

April 1998

The Role of County Government in the New York State Land Use System

Jeff LeJava

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Recommended Citation

Jeff LeJava, *The Role of County Government in the New York State Land Use System*, 18 Pace L. Rev. 311 (1998)

DOI: <https://doi.org/10.58948/2331-3528.1314>

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Comment

The Role of County Government in The New York State Land Use System

Table of Contents

I.	Introduction	313
II.	The Substance and Structure of County Government	316
	A. The Changing Role of the County	316
	B. Noncharter Counties.....	320
	C. Charter Counties	322
	D. Administrative Structure	324
III.	County Land Use Functions	324
	A. County Authority Under the County Law and General Municipal Law.....	325
	1. Counties and Their County Planning Boards	325
	a. Membership and Financing	326
	b. Research and Planning Authority	327
	c. Review of Municipal Zoning and Planning Actions.....	331
	d. Recent Amendments to General Municipal Law Article 12-B	338
	1. Simplification and Clarification of Existing Law	338
	2. The Effect of the Recent Amendments on Provisions Relating to County Planning Boards.....	339
	3. County Comprehensive Plans	341
	4. Regional Planning Councils	343
	e. Adoption of a County Official Map	344

B. County Water, Sewer and Drainage Districts ..	349
C. County Land Use Authority Under Other State Law	352
1. Soil and Water Conservation Districts	352
2. County Health Department Approval of Realty Subdivisions	354
3. County Role in Affordable Housing.....	355
IV. The Authority of Counties to Exceed the County Law and General Laws to Undertake Land Use Functions.....	359
A. Home Rule in the County Context	359
B. Augmenting or Decreasing a County Planning Board's Review Authority.....	361
C. Adopting Other County Programs – The Suffolk County Farmland Preservation Program	362
V. County-Municipal Cooperation to Undertake Land Use Functions	363
A. Intermunicipal Cooperation Generally	364
B. Examples of County-Municipal Intermunicipal Agreements	367
1. Walnut Creek Water Resource Development Agreement	367
2. Horizons Waterfront Commission Intermunicipal Cooperation Agreement	368
3. Tompkins County – Town of Covert, Seneca County Intermunicipal Agreement .	371
VI. Expanding the County Role	371
VII. Conclusion.....	374

ANALYSIS OF THE CONFLICT BETWEEN THE TWO MUNICIPALITIES SUGGESTS THE NEED FOR THE DEVELOPMENT OF EFFECTIVE PLANNING AGENCIES AT THE REGIONAL . . . LEVEL. ONLY AT THE REGIONAL LEVEL CAN THE PITFALL OF IDIOSYNCRATIC MUNICIPAL ACTION BE AVOIDED¹

I. Introduction

In New York State, land use decision-making is a function of local governments.² The State's sixty-one cities, nine hundred thirty-two towns, and five hundred thirty-seven villages have specific authority from the State Legislature to engage in local land use planning.³ The state land use system, however, fails to account for the intermunicipal impacts on surrounding communities often produced by local land use decisions. This failure is illustrated by the conflict that arose between the Town of Bedford and the Village of Mount Kisco.

In *Town of Bedford v. Village of Mount Kisco*,⁴ the Town of Bedford challenged the Village of Mount Kisco's rezoning of a 7.68-acre parcel from single family residential to multiple family, six story residential. The parcel is located in the northwest corner of the village and is isolated from the rest of the village by the Saw Mill River Parkway — "an island within the Town of Bedford."⁵ The parcel was rural in character and blended in topographically with the adjoining single family homes in Bedford.⁶ By building a six-story apartment building, the village would change the character of the surrounding community.⁷ Additionally, the only road access to the parcel was over a Bed-

1. *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 192, 306 N.E.2d 155, 162, 351 N.Y.S.2d 129, 139 (1973) (Breitel, J. dissenting) (citations omitted).

2. See Robert M. Anderson, *ZONING LAW AND PRACTICE IN NEW YORK STATE* 11-12 (1963).

3. See Patricia Salkin, *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination*, 13 *PACE L. REV.* 505, 506 and n.6 (1993); N.Y. GEN. CITY LAW § 20(24) (McKinney 1989); N.Y. TOWN LAW § 261 (McKinney 1987); N.Y. VILLAGE LAW § 7-700 (McKinney 1996).

4. 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973).

5. *Id.* at 183, 306 N.E.2d at 157, 351 N.Y.S. 2d at 132.

6. See *id.*

7. See *id.* at 191, 306 N.E.2d at 161, 351 N.Y.S. 2d at 139.

ford road.⁸ Thus, the increased vehicular traffic would be borne not by the village, but the town. Bedford voiced its opposition to the planned rezoning at a Village of Mount Kisco Planning Board hearing, but its concerns went unaddressed and the village adopted a resolution rezoning the property.⁹ Bedford then sought judicial review of the determination pursuant to an Article 78 proceeding.¹⁰ After working its way through the state court system, the New York Court of Appeals resolved the matter in favor of Mount Kisco, demonstrating the difficulty that adjoining municipalities have in challenging neighboring municipal land use decisions. Overturning the Appellate Division, the Court of Appeals held that even though the impact of the rezoning would be borne primarily by Bedford, Mount Kisco demonstrated sufficient basis for its decision and its determination was not arbitrary or capricious.¹¹ Citing Justice Hopkins' dissenting opinion in the Appellate Division, the court wrote, "Bedford understandably differed from the conclusion reached, but that difference must be regarded as the necessary result of conflicting zoning policies that are confronted at the edge of every municipality."¹² Thus, although an adjacent municipality may have the opportunity to voice its concerns at local hearings regarding development projects in surrounding communities,¹³ there is no law commanding the municipality conducting the

8. *See id.* at 183, 306 N.E.2d at 157, 351 N.Y.S. 2d at 132.

9. *See* 33 N.Y.2d at 186, 306 N.E.2d at 159, 351 N.Y.S. 2d at 134-35.

10. Article 78 of the New York Civil Practice Law and Rules allows aggrieved parties to bring an action, called an Article 78 proceeding, to obtain writs of certiorari and mandamus against the final determinations of public officers and bodies. *See* John Nolon, LAND USE LAW — SUPPLEMENT II: EXPLANATORY TEXT 75 (1996).

11. *See* *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d at 186, 306 N.E.2d at 159, 351 N.Y.S.2d at 134-35.

12. *Id.* at 189, 306 N.E.2d at 160, 351 N.Y.S.2d at 137.

13. *See* COUNTY OF WESTCHESTER, N.Y., ADMIN. CODE § 277.71 (1990). Section 277.71 provides that each city, town, or village in the county must provide ten days written notice of any hearing to an adjoining municipality that lies within five hundred feet of certain proposed municipal land use actions to be taken by the first municipality. At the hearing, the affected municipality may voice its concerns and also file a memorandum of its position. If the adjoining municipality disapproves of the proposed land use action, or recommends modifications to the proposal, the municipal agency having jurisdiction over the matter cannot act contrary to such a disapproval or recommendation, except upon the adoption of a resolution by the municipal agency. Once adopted, the proposed action is subject to judicial review pursuant to an article 78 proceeding if such an action is commenced within thirty days of the resolution's adoption.

hearing to address the concerns raised by its neighbor. Without another mechanism by which the potentially impacted adjacent municipality can lodge its complaints, its concerns may never be accounted for, and the impact may be inevitable.

A consequence of failing to account for intermunicipal impacts of land use decisions is the difficulty in devising solutions to interjurisdictional problems. Because land use decision-making is essentially undertaken at the local level, intercommunity issues such as natural resource protection, affordable housing, and sustainable economic development¹⁴ may not receive the attention they deserve. Officials responsible for planning decisions tend to focus solely on their own jurisdiction given that their authority extends only to the municipal boundaries of their respective communities. In doing so, however, problems requiring regional solutions are often exacerbated. For example, assume that a 12 acre wetland lies within four contiguous municipalities. Assume further that each municipality is responsible for the protection and preservation of three acres of the wetland to ensure an adequate supply of clean drinking water. Municipality A, which oversees the northwest corner of the wetland, decides to approve the construction of a 2 acre private parking lot 200 feet from the edge of the wetland, a permissible project under state and federal law. If constructed, this parking lot, as an impervious surface, will impede the filtration of storm water into the wetland. The area in which the parking lot is to be built is part of the wetland's watershed,¹⁵ an area that serves as catch basin for the region's drinking water. Thus, municipality A's action will impact downstream communities that rely on the area in and near the wetland to collect and filter rain water before it enters the water table.

One governmental entity that may be able to account for intercommunity impacts of proposed projects and consider intercommunity issues is the county government. Since the structure of a county government is regional, incorporating representatives from many municipalities or county voting districts, its perspective is naturally interjurisdictional.

14. See Salkin, *supra* note 3, at 506, n.7.

15. A watershed or drainage basin is the geographical region drained by a river or stream and its tributaries. See Michael D. Morgan et al., ENVIRONMENTAL SCIENCE 271 (1993).

The purpose of this comment is to explore county involvement in the state land use system and to discuss the need for expanding the county's role. Part II discusses the general functions and structure of county government, keeping in mind the similarities and differences between charter¹⁶ and noncharter¹⁷ counties. Part III focuses on those land use functions specifically delegated to counties under state law including the role of the county planning board,¹⁸ the powers of a county in establishing water districts,¹⁹ the functions of a county under the Soil and Water Conservation Law,²⁰ the authority of a county health department related to subdivision approval,²¹ and the duty of a county to engage in affordable housing programs.²² Part IV discusses the ability of counties to go beyond their delegated land use functions pursuant to their home rule authority. In part V, the use of intermunicipal cooperation is explored explaining how counties may formally participate in local land use decision-making at the request of local governments. And finally, in part VI, the comment concludes with an analysis of why county governments should undertake a slightly expanded role in the state land use system and how such an expansion would be achieved.

II. The Substance and Structure of County Government

A. *The Changing Role of the County*

Although they provide similar services to their residents, the 57 counties outside of New York City differ in a variety of ways.²³ Geographically counties range in size from over 2,700 square miles in St. Lawrence County to only 175 square miles

16. *See infra* pp. 311-314.

17. *See infra* pp. 309-311.

18. *See infra* pp. 314-322.

19. *See infra* pp. 332-335.

20. *See infra* pp. 335-339.

21. *See infra* pp. 339-340.

22. *See infra* pp. 340-345.

