. 2000)).

84. *Id.* at 128-30.

85. The zoning amendments were proposed on May 28, 1998 and adopted by the Town Board on April 28, 1999 although substantial research was conducted during the year prior to the proposal of the zoning amendments.

86. Juan Sepulveda, *The Case for New Relationships: Process Means Progress*, at <http://www.pew-partnership.org/pubs/civicpartners/page2.html> (last visited Dec. 3, 2002).

question the effectiveness of having the public involved in major decision-making.”<sup>87</sup> A majority of elected officials believe that citizens do not have enough of the facts to make an informed decision, or worse, that they are operating solely on self-interest.<sup>88</sup>

Contrast this with the findings of a survey that polled average citizens about their desire to participate in local governance. It found that Americans are profoundly connected to their community, but often feel disconnected from meaningful involvement. “Overall, 77 percent of the adult population . . . feel . . . connected to the communities in which they live.”<sup>89</sup> The survey also showed that Americans have a strong desire to get involved in their communities - to address current issues or prevent problems from arising in the future.<sup>90</sup>

A survey conducted for the Smart Growth America project confirmed the disconnect between citizens and their elected officials. It sought to discern the public’s perceptions regarding the capacity of different groups to make the best local land-use decisions. “[Sixty-seven percent] registered confidence in neighborhood associations and civic groups,” fewer registered such confidence in their city and county government.<sup>91</sup>

The perceptions may stem, in part, from the “public hearing” process that is required by law. At a public hearing, residents are invited to comment on pending decisions, however, their “input” is often too late to be meaningfully incorporated. Additionally, the public’s reaction to the proposal is often presented in an exaggerated fashion because of fear that local officials will not take their concerns seriously.

Collaborative processes offer an alternative to the public hearing process. These processes may take the form of mediation or facilitation, but are structured to engage potentially interested stakeholders in a deliberative process of issue identification and problem solving. Parties agree to learn about the issues and work

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87. *Id.*

88. *Id.*

89. Pew Partnership, *Ready Willing and Able—Americans Tackle Their Communities*, at [http://www.pew-partnership.org/pubs/rwa/full\\_report/detailed\\_findings.html](http://www.pew-partnership.org/pubs/rwa/full_report/detailed_findings.html) (last visited Dec. 3, 2002).

90. *Id.*

91. Jonathan Davidson & Susan Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW 705 (2001) (citing NATIONAL SURVEY ON GROWTH AND LAND DEVELOPMENT IN SMART GROWTH AMERICA, GREETINGS FROM SMART GROWTH AMERICA (2001)).

together to create mutually acceptable solutions.<sup>92</sup> While some find this approach "too soft," there are many examples of leaders who have effectively engaged their constituencies to create a vision for the community, resolve disputes over proposed development and even make recommendations on municipal budget issues.<sup>93</sup>

Under New York law, there are numerous opportunities to engage citizens in a collaborative decision-making process for broad-based policy regulations, as well as in resolving specific development proposals. For example, when the municipality is preparing or updating its comprehensive plan, the public can be involved in creating a vision for the community, incorporating that vision into the comprehensive plan and revising the zoning ordinances to achieve the desired vision. The actions of the Dover Town Board and Planning Board are prime examples of how to productively engage the community in the land use planning process.

Alternatively, before a development proposal is submitted, a small group of residents can be convened to discuss the proposal and make preliminary recommendations. This approach can be applied to site plan review, to variances, to special permits or during the SEQRA process.<sup>94</sup> Collaborative decision-making techniques can also be used when entering into intermunicipal agreements for regional resource protection or economic development. Citizens can be involved in creating a regional vision and strategy on particular issues and may be interested in serving as members of a regional advisory board.

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92. See JAYNE DALY, *CREATING COLLABORATIVE COMMUNITIES: A HANDBOOK FOR COMMUNITY LEADERS* (Glynwood Center, Inc. ed., 2001).

93. See LAWRENCE SUSSKIND, *USING ASSISTED NEGOTIATION TO SETTLE LAND USE DISPUTES* (Lincoln Institute of Land Policy ed., 1999) (including examples of effective dispute resolutions regarding a variety of land development issues).