23. *See* NATURAL RESOURCES DEFENSE COUNCIL, LAND USE CONTROLS IN NEW YORK STATE 62 (Elaine Moss ed., 1975) [hereinafter LAND USE CONTROLS]. Although considered counties for certain purposes, the five boroughs of New York City are neither organized nor operate as county governments. *See* NEW YORK STATE DEPARTMENT OF STATE, LOCAL GOVERNMENT HANDBOOK 59 (4th ed. 1987) [hereinafter HANDBOOK]. As such, when the word "counties" is used, it refers to the 57 counties outside of New York City.

in Rockland County.²⁴ Likewise, populations vary from Nassau County's 1,321,582 to Hamilton County's 5,034.²⁵ In addition to varying in population and geographic size, counties also differ in political orientation, financial resources, sophistication and efficiency of government operations, and strength of leadership.²⁶

Historically, counties in New York State were established to carry out specified functions at the local level at the behest of the State Legislature.²⁷ Over the last half century, however, counties have taken on a greater role as "local governments" with their own geographical jurisdiction, powers, and fiscal capacity.²⁸ Counties that once functioned merely as an arm of the State are now actively involved in the protection of the environment and development of affordable housing. These changes have occurred primarily due to rapid urbanization, the ability of county residents to adopt a county charter, and the alteration of county representation in county legislatures.²⁹

By 1986, ninety percent of New York's citizens resided in counties considered urban in character under criteria of the U.S. Office of Management and Budget and the U.S. Census Bureau.³⁰ As populations burgeoned in the metropolitan centers and flowed toward less developed surrounding towns, villages and counties, those counties lying in the periphery had to assume new functions to meet the demands of their new constituents.³¹ Meeting these demands, along with those of its traditional role as an administrative arm of the State Legislature, required county governments to change their forms and

24. See HANDBOOK, *supra* note 23, at 59.

25. See *id.*

26. See LAND USE CONTROLS, *supra* note 23.

27. See HANDBOOK, *supra* note 23, at 59. Counties were created in the early colonial period to improve protection against enemies and the administration of law and order. See *id.* at 60. Counties also took on the duties of keeping records on behalf of the state, enforcing state laws and conducting elections for the state. See *id.* at 76.

28. See *id.* at 76.

29. See *id.* at 62.

30. See HANDBOOK, *supra* note 23, at 63. In addition to the counties of New York City, counties considered urban in character include Erie, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester. See *id.*

31. See *id.*

procedures.³² Issues of natural resource conservation, affordable housing, and regional transportation presented problems not previously encountered at the county level.

The county charter movement has also played a significant role in altering the duties and functions that counties perform.³³ In 1963, the State Legislature adopted current article IX of the State Constitution requiring the Legislature to authorize counties to adopt, amend, or repeal alternative forms of county government.³⁴ The provisions of article IX pertaining to county governments have been implemented through the enactment of the "County Charter Law," section 33 of the Municipal Home Rule Law.³⁵ Under the provisions of section 33 a county charter, if adopted, allows a county to replace the governmental structures provided for in the County Law to meet the demands and challenges raised by a county's particular circumstances.³⁶ Because of the greater flexibility provided for by the "County Charter Law,"³⁷ counties may undertake duties and functions not previously exercised by them.³⁸ Currently, nineteen counties operate under the county charter form of county government.³⁹

Finally, judicial mandates that county legislatures provide for one person-one vote representation have altered the form of

32. *See id.*

33. *See id.* at 64.

34. *See* James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713, 725-26 (1985), for a discussion of the State Legislature's efforts to provide counties with greater flexibility to adopt different governmental structures prior to 1963.

35. N.Y. MUN. HOME RULE LAW § 33 (Consol. 1996).

36. *See generally* HANDBOOK, *supra* note 23, at 64-65.

37. N.Y. MUN. HOME RULE LAW § 33.

38. *See, e.g.,* *Smithtown v. Howell*, 31 N.Y.2d 365, 292 N.E.2d 10, 339 N.Y.S.2d 949 (1972) (the New York Court of Appeals upheld an amendment to the Suffolk County Charter providing its County Planning Commission with veto power over municipal zoning changes). Under New York General Municipal Law section 239-m, noncharter counties do not have veto power over municipal land use decisions. However, "section 34(3) of the Municipal Home Rule Law restricts the county from superseding state legislation relating to . . . functions of local government units unless there has been a transfer of functions." Cole, *supra* note 34, at n.50.

39. *See* HANDBOOK, *supra* note 23, at 64. The 19 counties include: Albany, Broome, Chautauqua, Chemong, Dutchess, Erie, Herkimer, Monroe, Nassau, Oneida, Onondaga, Orange, Putnam, Rennselaer, Rockland, Schenectady, Suffolk, Tompkins, and Westchester. *See id.* at 64.

county governments in the state.⁴⁰ Traditionally, within a county legislature, usually called a "county board of supervisors," municipalities⁴¹ were accorded only one vote regardless of the municipalities' population.⁴² "Thus a voter in a town with a population of a hundred wielded ten times more weight in the county legislative body than did a voter in a town of a thousand."⁴³ With the U.S. Supreme Court decision in *Reynolds v. Sims*,⁴⁴ as well as state court decisions,⁴⁵ representation arrangements of New York county legislatures were in violation of the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution.⁴⁶ To meet the requirements that county legislatures more nearly present one person-one vote representation, counties have generally employed one of two voting methods: weighted voting or districting.⁴⁷ Changes in representation also seem to have provided an impetus for county legislators to serve solely in that capacity, thus giving the county legislature greater independence from its constituent municipalities.⁴⁸

Given that county governments no longer serve primarily as an arm of the State, one function in which counties actively participate is land use planning.⁴⁹ Although counties have participated in land use planning since the 1920s-30s,⁵⁰ the scope of their participation has slowly expanded over the last thirty-five years due to the same forces that required county govern-

40. See *Seaman v. Fedourich*, 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965); *Iannucci v. Bd. of Supervisors of the County of Washington*, 20 N.Y.2d 244, 229 N.E.2d 195, 282 N.Y.S.2d 502 (1967). See also Jack B. Weinstein, *The Effect of Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21 (1965).

41. Under N.Y. County Law § 150 (Consol. 1996) only supervisors of cities and towns may serve on the county board of supervisors — village officials may not.

42. See HANDBOOK, *supra* note 23, at 65. Although elected solely as town officers, town supervisors served as *ex officio* members of a county board of supervisors, acting as both town and county officials. See *id.* On the other hand, "city supervisors" were elected by city voters solely to serve as county legislators. See *id.*

43. See *id.* at 66.

44. 377 U.S. 533 (1964).

45. See *supra* note 40.

46. See HANDBOOK, *supra* note 23, at 66.

47. See *id.*

48. See *id.*

49. See generally N.Y. GEN. MUN. LAW § 239-m (McKinney Supp. 1996).

50. See *id.*

ments to assume other new functions. To understand the role that counties play in land use planning it is necessary to understand the two general legal frameworks in which county governments operate. The role counties play in land use planning often varies depending on whether they function under the County Law or under an individual county charter.

B. *Noncharter Counties*

Of the fifty-seven counties in New York State, thirty-eight are noncharter counties. Noncharter counties are governed by the State Constitution, provisions of the County Law, and provisions of the Municipal Home Rule Law. Under the County Law, a county is to establish either a county board of supervisors⁵¹ or a county legislature⁵² which is empowered with both legislative and executive authority.⁵³ Likewise, a county legislative body has administrative authority to oversee the operation of the county government.⁵⁴ The County Law "makes no provision for an independent executive or administrative authority."⁵⁵ These powers rest solely with the legislative body.

Under the County Law, the day-to-day supervision and coordination of the county government may be carried out by one of three methods. First, the legislative body may establish a legislative committee structure built around the principal functions of the county government.⁵⁶ Under this structure, the committees or their chairpersons maintain administrative oversight on behalf of the legislative body.⁵⁷ Second, the legislative body may assign administrative authority to the chairperson of the legislative body.⁵⁸ Third, the legislative body may delegate specific duties to an appointed administrative officer who is re-

51. See N.Y. COUNTY LAW § 150 (Consol. 1996).

52. See *id.* § 150-a (Consol. 1996). Because county legislatures are called a variety of names, for sake of simplicity, where appropriate, county legislatures will be called county legislative bodies.

53. See New York State Department of State, LOCAL GOVERNMENTAL TECHNICAL SERIES: ADMINISTRATION IN NONCHARTER COUNTIES 3 (1983) [hereinafter ADMINISTRATION].

54. See *id.*

55. See HANDBOOK, *supra* note 23, at 66.

56. See ADMINISTRATION, *supra* note 53, at 4.

57. See *id.*

58. See *id.*

sponsible to the legislative body or its chairperson.⁵⁹ Given the complexity and scope of functions required of the county legislative body, more non-charter counties are choosing to establish some form of county administrative officer.⁶⁰

Pursuant to the County Law, noncharter counties are vested with the authority to adopt laws, enact resolutions, and undertake other legally binding actions.⁶¹ Noncharter counties may also adopt and amend local laws⁶² relating to their property, affairs, and government so long as such local laws are consistent with provisions of the State Constitution and general laws.⁶³ Thus, counties, like cities, towns and villages, are endowed with home rule authority.⁶⁴

Furthermore, noncharter counties are empowered to adopt local laws not related to their property, affairs, or government where the State Legislature has specifically provided them with such authority. For example, counties may adopt local laws for

59. *See id.* at 5. There are several provisions of state law which enable the county legislative body to establish the office of a county administrator to carry out, on the legislature's behalf, certain administrative functions. *See HANDBOOK, supra* note 23, at 67. First, section 10(1)(a)(1) of the Municipal Home Rule Law provides that local governments may adopt local laws concerning "the powers, duties, qualifications, number, mode of selection and removal, terms of office of their officers and employees." *Id.* Second, Municipal Home Rule Law section 10(1)(b)(4) empowers a county to establish the office of administrative assistant to the chairman of the board of supervisors. *See id.* Third, County Law section 204 permits the county legislative body to create an executive assistant position "by local law, resolution, or inclusion in the county budget." *Id.*

60. *See ADMINISTRATION, supra* note 53, at 4. As of November, 1982, 14 counties had some form of administrative officer: Alleghany, Clinton, Essex, Genesee, Greene, Jefferson, Montgomery, Ontario, Orleans, Oswego, Rockland, Saratoga, Sullivan and Ulster. *See id.* at 7.

61. *See HANDBOOK, supra* note 23, at 69.

62. Local laws are the highest form of local legislation. *See id.* at 53. The power to adopt local laws extends from article IX of the State Constitution to local governments, including counties. *See id.* Because local laws derive from the Constitution, they have the same quality as acts of the State Legislature. *See id.*

63. *See N.Y. MUN. HOME RULE LAW § 10(1)(i)* (McKinney 1994). Under the State Constitution a general law is defined as "a law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages." N.Y. CONST. art. IX, § 3(d)(1).

64. Home rule may be described as a "method by which a state government can transfer a portion of its governmental powers to a local government." Cole, *supra* note 34, at n.1 (citing Note, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place*, 49 BROOK. L. REV. 259, 261 (1983)). With the transfer of power, local governments are provided with the authority to manage their local affairs. *See id.*

the protection and enhancement of their physical and visual environments.⁶⁵

C. *Charter Counties*

Under Article IX of the State Constitution counties are granted the express power to adopt, amend, or repeal a county charter subject to a mandatory referendum.⁶⁶ This authority is implemented by section 33 of the Municipal Home Rule Law.⁶⁷ By adopting a county charter, counties may devise alternative forms of government⁶⁸ and provide for the transfer of power to or from a city, town or village within a county as dictated by local needs.⁶⁹ A charter must: (a) provide for the exercise of legislative and appropriation authority by a legislative body;⁷⁰ (b) specify the agencies or officers responsible for county functions;⁷¹ (c) lay out agency or officer powers and duties;⁷² (d) stipulate the manner of election or appointment, terms of office and removal for county officers;⁷³ and (e) provide for the equalization of real property taxes consistent with standards prescribed by the legislature.⁷⁴ Importantly, a county charter may also assign executive or administrative functions to an elected or appointed officer.⁷⁵

The election or appointment of a County Executive is one of two principal differences between charter and noncharter counties. Of the nineteen counties that had enacted charters by 1986, sixteen provide for elected county executives.⁷⁶ The County Executive is important for several reasons. First, the elected County Executive operates from a strong, county-wide political base which allows him or her to speak for the whole

65. See N.Y. MUN. HOME RULE LAW § 10(1)(a)(11) (Consol. 1996).

66. N.Y. CONST. art. IX, § 2.

67. See N.Y. MUN. HOME RULE LAW § 33(7) (Consol. 1996).

68. Alternative forms of county government are those that are not suggested by the New York County Law.

69. See HANDBOOK, *supra* note 23, at 56. This authority is implemented by the County Charter Law as set out in section 33 of the Municipal Home Rule Law.

70. See N.Y. MUN. HOME RULE LAW § 33(3)(a) (Consol. 1996).

71. See *id.* § 33(3)(b) (Consol. 1996).

72. See *id.*

73. See *id.*

74. See *id.* § 33(3)(c) (Consol. 1996).

75. See N.Y. MUN. HOME RULE LAW § 33(4)(a) (Consol. 1996).

76. See HANDBOOK, *supra* note 23, at 68.

county.⁷⁷ Thus, the County Executive provides an intercommunity perspective that acts as a check against members of the legislative body who represent either their particular municipality or district. Second, because the County Executive is under constant scrutiny, public attention is focused on the operation of county government.⁷⁸ With a single figurehead at the helm of county operations, citizens have an official who they may hold accountable for policies adopted by the county. Third, a County Executive may also be provided with veto power over the county legislative body.⁷⁹ Providing the County Executive with a veto power allows the executive to stop efforts of the county legislative body that will have deleterious effects on the county as a whole. Fourth, an elected County Executive has budgetary authority which provides the executive with an essential tool for participation in county-wide policy development.⁸⁰ By framing an executive county budget, the County Executive establishes priorities among various county programs. If adopted by the legislative body, the budget sets out a direction "for the implementation of the policies" it reflects.⁸¹

The other principal difference between a charter and non-charter county is the authority of a charter county to adopt a charter law inconsistent with the general laws of the state.⁸² Unlike a noncharter county whose local laws must be consistent with general state laws,⁸³ a charter county has authority to enact charter laws providing it with even greater flexibility to meet the service demands sought by its constituents. For example, as a charter county, Suffolk County was able to provide its County Planning Commission with veto power over all municipal zoning changes, even though this directly conflicted with the provisions of General Municipal Law section 239-m.⁸⁴

77. *See id.*

78. *See id.*

79. *See* N.Y. MUN. HOME RULE LAW § 33(4)(b) (McKinney 1994).

80. *See* HANDBOOK, *supra* note 23, at 68.

81. *See id.* at 69.

82. *See* Cole, *supra* note 34, at 727.

83. *See id.* at n.47.

84. *See* *Smithtown v. Howell*, 31 N.Y.2d 365, 292 N.E.2d 10, 339 N.Y.S.2d 949 (1972). General Municipal Law section 239-m provides county planning boards with review authority over certain municipal zoning actions. However, the municipal agency which referred the action to the county planning board retains final

D. *Administrative Structure*

As the role of the county has expanded to meet the service demands of its constituents, so too have the number of administrative departments and agencies in county government. New departments and agencies, such as industrial and economic development departments, had to be created. Generally, the structure of county administrative agencies is similar throughout New York State regardless of whether the county operates under a county legislative body, a county executive, or an administrative assistant to the county legislative body.⁸⁵ What is important to note is that the administrative departments are often responsible for the day-to-day operations of the various functions counties undertake. For example, with respect to county planning boards discussed below, many of the planning and research functions delegated to county planning boards are conducted by county planning departments.⁸⁶ These departments employ professional planners and other specialists who are authorized by the county planning board to undertake these functions, often because of the sheer volume of proposals and projects requiring county planning board attention.⁸⁷ For instance, where a county planning board is to review a municipal land use action, such as the proposed development of an office building 500 feet from a municipal boundary, the county planning department will review the plan and make a determination on the proposed project. For projects with greater significance, such as the adoption of a county-wide comprehensive master plan, the county planning department will review the proposal and then make its recommendations to the board.⁸⁸

III. County Land Use Functions

Although counties have not been delegated the specific authority to zone, counties do undertake a variety of important land use functions. The functions include: (a) the creation of

authority. It may override a county planning board disapproval with a majority plus one of the referring municipal agency.

85. See generally HANDBOOK, *supra* note 23, at 70.

86. See Telephone Interview with David Phillips, Chautauqua County Planning Department (Jan. 14, 1996).

87. See *id.*

88. See *id.*

county planning boards,⁸⁹ (b) the establishment of county water and sewer districts,⁹⁰ (c) the adoption of county soil and water conservation districts,⁹¹ (d) the oversight of county health departments of subdivision development,⁹² and (e) the participation in affordable housing development.⁹³ In addition, both noncharter and charter counties may adopt local laws and charter laws respectively to meet the specific land use needs and conditions of their counties.⁹⁴ Through these functions, and the advisory role that counties play in municipal land use decisions, counties are an integral component of the state land use system. This section examines in detail those functions discussed above, setting out the substantive authority and advisory capacity of both noncharter and charter counties.

A. *County Authority Under the County Law and General Municipal Law*

Both noncharter and charter counties are given express authority to engage in certain land use functions under the New York County Law and other general laws. How noncharter and charter counties utilize this authority is explored below.

1. *Counties and Their County Planning Boards*

Since 1925, counties have had the authority to establish county or regional planning boards.⁹⁵ The precursors to today's county planning boards were limited to undertaking studies of the needs and conditions of communities within the county and preparing plans to meet such needs. Presently, under General Municipal Law Article 12-B, section 239-b, any county legislative body may unilaterally, or in cooperation with the legislatures of the municipalities within that county, establish a county planning board.⁹⁶ County planning boards may also be

89. See *infra* p. 325; N.Y. GEN. MUN. LAW § 239-b (McKinney Supp. 1997).

90. See *infra* p. 349; N.Y. COUNTY LAW § 250 (McKinney Supp. 1995).

91. See *infra* p. 352; N.Y. SOIL & WATER CONSERV. DIST. LAW § 5 (McKinney Supp. 1997).

92. See *infra* p. 360; N.Y. PUB. HEALTH LAW § 1116 (McKinney 1990).

93. See *infra* pp. 325-355; Informal Op. N.Y. Att'y Gen. 4 (1992).

94. See N.Y. MUN. HOME RULE LAW § 10 (Consol. 1996).

95. See 1925 N.Y. Laws Ch. 539 § 239-b.

96. See N.Y. GEN. MUN. LAW § 239-b.

created between counties (regional planning boards),⁹⁷ and with municipalities in those other counties.⁹⁸ Sections 4a through 4c examine the authority and duties of county planning boards as they exist today. Section 4d then discusses the recent amendments to General Municipal Law 12-B and the effect of these amendments on county planning board authority.

a. *Membership and Financing*

The composition of county planning boards varies depending on whether the board is established by the county or in cooperation with municipalities of the county.⁹⁹ Where established solely by a county, a county planning board consists of representatives from the county.¹⁰⁰ Where municipalities participate in the formation of the board, the board may contain representatives of the municipalities to be selected in a manner determined by the county legislative body.¹⁰¹ Regardless of whether the county itself, or in cooperation with municipalities of the county, establishes the board, if existing in the county, the county engineer, superintendent of highways, or district superintendent, and the comptroller or commissioner of finance are *ex officio* members of the board.¹⁰² The county legislative body may also designate chief engineers of any special county improvement commission to serve as *ex officio* members as well.¹⁰³

To finance a county planning board's activities, the county legislative body is authorized to appropriate and raise money, by taxation, for the expenses of the county planning board.¹⁰⁴ If

97. See *id.* For example, Erie and Niagara counties formed a regional planning board. Under section 239-b of the General Municipal Law, regional planning boards may also be established, but they have the same powers as the county planning boards only on a broader scope. For a general discussion of regional planning boards, see Salkin, *supra* note 3, at 524.

98. See N.Y. GEN. MUN. LAW § 239-b. As of July 1, 1998, regional planning boards may no longer be established under General Municipal Law § 239-b. Regional planning boards are replaced by regional planning councils established under the new section 239-h. See *infra* p. 343.

99. See *id.*

100. See *id.*

101. See *id.*

102. See *id.*

103. See N.Y. GEN. MUN. LAW § 239-b.

104. See *id.* § 239-c (McKinney 1986).

the county planning board is formed with the collaboration of municipalities, they too have the power to appropriate and raise funds, by taxation, for county planning board expenses.¹⁰⁵

b. *Research and Planning Authority*

A county planning board has extensive planning and research authority under section 239-d(1). A board is specifically empowered to perform planning work which includes surveys, land use studies, urban renewal plans, and technical services.¹⁰⁶ It also has the authority to conduct studies concerning the needs and conditions of the county which may then be utilized to adopt a county-wide comprehensive master plan¹⁰⁷ for the development of the county.¹⁰⁸ A master plan may include: (a) county highways; (b) transportation terminals and facilities; (c) parks and parkways; and (d) sites for public buildings or works including subsurface facilities in which the county or constituent municipalities participated in the acquisition, financing or construction thereof.¹⁰⁹

Section 239-d(2) provides that the county legislative body may change or add to the county-wide master plan whenever required for the public interest.¹¹⁰ For example, if necessary, the county legislative body may amend the plan to incorporate a new park to be donated to the county. Before such change may be made, however, the county legislative body is required to give two weeks notice of the pending change and hold a public hearing where other state, county, and municipal governments,

105. *See id.*

106. *See id.* § 239-d(1) (McKinney Supp. 1997). The county planning board is also empowered to collect data related to county planning and zoning within the county and disseminate such information to interested persons. *See id.*

107. Although no exact definition of the term "comprehensive master plan" has been given, the courts examine all relevant evidence such as the municipal zoning ordinance, the municipal zoning map, any development policies, and past planning decisions to determine whether the municipality has in fact set out some sort of plan for the present and future growth of the community. *See Udell v. Haas*, 21 N.Y.2d 463, 471-72, 235 N.E.2d 897, 902, 288 N.Y.S.2d 888, 895-96 (1968).

108. *See* N.Y. GEN. MUN. LAW § 239-d(1).