94. See John Nolon, *Facilitation Adds Flexibility to Land Use Decision Making*, 220 N.Y. L.J. 5 (1998). In 1997, the New York State Court of Appeals upheld the actions of the Philipstown Planning Board that had conducted a series of open public meetings in conjunction with an application for a special permit to conduct mining operations. *Merson v. McNally*, 90 N.Y.2d 742, 747 (1997). As a direct result of the input received at the meetings, the applicant revised the project to avoid any significant environmental impact. *Id.* at 748. The Planning Board then issued a negative declaration under SEQRA, requiring no further environmental review or mitigation. *Id.* A group of community activists claimed the Board's actions violated SEQRA's requirements. *Id.* at 749. The Court of Appeals disagreed and found that the Planning Board had engaged in an "open process that also involved other interested agencies and the public" and upheld the early involvement of the public in the SEQRA process. *Id.* at 753.

Carol Rose, in her article *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, argues, “we need a new jurisprudence of local land decisions, not because of the external consequences of those decisions—serious though they may be—but because local governments cannot be trusted to deal fairly or carefully even in land decisions with only local consequences.”<sup>95</sup> She proposes that mediation offers a way to overcome the limitations of the local administrative decision-making process that compares applications to the master plan and approves or denies those applications accordingly. Referred to as “plan jurisprudence,” Rose asserts that this quasi-judicial process fails to account for the changing norms in communities. The mediative model provides an alternative that considers planning as a source of community norms, inventoried valued resources, perceived challenges and directions for future growth. As the plan implicitly acknowledges that all values may not be attained at the same time, the mediative model creates a decision-making framework within which to balance the communities’ wishes against a particular development proposal.<sup>96</sup>

Rose envisions that through mediation, communities are educated about local conditions and able to make more cogent decisions regarding land use development. This approach goes beyond advocating the use of mediation simply to resolve specific disputes, but rather sees the methodology as a way to “transform” the group and make significant changes at the institutional level. Though mediation always takes place within the confines of a given context, through transformative mediation, the group eventually learns to resolve some disputes on their own, through communication and education, reducing the overall need for the process.<sup>97</sup>

While mediation holds great promise to develop public policy and resolve disputes, it may not be the appropriate answer for all

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95. Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 841 (1983).

96. *Id.* at 890–91.

97. See THE REALITIES OF MAKING TALK WORK (Deborah Kolb et al. eds., 1994). Transformative mediation is most effective when there are ongoing or potential disputes between the same or similar parties. Therefore, it is ideally suited to be used in the land use context. See also Judith Innes & David Booher, *Consensus Building and Complex Adaptive Systems*, APA J. 412–23 (1999) (proposing that consensus building is not only about producing agreements, but also about learning, change, and building shared meaning).

situations. In *Collaboration, A Guide for Environmental Advocates*, the author notes that

many environmental advocates argue that collaborative processes have weakened advocacy, coalition building and the protections of due process. There is concern that ad hoc private groups accountable only to themselves are replacing public processes; that collaborative processes involving public lands favor local interests and do not sufficiently represent national constituencies; that public officials are avoiding controversial decisions that should be made on the basis of science or law; and that the environment is suffering as a consequence.<sup>98</sup>

It is wrong to perceive that mediation should replace public process and that collaborative processes take place outside the context of the law. Particularly in the land use arena, where mediation is used, the municipal review board is charged with the final review and acceptance or rejection of the agreement. What is proposed to the review board is not a binding decision, made by the parties, but rather a recommendation on a proposal that meets the needs of the participants.

There may also be issues or projects that are not suitable for mediation, because there is nothing to negotiate. For example, in the DFC application for a C&D permit, a consensus building process regarding local zoning would have proved futile because the Town's needs, e.g. protecting the water supply, could not have been met through alternative project designs, etc. In this case, the most appropriate course of action for the Town was to participate in the application review process. It is very important to remember that consensus-building processes, whether they are mediative in nature or facilitative, require all participants to understand and actively protect their interests. Solutions are derived based on these principles and not, as is commonly thought, by abject compromise. It is as important to know when to walk away from the table, as it is to reach agreement.

What collaborative processes offer is an alternative, not a "one size fits all" answer. By engaging citizens and educating them about the community, its environment, economic and social conditions, the political process can be made more effective, less adversarial and more productive.

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98. E. DUKES, UNIVERSITY OF VIRGINIA'S INSTITUTE FOR ENVIRONMENTAL NEGOTIATION, THE WILDERNESS SOCIETY, AND THE NATIONAL AUDUBON SOCIETY, *COLLABORATION: A GUIDE FOR ENVIRONMENTAL ADVOCATES* vi (2001).

### **Conclusion**

There is hope for protecting our natural and cultural resources, but the “next generation advocates” and smart growth proponents must come to recognize and appreciate the real challenges faced by local leaders every day. They are on the front line. Some have the tools to fight the battle and some do not. What local leaders need in addition to model regulations or new legislation is financial support, training and a process that will encourage their communities to work more effectively together.