109. *See id.*

110. *See id.* § 239-d(2) (McKinney Supp. 1997). The recent amendments to Article 12-B now provide counties with the authority to adopt comprehensive plans. The distinction between a comprehensive master plan and a comprehensive plan is discussed below. *See infra* at p. 341.

as well as the public at large may voice their concerns.¹¹¹ Furthermore, the county legislative body is required to submit the proposed changes to the county planning board for its consideration prior to holding the public hearing.¹¹² The county legislative body may act upon the proposed changes once the county planning agency approves the changes or fails to take any action.¹¹³ Where the county legislative body chooses to act contrary to the county planning board's recommendations, changes to the comprehensive master plan require an affirmative vote of a majority of all the members of the county legislative body.¹¹⁴ Once the plan or its subsequent changes are adopted, it is binding on all agencies of the county.¹¹⁵ Thus, any subsequent expenditure of county funds for the purchase of land or public improvements shown on the master plan must be consistent with the plan.¹¹⁶ Likewise, if land or public improvements are not shown on the master plan, expenditures for such projects contravene the master plan, and require the county legislative body to amend the master plan to undertake these projects.¹¹⁷

In addition to the adoption of a county-wide master plan, a county planning board may also recommend to local legislatures within the county a comprehensive zoning plan which designates areas in the county suitable for residential, commercial and industrial uses.¹¹⁸ Such zoning plans should consider existing and proposed highways, parks, parkways, public works, public utilities, public transportation terminals, population trends, topography and geological structure.¹¹⁹ A variety of county planning boards have devised and recommended such plans to the municipalities within their county. For example, Westchester County recently released its county-wide comprehensive guidance document entitled, *Patterns for Westchester: The Land and the People* [hereinafter *Patterns*].¹²⁰ This docu-

111. See *id.*

112. See *id.*

113. See N.Y. GEN. MUN. LAW § 239-d(2).

114. See *id.*

115. See *id.*

116. See *id.*

117. See *id.*

118. See N.Y. GEN. MUN. LAW § 239-d(5) (McKinney Supp. 1997).

119. See *id.*

120. WESTCHESTER COUNTY PLANNING BOARD, PATTERNS FOR WESTCHESTER: THE LAND AND THE PEOPLE (Mar. 1996).

ment was presented at a variety of public hearings throughout the county for citizens and municipal officials to voice their support or concerns. *Patterns* contains a variety of recommendations including the channeling of development to areas where infrastructure can support growth, the development of an interconnected system of open space, the encouragement of a variety of housing types to meet county housing needs, and the enhancement of Westchester's quality of life by protecting the county's educational, cultural and historical resources.¹²¹ Other counties recently issuing comprehensive plans or guidance documents include Dutchess County in 1987 (*Directions: The Plan for Dutchess County*), Yates County in 1990, Onondaga County in 1991, and Chenango County in 1992.¹²² It is important to note that these plans remain advisory only and are not in any way binding on the municipalities within a county.

A county planning board may also exercise limited regulatory authority over county subdivision control areas.¹²³ Under section 239-d(7) of the General Municipal Law, a county planning board is authorized to designate areas outside the limits of any incorporated village or city, or any area beyond which a city exercises powers of plat approval, as county subdivision control areas.¹²⁴ In addition, the designation of subdivision control areas cannot occur in towns where the town planning board has the power of subdivision plat approval and has promulgated subdivision regulations.¹²⁵ Thus, the areas in which a county planning board may exercise this authority is limited. However, within subdivision control areas, the county may, pursuant to the requirements of Town Law section 277, adopt subdivision regulations which are then in force in the subdivision control areas.¹²⁶ Upon the establishment of the subdivision

121. *See id.*

122. *See Salkin, supra* note 3, at n.132.

123. *See* N.Y. GEN. MUN. LAW § 239-d(7) (McKinney 1986). A county subdivision control area is that region outside the limits of any incorporated village, city area, in which a city exercises plat approval authority, or area of a town which has a planning board with plat approval authority, where the county may regulate the development of subdivisions subject to section 277 of the Town Law. *See id.* Under the new amendments to Article 12-B of the General Municipal Law, this power is removed from county authority. *See infra* pp. 340-41.

124. *See id.*

125. *See id.*

126. *See id.*

control areas and regulations governing subdivisions, no subdivision map of any land within a control area can be filed or recorded with the county clerk until it has been approved by the county planning board.¹²⁷ Under this provision, the county planning board acts in a manner similar to a town planning board when the town planning board approves subdivision plats.¹²⁸ By agreement, the county planning board can also assume this role for villages and cities if they so desire.¹²⁹

An important function undertaken by a county planning board is to assist municipalities in the everyday operation of municipal planning. Pursuant to section 239-d(8) of the General Municipal Law, upon the request of a municipality, the county planning board may provide any of its services to the requesting municipality.¹³⁰ This may include technical analysis of a land use problem, as well as assistance in the drafting of local zoning laws. David Phillips, a county planner for Chautauqua County, has acted in an advisory role for nearly twenty years where municipalities have chosen to enact new, or amend existing zoning laws.¹³¹ Through this role, county planning boards (or more accurately, county planning departments) have the ability to recommend that municipal planning authorities account for intercommunity considerations. This becomes a particularly important function in more rural counties, such as Chautauqua, where local governments do not have the financial wherewithal to undertake professional planning activities.¹³² By seeking the assistance of county planning department personnel, the county planning board may bring its county-wide perspective into the planning process of a local municipality.

Finally, under section 239-d(10), the State Legislature has provided counties with the express authority to enter into intermunicipal agreements (IMAs) to perform certain ministerial functions on behalf of a city, town or village related to zoning

127. See N.Y. GEN. MUN. LAW § 239-d(7).

128. See N.Y. TOWN LAW § 277 (McKinney 1987).

129. See N.Y. GEN. MUN. LAW § 239-d(7).

130. See *id.* § 239-d(8) (McKinney 1986).

131. See Telephone Interview with David Phillips, Chautauqua County Planning Department (Oct. 9, 1996) [hereinafter Phillips].

132. See *id.*

and planning.¹³³ This provision will be discussed at length below.¹³⁴

c. Review of Municipal Zoning and Planning Actions

Arguably, a county planning board's most important land use function is the authority to review certain municipal zoning and planning actions for their potential intercommunity and county-wide impacts.¹³⁵ By allowing a county planning board to carefully examine reviewable actions, the county provides an intercommunity perspective usually lacking when a single municipality makes a zoning or planning decision. Furthermore, county planning board review provides another opportunity for surrounding municipalities to voice their concerns over a proposed project's regional impacts. The authority for such review falls under sections 239-m and 239-n of the General Municipal Law.

Before taking final action on certain proposed actions, municipal referring agencies (those city, town or village bodies responsible for final approval on a proposed project subject to section 239-m) must refer the project to the county planning board.¹³⁶ Proposed actions subject to county review include: (a) the adoption or amendment of a municipal comprehensive plan; (b) adoption or amendment of a zoning ordinance or local law; (c) issuance of special permits; (d) approval of site plans; (e) granting of use or area variances; and (f) other authorizations which a referring body may issue under the provisions of any zoning ordinance or local law.¹³⁷ In addition to those actions specified under this subdivision, courts have also held the enactment of a building moratorium is subject to county review.¹³⁸

133. See N.Y. GEN. MUN. LAW § 239-d(10) (McKinney Supp. 1997).

134. See *infra* pp. 46-56.

135. See N.Y. GEN. MUN. LAW §§ 239-m to -n (McKinney Supp. 1997).

136. See *id.* § 239-m(2) (McKinney Supp. 1997).

137. See *id.* § 239-m(3)(A) (McKinney Supp. 1997).

138. See *B&L Development Corp. v. Town of Greenfield*, 146 Misc. 2d 638, 551 N.Y.S.2d 734 (Sup. Ct. Saratoga County 1990). A local law enacted by the Greenfield Town Board, imposing a one year moratorium on the issuance of building permits, was vacated and annulled due to the Board's failure to submit its moratorium plan to the County Planning Board pursuant to General Municipal Law section 239-m. See *id.*

Although it may seem that nearly every determination of a municipal planning body is subject to review by the county planning board, such review is limited. Only municipal land use actions occurring within 500 feet of certain areas may be reviewed. These areas include: (a) the boundary of any city, town or village; (b) the boundary of any existing or proposed county or state park, or any other recreation area; (c) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; (d) the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; (e) the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; and (f) the boundary of a farm operation located in an agricultural district.¹³⁹ Where a proposed project falls within 500 feet of one of these areas, the county planning board has the authority to review such municipal zoning and planning actions. A county planning board also has the power to enter into an agreement with a referring body stating that any of the proposed actions above are matters of local concern, and therefore, not subject to review.¹⁴⁰ This authority has been utilized by Otsego County, where the county has agreed that certain subdivision proposals are not subject to county referral.¹⁴¹

Once it is determined that a proposed municipal zoning or planning action must be reviewed by the county planning board, the action is then reviewed for its intercommunity or county-wide impact. Pursuant to section 239-l of the General Municipal Law, the county planning board is to specifically examine:

compatibility of various land uses with one another; traffic generating characteristics of various land uses in relation to the effect of such traffic on other land uses and to the adequacy of existing and proposed thoroughfare facilities; impact of proposed land uses on existing and proposed county or state institutional uses; protection of community character as regards to predominant land uses, population density, and relation between residential and

139. See N.Y. GEN. MUN. LAW § 239-m(3)(B) (McKinney Supp. 1997).

140. See *id.* § 239-m(3)(C) (McKinney Supp. 1997).

141. See Telephone Interview with Diane V. Carlton, Director, Otsego County Planning Department (Oct. 9, 1996) [hereinafter Carlton].

nonresidential areas; community appearance; drainage; community facilities; official development policies, municipal and county as expressed through comprehensive plans, capital programs or regulatory measures; and other such matters as may relate to the public convenience, to governmental efficiency, and to the achieving and maintaining a satisfactory community government.¹⁴²

After examining a proposed action's potential impact, the county planning board then either approves the proposed action, conditionally approves the action, or disapproves the action.¹⁴³ The county planning board may also determine that the proposed action will have no significant inter-community impact, and approve the project.¹⁴⁴ This language suggests that even where the proposed action will have inter-community or county-wide effect, the county planning board may approve the action without recommending any modifications to the project. The review and determination must be made within 30 days although the period for review may be extended by agreement with the municipal referring body.¹⁴⁵ The county planning board is also required to include with its determination a statement of reasons for its recommendation.¹⁴⁶

Upon receiving the county planning board's recommendation, the referring agency must then vote on it.¹⁴⁷ If the county planning board approves a proposed action or fails to make a recommendation within the 30 day period, the referring agency need only approve the action upon a majority vote.¹⁴⁸ Where the county planning board determines that no significant inter-community or county-wide impact is posed by the proposed action, the matter is returned to the referring municipal body for a local decision.¹⁴⁹ However, where the county planning board disapproves the proposed action or conditionally approves the action upon modification, and the referring municipal body chooses to act contrary to the county planning board's recom-

142. See N.Y. GEN. MUN. LAW § 239-1 (McKinney 1986).

143. See *id.* § 239-m(4)(A) (McKinney Supp. 1997).

144. See *id.*

145. See *id.* § 239-m(4)(B) (McKinney Supp. 1997).

146. See *id.*

147. See N.Y. GEN. MUN. LAW § 239-m(5) (McKinney Supp. 1996).

148. See *Leisure Time Sales, Inc. v. Waring*, 91 Misc. 2d 633, 634, 398 N.Y.S.2d 493, 495 (Sup. Ct. Saratoga County 1977).

149. See N.Y. GEN. MUN. LAW § 239-m(4) (McKinney Supp. 1997).

mendation, the municipal body must approve the proposed action by a majority plus one of all its members.¹⁵⁰ If the referring municipal body fails to obtain a majority plus one vote overriding a county planning board's disapproval, the action cannot move forward.

After the referring agency has made its final determination on the proposed action (either taking into account the county planning board's recommendations or acting contrary to a majority plus one vote), the referring agency must report its determination to the county planning board within 30 days.¹⁵¹ Where the referring municipal body acts contrary to a recommendation of disapproval or modification it must set forth its reasons for such contrary action.¹⁵²

Failure to refer proposed actions subject to this subdivision results in the nullification of the referring agency's determination.¹⁵³ For example, the Appellate Division, Fourth Department, reversed the issuance of a special permit by the Board of Appeals of City of Niagara Falls where the board failed to refer a development project situated within 500 feet of a state highway to the Erie and Niagara Counties Regional Planning Board.¹⁵⁴ Likewise, in *B&L Development Corporation v. Town of Greenfield*,¹⁵⁵ upon finding the Town Board's enactment of a local moratorium on the issuance of building permits, the court vacated and annulled the moratorium due to the Board's failure to follow the procedure for county planning board review established by section 239-m of the General Municipal Law.¹⁵⁶ Thus, these cases demonstrate that referral of actions listed under subdivision (a) to a county planning agency is a "condition pre-

150. *See id.* § 239-m(5).

151. *See id.* § 239-m(6) (McKinney Supp. 1997).

152. *See id.*

153. *See Friendly Hillside Motel, Inc. v. Town of Brunswick*, 74 Misc. 2d 1001, 347 N.Y.S.2d 112 (Sup. Ct. Rensselaer County 1973) (local sign ordinance was declared invalid because when proposed, the sign ordinance was not referred to the Rensselaer County Planning Commission for review.).

154. *See Asthma v. Curcione*, 31 A.D.2d 883, 298 N.Y.S.2d 286 (4th Dep't 1969).

155. 146 Misc. 2d 638, 551 N.Y.S.2d 734 (Sup. Ct. Saratoga County 1990).

156. *See id.* at 639-40, 551 N.Y.S.2d at 735.

cedent" to final action by the referring municipal board.¹⁵⁷ Failure by a municipal board to refer is a jurisdictional defect.

When a county planning board makes a determination on a proposed action, such determination does not constitute a final administrative action subject to an article 78 proceeding of the Civil Practice Law and Rules.¹⁵⁸ This is so because the referring municipal board has the authority to override the recommendation of the county planning board.¹⁵⁹ Thus, a determination by a county planning board is advisory only, and is not subject to judicial review because final administrative action rests with the referring municipal board.

In addition to those actions subject to county review under General Municipal Law section 239-m, certain proposed subdivision plats must also be referred to a county planning board for approval. However, a county planning board may only review plats where it is authorized to do so by the county legislative body.¹⁶⁰ Where such authority is granted, section 239-n sets out the same procedure as section 239-m for determining which subdivisions are subject to review, and the process by which approval of the subdivision is achieved. Therefore it does not require elaboration here.

The impact of sections 239-l through 239-n on municipal land use decisions varies with a county's location, its financial resources and those of its constituent municipalities, the expertise of its planning officials, the efficiency and sophistication of its government, and the strength of its leadership and political orientation.¹⁶¹ For example, in Otsego County, a rural mid-state county with a population of only 60,000, the county has limited its review authority excluding certain subdivision approvals by entering into agreements with its constituent municipalities.¹⁶² This limitation may be attributed to several factors

157. *Leisure Time Sales, Inc. v. Waring*, 91 Misc. 2d 633, 634, 398 N.Y.S.2d 493, 495 (Sup. Ct. Saratoga County 1977) (holding that "referral to the [county] planning agency is a condition precedent to final action by the municipalities of the zoning matters specified").

158. See *Rickett v. Hackbarth*, 98 Misc. 2d 790, 414 N.Y.S.2d 988 (Sup. Ct. Onondaga County 1979).

159. See N.Y. GEN. MUN. LAW § 239-m(5) (McKinney Supp. 1996).

160. See N.Y. GEN. MUN. LAW § 239-n (McKinney 1986).

161. See LAND USE CONTROLS, *supra* note 23, at 62.

162. See Carlton, *supra* note 141.

including the county's fiscally conservative tendencies, its focus on large development projects such as capping a regional landfill, renovating an aging county nursing home, and the fact that the county planning department has only recently begun to garner the respect of the local municipalities.¹⁶³ As Diane Carlton, Director of the Otsego County Planning Department pointed out, more urban counties, such as Westchester, often have the financial and staff resources to conduct more project reviews.¹⁶⁴ These observations were reiterated by Dave Phillips of the Chautauqua County Planning Department.¹⁶⁵ Understaffing in the Chautauqua County Planning Department (which reviews municipal agency referrals and then makes its recommendation to the County Planning Board) has limited the number of reviews that the county planning board can undertake.¹⁶⁶ The Chautauqua County Planning Department has only four staff members to serve 27 towns, 15 villages and 2 cities.¹⁶⁷

The size of the proposed project can also determine the scope of a county planning board's impact on municipal planning decisions. Because of their size, complexity, and financial investment, large development projects often require professional engineers and consultants to review a project's impact under the State Environmental Quality Review Act [hereinafter "SEQRA"] process.¹⁶⁸ In undertaking a SEQRA review, intercommunity or regional impacts may be considered where a project's effects are likely to be interjurisdictional.¹⁶⁹ This may

163. *See id.*

164. *See id.*

165. *See Phillips, supra* note 131.

166. *See id.*

167. *See id.*

168. *See id.* The purpose of SEQRA is "to incorporate the consideration of environmental factors into existing planning, review and decision making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement." [1996] N.Y.C.R.R. § 617.1(c).

169. *See generally* [1996] N.Y.C.R.R. § 617.9(b)(5)(iii). This provision of the SEQRA regulations requires a draft environmental impact statement [hereinafter "EIS"] to include a "statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the *severity of the impacts* and the reasonable likelihood of their occurrence." *Id.* (emphasis added). Thus,

then lessen the role that the county planning board can play in that particular project because inter-community considerations have already been accounted for.¹⁷⁰ However, county planning boards have the ability to comment on a proposed project during the SEQRA process as an interested agency and may articulate concerns they want addressed.¹⁷¹ Moreover, projects subject to county review under section 239-m must still be examined by the county planning department regardless of whether they have been reviewed under SEQRA.¹⁷²

Small projects are often not submitted to a county planning board despite the board's jurisdiction to review such an undertaking. For example, although within 500 feet of a municipal border and thus, subject to county review, a project like the addition of a porch on a residence, may never be presented. In such a case, the builder may ignore the requirement or simply forget that the project must be referred to the county.¹⁷³ According to Dave Phillips, in Chautauqua County it is the medium-size project, such as a small strip mall development that requires county intervention.¹⁷⁴ Projects like this are often too small for professional engineers and consultants to be hired by the developer, but are often large enough to create inter-community impacts.¹⁷⁵ Thus, the county planning board review is often the first time that inter-community considerations are raised.

where impacts from a proposed project are intermunicipal, the draft EIS should address these concerns.

170. See Phillips, *supra* note 131.

171. See [1996] N.Y.C.R.R. § 617.2(t). "Interested agency" means an agency that lacks jurisdiction to fund, approve, or directly undertake an action but wishes to participate in the review process because of its specific expertise or concern about the proposed action. An 'interested agency' has the same ability to participate in the review process as a member of the public." *Id.* See also *In re Heritage Co. of Massena*, 191 A.D.2d 790, 792-93, 594 N.Y.S.2d 388, 390-91 (3d Dep't 1993).

172. See *In re Prospect Street Homeowners Ass'n*, 140 A.D.2d 992, 993, 529 N.Y.S.2d 726, 727 (4th Dep't 1988).

173. See Phillips, *supra* note 131.

174. See *id.*

175. See *id.*

d. *Recent Amendments to General Municipal Law
Article 12-B*

As part of the recodification of New York State land use laws,¹⁷⁶ on August 26, 1997, New York Governor George Pataki signed into law amendments to Article 12-B of the General Municipal Law.¹⁷⁷ As discussed above, Article 12-B (sections 239-b through 239-n) contains the authority for counties to establish county planning boards, adopt county comprehensive plans and officials maps, and provides for the powers and duties of county planning boards.¹⁷⁸ The recent amendments, which take effect July 1, 1998, clarify these powers.¹⁷⁹ Although important, the amendments neither significantly increase county authority as it relates to county planning boards, nor do the amendments enhance the review and recommendation function of county planning boards.¹⁸⁰ This section examines the amendments focusing on four areas: (a) simplification and clarification of the existing law; (b) limited changes to county authority and county planning board powers; (c) drafting and adoption of a county comprehensive plan; and (d) establishment of regional planning councils.

1. *Simplification and Clarification of
Existing Law*

The amendments to Article 12-B of the General Municipal Law (sections 239-b through 239-i) simplify the language of existing Article 12-B, as well as clarify the authority granted under this article. The present Article 12-B is very difficult to read, often consisting of a single paragraph with many clauses

176. The New York State Legislature's Legislative Commission on Rural Resources has been engaged in recodifying all New York State land use laws in an effort to streamline and clarify existing law. The recodification of Article 12-B of the General Municipal Law is but one of the recent recodification projects undertaken by the Legislative Commission on Rural Resources.

177. See 1997 N.Y. Laws ch. 451, §§ 1-8 (to be codified at N.Y. GEN. MUN. §§ 239-b to -n, N.Y. GEN. CITY § 34, N.Y. GEN. TOWN § 279, N.Y. VILLAGE § 7-732).

178. See *id.* at §§ 1-7 (to be codified at N.Y. GEN. MUN. §§ 239-b to -n, N.Y. GEN. CITY § 34, N.Y. GEN. TOWN § 279, N.Y. VILLAGE § 7-732).

179. See *id.* at § 8.

180. See *id.* at § 1-7 (to be codified at N.Y. GEN. MUN. §§ 239-b to -n, N.Y. GEN. CITY § 34, N.Y. GEN. TOWN § 279, N.Y. VILLAGE § 7-732).

strung together. For example, section 239-d(1), setting forth the powers of a county planning board, reads:

Said planning board is hereby empowered to perform planning work, including but not limited to surveys, land use studies, urban renewal plans and technical services, and shall study the needs and conditions of metropolitan, regional, county and community planning in such county or counties or the area covered by constituent municipalities and prepare and adopt in whole or in part and, whenever and as often as the board may deem it for the public interest, to change or add to, a comprehensive master plan for the development of the entire area of the county or counties or municipalities participating, which master plan shall include the highways, transportation terminals and facilities, parks, parkways and sites for public buildings or works including sub-surface facilities, in the acquisition, financing or construction of which the county or the constituent municipalities has participated or may be called upon to participate acquire, finance or construct.¹⁸¹

Making this language more understandable, the amendments segment each of the powers discussed in section 239-d(1) into separate subdivisions. Thus, for example, the authority for a county legislative body to request the county planning board to aid in the preparation of a county comprehensive plan is now found in the new section 239-c(3)(B),¹⁸² while the authority to conduct county land use studies is found in the new section 239-c(3)(D).¹⁸³ By separating the individual powers from one another, the amendments are much easier to read and efficiently set forth county authority and county planning board powers.

2. *The Effect of the Recent Amendments on Provisions Relating to County Planning Boards*

In addition to simplifying the language of Article 12-B and clarifying county authority and county planning board powers, the recent enactments amend some of the provisions relating to county planning boards. To begin, the amendments provide legislative findings of fact, absent from existing provisions, that ex-

181. N.Y. GEN. MUN. LAW § 239-d (McKinney 1986 and Supp. 1997).

182. See 1997 N.Y. Laws ch. 451, §2 (to be codified at N.Y. GEN. MUN. § 239-c(3)(B)).

183. See *id.* (to be codified at N.Y. GEN. MUN. § 239-c(3)(D)).

plain the important role county planning boards play in the growth and development of the state.¹⁸⁴ Specifically, the findings state that county planning boards are essential to establish productive linkages between communities and to focus on and address intermunicipal land use issues.¹⁸⁵ The amendments also give the county legislative body the complete discretion to select the number and manner in which county planning board members will be appointed.¹⁸⁶ Importantly, this new provision directs the county legislative body to include "members from a broad cross section of interests within the county," giving consideration to "securing representation by population, size, geographic location and type of municipality."¹⁸⁷ There is no such requirement under present section 239-b, which details the establishment of a county planning board.¹⁸⁸ Additionally, the amendments provide the county legislative body with the authority to establish, as a condition of appointment, training, continuing education and attendance requirements for all county planning board members.¹⁸⁹

Nor do the amendments significantly alter the authority of a county planning board. As with earlier county planning boards, boards created under these amendments have the authority to review certain municipal planning and zoning actions, prepare a county comprehensive plan, prepare a county official map, engage in land use planning and conduct county-wide and local studies, collect and distribute planning information, and provide local technical assistance.¹⁹⁰ In addition to these powers, a county planning board may now review and provide suggestions on the construction of any state or county highway, but the suggestions may not nullify or contravene the final approval of the New York State Commissioner of Transportation.¹⁹¹ Although county planning boards gain a limited review function, the amendments also remove a previous power.

184. *See id.* (to be codified at N.Y. GEN. MUN. § 239-c(1)).

185. *See id.* (to be codified at N.Y. GEN. MUN. § 239-c(1)(B), (C)).

186. *See id.* (to be codified at N.Y. GEN. MUN. § 239-c(2)(B)).

187. *Id.*

188. *See* N.Y. GEN. MUN. LAW § 239-b (McKinney Supp. 1997).

189. *See* 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-c(2)(D)).

190. *See id.* (to be codified at N.Y. GEN. MUN. § 239-c(3)(A)-(G)).

191. *See id.* (to be codified at N.Y. GEN. MUN. § 239-c(3)(H)).

County planning boards will no longer be authorized to designate county subdivision control areas and to exercise powers of plat approval in such areas.¹⁹²

3. *County Comprehensive Plans*

The most significant provision in the amendments to Article 12-B concerns county comprehensive plans.¹⁹³ Mirroring the language found in General City Law 28-a, Town Law 272-a, and Village Law 7-722, a county legislative body is now authorized to adopt a county comprehensive plan.¹⁹⁴ A comprehensive plan is a written document that identifies the goals, objectives, strategies and implementation measures for the "immediate and long-range protection, enhancement, growth and development of the county."¹⁹⁵ The comprehensive plan is important because it sets forth a vision for the community's development while considering the natural, social and economic resources necessary to achieve that vision. Without such a plan, local governments are likely to proceed with haphazard land development that may later have dire consequences for their respective communities economically, socially and physically.

Like city, town and village comprehensive plans, a county comprehensive plan may contain a variety of topics. Such topics include the "existing and proposed location and intensity of land uses[,]"¹⁹⁶ population, demographic and socioeconomic trends,¹⁹⁷ consideration of agricultural uses, historic, cultural, scenic and natural resources,¹⁹⁸ "existing housing resources and future housing needs[,]"¹⁹⁹ the present and potential future lo-

192. Compare N.Y. GEN. MUN. § 239-d(7) (1986) (giving county and regional planning boards authority to designate county subdivision control areas and to exercise powers of plat approval in such areas), with 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-c(3) (omitting such language)).

193. See 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-d).

194. See *id.* (to be codified at N.Y. GEN. MUN. § 239-d(1)(A)).

195. *Id.* See also Land Use Law Center, LOCAL LEADERS GUIDE, Series V, Issue Number 2 (1998). See Cori Traub and David Church, A PRACTICAL GUIDE TO COMPREHENSIVE PLANNING, New York Planning Federation (1996), for an in-depth discussion of comprehensive planning in New York.

196. 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-d(1)(C)).

197. See *id.* (to be codified at N.Y. GEN. MUN. § 239-d(1)(E)).

198. See *id.* (to be codified at N.Y. GEN. MUN. § 239-d(1)(D)).

199. *Id.* (to be codified at N.Y. GEN. MUN. § 239-d(1)(H)).

cation of commercial and industrial facilities,²⁰⁰ and consideration of cumulative impacts²⁰¹ among other topics. However, the topics listed under section 239-d(1) are illustrative only; a county legislative body may include other topics not listed that are "consistent with the protection, enhancement, orderly growth and development of the county."²⁰²

Although a county legislative body presently has the authority to adopt a county master plan under section 239-d, there are several differences between the present section 239-d and the new section 239-d. First, under the new section 239-d, the county legislative body has the authority to prepare and adopt a comprehensive plan.²⁰³ This authority may be delegated to the county planning board or to a special board, if the county legislative body so desires.²⁰⁴ Where delegation occurs, the plan must still be adopted by the county legislative body.²⁰⁵ Second, during the preparation of a county comprehensive plan, there must be public participation in the form of at least one public hearing prior to the plan's adoption.²⁰⁶ Third, a county comprehensive plan and any amendment thereto is now specifically subject to environmental review under the State Environmental Quality Review Act.²⁰⁷ Finally, unlike the county master plan, a county comprehensive plan has significant legal effect on the county land use system. Any plan for a capital project to be undertaken in the county by a municipality or state agency must take into consideration the county comprehensive plan.²⁰⁸ Thus, an agency undertaking a capital project cannot move forward without first having carefully reviewed the relevant provisions of the county comprehensive plan. Additionally, all county land acquisitions and public improvements must take

200. *See id.* (to be codified at N.Y. GEN. MUN. § 239-d(1)(K)).

201. *See* 1997 N.Y. Laws ch. 451, §2 (to be codified at N.Y. GEN. MUN. § 239-d(1)(P)).

202. *Id.* (to be codified at N.Y. GEN. MUN. § 239-d(1)(O)).

203. *See id.* (to be codified at N.Y. GEN. MUN. § 239-d(2)). Prior to the amendments, this authority rested solely with the county planning board. *See* N.Y. GEN. MUN. LAW § 239-d (McKinney 1986 & Supp. 1997).

204. *See* 1997 N.Y. Laws ch. 451, §2 (to be codified at N.Y. GEN. MUN. § 239-d(2)).

205. *See id.* (to be codified at N.Y. GEN. MUN. § 239-d(2)).

206. *See id.* (to be codified at N.Y. GEN. MUN. § 239-d(6)(A)).

207. *See id.* (to be codified at N.Y. GEN. MUN. § 239-d(3)).

208. *See id.* (to be codified at N.Y. GEN. MUN. § 239-d(9)(B)).

the county comprehensive plan into consideration.²⁰⁹ Where such acquisitions or improvements are inconsistent with the county comprehensive plan, the actions may possibly be annulled in a legal proceeding.²¹⁰

4. *Regional Planning Councils*²¹¹

Another important change to Article 12-B is the authority for two or more contiguous municipal legislative bodies to establish a regional planning council.²¹² The purpose of such a council is to allow municipalities to focus on planning and development considerations on a broader geographic scale, particularly where resources extend beyond the borders of any one community.²¹³ Under the present section 239-b, there is no authority for two municipalities to form a regional planning council,²¹⁴ although a municipality in one county may form a regional planning board with the county legislative body in a neighboring county.²¹⁵

To create a regional planning council, the legislatures of at least two contiguous municipalities must "adopt by resolution an agreement setting forth the terms and conditions of such collaboration."²¹⁶ Once established, the regional planning council has authority similar to that of county planning boards. A regional planning council may conduct surveys, studies and research programs addressing regional needs.²¹⁷ It may also

209. See 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-d(9)(B)).

210. See *e.g.*, *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968) (rezoning of property annulled where legislative enactment failed to conform to the comprehensive plan of the Village of Lake Success).

211. It should be noted that regional planning councils differ from "joint planning boards" established pursuant to section 119-u of the General Municipal Law. Whereas joint planning boards created by intermunicipal agreement between two or more municipalities constitute a unified planning board with all the powers and duties of a planning board established pursuant to General City Law § 27, Town Law § 271, or Village Law § 7-718, regional planning councils have no binding authority.

212. See 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-h(3)).

213. Legislative Commission on Rural Resources, Memorandum in Support of Senate Bill No. 780-A and Assembly Bill No. 1478-A, 2 (1997).

214. See N.Y. GEN. MUN. LAW § 239-b (McKinney 1986 & Supp. 1997).

215. See *id.*

216. 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-h(3)).

217. See *id.* (to be codified at N.Y. GEN. MUN. § 239-h(4)(A)(i)).

distribute planning information,²¹⁸ prepare a regional comprehensive plan²¹⁹ and assist with transportation planning for the region.²²⁰ Finally, a regional planning council may conduct reviews of certain classes of planning and zoning actions by a municipality within its jurisdiction pursuant to sections 239-l through 239-n of the General Municipal Law.²²¹ This review function is the same as that engaged in by county planning boards and follows the same procedures outlined in sections 239-m and 239-n. Although nearly having identical powers to a county planning board, a regional planning council is prohibited from undertaking "any capital construction project, including but not limited to the design, acquisition, construction, improvement, reconstruction or rehabilitation of any capital asset, whether in the nature of real or personal property."²²²

Overall, the amendments to Article 12-B have little effect on the present authority found in its provisions. Importantly, however, the amendments significantly clarify the authority given to counties and county planning boards, and strengthen this authority through the ability of counties to adopt a comprehensive plan that must be considered by the municipalities within its jurisdiction.

e. *Adoption of a County Official Map*

County official maps play an important role in setting aside unimproved land for the future development of public facilities such as county and state roads and flood prevention projects.²²³ By identifying such areas on a map, the county earmarks these land areas so that private development will not encroach upon and disrupt the land necessary for planned future public improvements. The creation and adoption of county official maps

218. *See id.* (to be codified at N.Y. GEN. MUN. § 239-h(4)(A)(i)).

219. *See id.* (to be codified at N.Y. GEN. MUN. § 239-h(4)(A)(iii)). The regional comprehensive plan language mirrors the language of the provisions concerning county comprehensive plans, except that there is no binding authority for regional projects to be consistent with the regional comprehensive plan, where the regional planning council is precluded from undertaking any capital construction project pursuant to section 239-h(4)(B).

220. *See* 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-h(4)(A)(v)).

221. *See id.* (to be codified at N.Y. GEN. MUN. § 239-h(4)(A)(vi)).

222. *Id.* (to be codified at N.Y. GEN. MUN. § 239-h(4)(B)).

223. *See* N.Y. GEN. MUN. LAW § 239-h (McKinney 1986).

is governed by General Municipal Law Article 12-B.²²⁴ Like county planning boards, the recent amendments to Article 12-B have changed some of the provisions relating to county official maps. This section first examines current law as it relates to county official maps and then discusses the effect of the recent amendments on the existing provisions.

Under the present section 239-h of the General Municipal Law, a county legislative body may establish a county official map delineating sites in the county where land will be acquired for future use as public facilities.²²⁵ By showing where such lands are located, the county may prevent development on those lands, leaving them unimproved, and thus, less expensive for future purchase.²²⁶ In this manner county official maps serve

to enable counties to utilize certain regulatory powers which are essential for the purpose of providing for orderly growth and development, for affording adequate facilities for the safe, convenient, and efficient means for the traffic circulation of its population and the vehicular movement of goods, for safeguarding against flood damage, and for providing needed space for public development.²²⁷

County official maps may display both existing and proposed rights-of-way for county roads and drainage systems.²²⁸ Additionally, where the county has adopted a comprehensive master plan, the county official map may also include rights-of-way for any proposed county, state or federal transportation network, and sites for such county, state and federal facilities as parks, drainage works, water courses, and public buildings.²²⁹ County official maps, like their counterparts at the city, town and village levels, are "a valuable device which combines elements of planning and land use control."²³⁰

Upon adoption, the county official map is "final and conclusive with respect to location, width, and dimensions of all rights-of-way and sites thereon."²³¹ Thus, based on this lan-

224. *See id.*

225. *See id.*

226. *See* HANDBOOK, *supra* note 23, at 288.

227. N.Y. GEN. MUN. LAW § 239-g (McKinney 1986).

228. *See id.* § 239-h.

229. *See id.*

230. HANDBOOK, *supra* note 23, at 288.

231. N.Y. GEN. MUN. LAW § 239-h.

guage, the State Comptroller has opined that when a conflict exists between a county official map and that of a municipality concerning a county right-of-way, the county official map controls.²³² Furthermore, a county official map is considered an addition or amendment to a municipal official map and therefore is binding upon a municipality.²³³ Most importantly, where a municipality does not have an official map, the county official map becomes that municipality's official map.²³⁴

Presently, changes in the county official map may be made by the county legislative body when it determines that it would be in the public interest.²³⁵ However, a public hearing is required on the proposed change and 10 days notice must be given to state or federal agencies for the development facilities affected, to any municipality where the change will have an effect, and to the county public at large.²³⁶ Furthermore, any changes proposed by the county legislative body must also be submitted to the county planning board, the county superintendent of highways, as well as to the governing body and planning board of the municipalities possibly affected.²³⁷ If one of the municipal governing bodies disapproves such a change, it cannot take effect unless overridden by a two-thirds majority of the county supervisors or, if the county has a comprehensive plan, by simple majority.²³⁸

The county official map is significant in that it limits where a developer may undertake a given project.²³⁹ Generally, a municipality may not issue building permits or grant subdivision approval for development which lies in county rights-of-way or on sites preserved by the county official map.²⁴⁰ Furthermore, this prohibition applies to proposed developments on property which shall have frontage on and access to any existing or proposed rights-of-way.²⁴¹ Such approval may not be given because

232. See 1979 OP. N.Y. COMPTROLLER 79-702.

233. See N.Y. GEN. MUN. LAW § 239-i (McKinney 1986).

234. See *id.*

235. See *id.*

236. See *id.*

237. See *id.*

238. See N.Y. GEN. MUN. LAW § 239-j (McKinney 1986).

239. See *id.*

240. See *id.*

241. See *id.* § 239-i.

of the need to maintain the map's integrity,²⁴² particularly where it is adopted pursuant to a county-wide comprehensive plan.²⁴³ If building permits were given and subdivision approval granted, the purposes of the county official map would be thwarted. However, a procedure exists to allow building within these areas. Where a proposed project lies directly within a right-of-way or site, the project's sponsor may seek a variance from the board of appeals of the municipality with jurisdiction over that land.²⁴⁴ The project sponsor must demonstrate that the land situated within the right-of-way or site is "not yielding a fair return on its value to the owner."²⁴⁵ If this standard is met, the zoning board of appeals [hereinafter ZBA] may grant a variance by a two-thirds majority.²⁴⁶ With the granting of a variance the ZBA may also place conditions on the variance approval to reduce the impact of the development on the community.²⁴⁷ In this manner, it is possible that the ZBA's decision to grant a building permit or subdivision approval will alter the county official map, but will do so with as little impact as possible.

Where a building permit is sought for a project that has frontage on, access to, or is otherwise directly related to any existing proposed right-of-way or site on the county official map, a procedure likewise exists to overcome the general prohibition.²⁴⁸ After receiving an application for a building permit, the municipal building inspector must notify the county planning board and the county highways superintendent or commissioner of public works.²⁴⁹ The county highways superintendent then notifies the appropriate state or federal agency if a state or federal public facility right-of-way or site is to be affected.²⁵⁰ Such state or federal agency then has five days in which to lodge its objections to the proposed project to the county highways superinten-

242. *See id.* § 239-j.

243. *See* N.Y. GEN. MUN. LAW § 239-k (McKinney 1986).

244. *See id.* § 239-j.

245. *Id.*

246. *See id.* § 239-k.

247. *See id.*

248. *See* N.Y. GEN. MUN. LAW § 239-k (McKinney 1986).

249. *See id.* For simplicity, reference will only be made to the county highways superintendent.

250. *See id.*

dent.²⁵¹ Within 10 working days of receipt of the building permit application, the county highways superintendent must report his approval, disapproval, or approval subject to stated conditions to the municipality in which the proposed project is situated.²⁵² In making the report, the county highways commissioner must consider

the prospective character of the development, any appropriate access standards or non-access or limited access provisions of state and federal agencies, the traffic which it will generate, and the effect of said traffic upon existing or proposed rights-of-way or sites shown on the county official map. He shall also consider the design and frequency of access, the effect of the development upon drainage as related to drainage systems, and the extent to which such development may impair the safety and traffic carrying capacity of existing and proposed rights-of-way affected.²⁵³

If the county highways superintendent recommends approval of the building permit, its issuance must be in accord with the superintendent's report.²⁵⁴ The report's requirements may be varied by the municipality's ZBA upon a "two-thirds vote of all the members where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the report."²⁵⁵

A similar procedure is followed where the applicant proposes to construct a subdivision that fronts, accesses, or is otherwise directly related to any existing or proposed right-of-way or site shown on the county official map.²⁵⁶ In such a situation, upon receiving an application for subdivision plat approval, the clerk of the municipal planning board notifies the county planning board and the county highways superintendent.²⁵⁷ The county highways superintendent notifies the appropriate state or federal agency if it is their property that will be affected.²⁵⁸ The county planning board then has thirty days to report its approval, disapproval, or approval subject to stated

251. *See id.*

252. *See id.*

253. N.Y. GEN. MUN. LAW § 239-k (McKinney 1986).

254. *See id.*

255. *Id.*

256. *See id.*

257. *See id.*

258. *See* N.Y. GEN. MUN. LAW § 239-k (McKinney 1986).

conditions on the subdivision plat application to the referring municipality.²⁵⁹ Like the county highways superintendent's consideration of building permit applications, the county planning board must examine such potential impacts as traffic generation, traffic safety, and traffic carrying capacity of existing and proposed rights-of-way, as well as drainage impacts and the prospective character of the development.²⁶⁰

The recent amendments to Article 12-B have neither significantly altered the authority to adopt a county official map, nor changed its legal effect. However, there are several limited changes. First, like other sections of Article 12-B, the language of sections 239-g through 239-k has been simplified to provide greater clarity and definition than its predecessor.²⁶¹ Present sections 239-g through 239-k have been repealed and replaced with new sections 239-e and 239-f.²⁶² Section 239-e clearly states the purpose, content, adoption, effect of and appeal from county official maps.²⁶³ This section also details the means of altering county official maps.²⁶⁴ Section 239-f explains the approval process for receiving building permits, curb cuts and subdivision plats that encroach on lands identified in the county official map.²⁶⁵ Second, a county official map may only be adopted or amended after a public hearing has been held.²⁶⁶ And third, all county land acquisitions and public improvements must be in accordance with the county official map.²⁶⁷

B. *County Water, Sewer, and Drainage Districts*

Water, along with food and shelter, is basic to human life. Thus, it is extremely important that citizens have access to an adequate supply of potable water. Two significant functions which counties may undertake in this area are the provision of

259. *See id.*

260. *See id.*

261. *See* 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. §§ 239-e, 239-f).

262. *See id.*

263. *See id.* (to be codified at N.Y. GEN. MUN. § 239-e).

264. *See id.*

265. *See id.* (to be codified at N.Y. GEN. MUN. § 239-f).

266. *See* 1997 N.Y. Laws ch. 451, § 2 (to be codified at N.Y. GEN. MUN. § 239-e(4)).

267. *See id.* (to be codified at N.Y. GEN. MUN. § 239-e(5)(B)).

public water and the disposal and treatment of water wastes.²⁶⁸ Pursuant to section 250 of the New York County Law, a county legislative body is empowered to establish or extend county water, water quality treatment, sewer, wastewater disposal, or drainage districts in which the county may provide water-related services to its constituents.²⁶⁹ It is under this authority that the county may exercise further substantive land use power — the power to condemn lands for the development and extension of county water districts and related projects.²⁷⁰

To establish a county water district,²⁷¹ the county legislative body must follow the procedures set out in sections 251 through 256 of the New York County Law. First a county agency must be created²⁷² to undertake an evaluation of a county's water resources, water requirements, and water quality.²⁷³ This assembly of data includes information such as the number and location of private wells, the contaminants present or reasonably expected in the water supply, the problems of collection, conveyance and disposal of storm water and other waters, and measures designed to rehabilitate and protect lake waters.²⁷⁴ Once such information is examined, the county legislative body may direct the agency to prepare maps and plans on its own initiative, or upon petition from a municipality (or municipalities) or a certain number of property owners, to create a county water district.²⁷⁵ Section 253 stipulates the elements to be included in the maps and plans delineating a district.²⁷⁶ If maps, plans and related data had previously been prepared for existing or proposed municipal special or improvement districts,

268. See N.Y. COUNTY LAW § 250 (McKinney 1991 & Supp. 1996).

269. See *id.*

270. See *id.* § 263.

271. When the words "county water district" are used in this article, they are intended to include water quality treatment, sewer, wastewater disposal and drainage districts. Such districts may cover only portions of the county or may be county-wide.

272. See N.Y. COUNTY LAW § 251 (McKinney 1991).

273. See *id.* § 252(1).

274. See *id.*

275. See *id.* § 253(1).

276. See *id.* § 253(1).

the county legislative body may direct the agency to adopt and utilize that information.²⁷⁷

Upon a public hearing and due consideration of the maps, plans and data for the proposed district or improvement, the county legislative body may then determine whether the proposed district or facilities are satisfactory and sufficient.²⁷⁸ If the county finds the district or facilities inadequate, it remands the proposal to the agency for further study.²⁷⁹ If the county determines that the proposal is satisfactory and sufficient, the county legislative body may then approve the district or project by resolution.²⁸⁰

Once a district is approved, the county legislative body may appoint, designate or establish an officer, board or body to oversee the administration of the district.²⁸¹ The power to condemn lands lies within this administrative officer or body.²⁸² Condemnation proceedings may be brought for any real estate, easements, rights-of-way or other interests necessary to achieve the objectives of the district.²⁸³ Thus, if within a water district it is necessary to construct a dam that will inundate private property, such construction may occur so long as just compensation is given to the land owner(s). The power of condemnation is even more significant when it is understood that the county may create tax assessment districts throughout the county to finance the costs of districts and their projects.²⁸⁴

277. See N.Y. GEN. MUN. LAW § 253(3). The adoption of a county water district or county water project is an unlisted action for purposes of SEQRA and is thus subject to an environmental assessment to determine whether the project will have a significant adverse environmental impact on the community. See generally [1996] N.Y.C.R.R. 617.4 & 617.5.

278. See N.Y. COUNTY LAW § 256.

279. See *id.*

280. See *id.*

281. See *id.* § 261.

282. See *id.* § 263.

283. See N.Y. COUNTY LAW § 263.

284. See *Riley v. County of Monroe*, 55 A.D.2d 91, 94-95, 389 N.Y.S.2d 689, 692 (4th Dep't 1976) (Article 5-A of the County Law authorizes county governments to establish "special districts" to handle the individual needs of different portions of the county. The assessment and levy of taxes to finance such districts may only be upon those parcels situated within the boundaries of the special districts.).

C. County Land Use Authority Under Other State Law

1. Soil and Water Conservation Districts

Another means by which a county may influence land use practices is derived from the establishment of a soil and water conservation district. Such districts are created for the purposes of conserving soil and water resources, improving water quality, and preventing soil erosion and land inundation by flood waters.²⁸⁵ Soil and water conservation districts are established by resolution of a county legislature which has determined that the conservation of soil and water resources and the prevention of soil erosion and flooding are of public importance and are favored by a substantial portion of the rural land occupiers of the county.²⁸⁶ Before action is taken on such a resolution, however, the county legislative body must have provided the State Soil and Water Conservation Committee²⁸⁷ with written notice of its intention to act, along with the basis for its action.²⁸⁸ When established, soil and water conservation districts incorporate all lands within the county.²⁸⁹

Soil and water conservation districts are administered by a board of directors comprised of five members.²⁹⁰ Two of the directors are members of the county legislature, while the remaining three members must not be members of the legislature.²⁹¹ Of these three, two members must be "practical farmers."²⁹² It is important to note that although soil and water conservation districts are established by a county legislature, they are "independent legal entities, separate and distinct from

285. See N.Y. SOIL & WATER CONSERV. DIST. LAW § 2(1) (McKinney Supp. 1997).

286. See *id.* § 5(1).

287. The State Soil and Water Conservation Committee ("Committee") is a state agency created under the Soil and Water Conservation Law to oversee the implementation of the law by the local soil and water conservation districts. See *id.* Among other duties, the Committee is empowered to approve and coordinate the programs of the several districts, to adopt necessary policies to carry out the districts programs, and to disseminate information about the districts throughout the state. *Id.* §§ 4(4)(c), (a) & (e).

288. See *id.* § 5(1).

289. See Op. N.Y. Att'y Gen. F5 (1987).

290. See N.Y. SOIL & WATER CONSERV. DIST. LAW § 6(1)(a).

291. See *id.*

292. *Id.*

both the State and the county”²⁹³ which “for most purposes . . . retain autonomy for purposes of its operation.”²⁹⁴ Thus it is significant that two members of the board of directors are members of the county legislature. Without this representation, it is possible that county concerns regarding soil and water conservation issues would not be addressed. Additionally, the two county legislative members of the board are able to bring a broader, county-wide perspective to all decisions rendered by the board.

Furthermore, there are checks on the operation of the district. Under section 12, a county may, by resolution, discontinue a district at any time after five years from the establishment of the district and after determining that a substantial portion of the rural land occupiers desire dissolution.²⁹⁵ Once the resolution for discontinuance has passed, the directors of the district may not enter into any contracts or agreements on behalf of the district, and all rules and regulations governing the district’s operation are no longer in force.²⁹⁶ Also, section 9(6) provides for the county legislative body’s oversight on “contracts for the maintenance of structures, improvements or other works constructed by the district in the course of its operation.”²⁹⁷

Although the directors of a soil and water conservation district have no regulatory authority,²⁹⁸ they may influence land use patterns through a variety of powers granted. First, directors are authorized to carry out preventive and control measures within the district for the improvement of agricultural water management operations, the prevention of flooding and sediment damages, as well as the control of nonpoint source pollution.²⁹⁹ Many of these projects would dictate when and where certain agricultural practices would be carried out because they

293. Op. N.Y. Att’y Gen. F5 (1987).

294. *Id.*

295. See N.Y. SOIL & WATER CONSERV. DIST. LAW § 12(1).

296. See *id.* § 12(2).

297. Op. N.Y. Att’y Gen. F5 (1987) (citing N.Y. SOIL & WATER CONSERV. DIST. LAW §9(6) (McKinney 1949)).

298. See Westchester County Soil and Water Conservation District, Information Pamphlet, at 2 (1994) [hereinafter “INFORMATION PAMPHLET”] (on file with author).

299. See N.Y. SOIL & WATER CONSERV. DIST. LAW § 9(2) (McKinney Supp. 1997).

would provide improved irrigation, and prevent potential flooding and soil erosion on agricultural lands.

Second, the directors may furnish financial aid to any occupier of lands within the district to control erosion, prevent flooding and sedimentation, and to abate nonpoint sources of water pollution.³⁰⁰ These grants are limited to the district's appropriations and are subject to conditions deemed necessary by the directors.³⁰¹ By providing funds and attaching conditions to their grants, the directors may influence the type and scope of a project undertaken by land occupiers. For example, funds may be provided to a farmer to construct new irrigation ditches on the condition that he utilize contour plowing which will reduce top soil erosion and sedimentation in the new irrigation ditches.

In addition to these powers, section 9(9) allows soil and water conservation districts "to make and execute contracts and other instruments necessary or convenient to the exercise of its powers."³⁰² This power has been utilized by the Westchester County Soil and Water Conservation District to enter into contractual agreements with 37 Westchester municipalities. These agreements provide environmental planning assistance in exchange for the municipalities' agreement that they act on the District's recommendations.³⁰³ In this manner those recommendations concerning soil and water conservation practices will be implemented by the municipalities receiving such assistance.

2. *County Health Department Approval of Realty Subdivisions*

Unlike a county planning board's authority to review a proposed subdivision within the purview of section 239-n of the General Municipal Law, a county health department has binding approval authority over the development of subdivisions within its jurisdiction.³⁰⁴ The purpose of New York Public Health Law section 1116(1) is to ensure that a subdivision will

300. *See id.* § 9(3).

301. *See id.*

302. *Id.* § 9(9).

303. *See* INFORMATION PAMPHLET, *supra* note 298, at 2.

304. *See* N.Y. PUB. HEALTH LAW § 1116(1) (McKinney 1990).

have proper water and sewage facilities to meet the demands of those who settle there.³⁰⁵ This provision states:

No subdivision or portion thereof shall be sold, offered for sale, leased or rented by any corporation, company or person, and no permanent building shall be erected thereon, until a plan or map of such subdivision be filed with and approved by the department or city, county, or part-county department of health having jurisdiction.³⁰⁶

As required by subdivision 2 of section 1116, the plan or map to be filed must show the methods for obtaining and furnishing adequate and satisfactory water supply to the proposed subdivision. Even where a subdivider meets this requirement, the county health department may still determine that the proposed methods are inadequate to meet the potential water demand and require the subdivider to devise a new or improved plan. Unless and until these requirements are met, no construction upon a subdivided parcel may occur.

3. *County Role in Affordable Housing*

The shortage of affordable housing is a problem not limited to a single municipality. It is a problem of regional character. For example, in 1991, Westchester County had some 3,800 homeless people which required the county to spend \$56 million to provide temporary shelter.³⁰⁷ In addition to homeless persons, the shortage of low-cost housing also makes it extremely difficult for civil servants and professionals, such as teachers, to live in communities that often require their services the most. Without a county's authority to provide affordable housing, these problems were left to the individual municipalities.

In 1992, the State Attorney General issued an opinion that counties "may provide low-income housing utilizing their home rule powers . . . subject to constitutional debt constraints."³⁰⁸

305. See *Slavin v. Ingraham*, 44 A.D.2d 874, 355 N.Y.S.2d 658, *aff'd*, 37 N.Y.2d 653, 339 N.E.2d 157, 376 N.Y.S.2d 463 (1974).

306. N.Y. PUB. HEALTH LAW § 1116(1).

307. See Lisa W. Foderaro, *New York State Eases a Bar to Homeless Housing*, N.Y. TIMES, Feb. 16, 1992, at B44.

308. See Informal Op. N.Y. Att'y Gen. 4, at 2 (1992). But see John P. Deller, *County Powers in Assisted Housing Programs: The Constitutional Limits in New York*, 20 FORDHAM URB. L.J. 109 (1993). The author argues that the State Attorney General's analysis of Article 18 of the New York State Constitution is flawed, and

Under this opinion, counties were no longer required to simply provide shelter for the homeless while simultaneously being barred from constructing affordable and low-income housing.³⁰⁹ Counties may actually participate in the planning, development and construction of low-cost housing.³¹⁰

Under previous interpretations of the state constitution, the Attorney General's Office had held that counties could not participate in the development or operation of low-cost housing. Counties, unlike cities, towns and villages, were not specifically mentioned in Article XVIII which concerns housing in New York State. Article XVIII stipulates in part: "[T]he legislature may provide . . . for low rent housing and nursing home accommodations for persons of low income . . . , or for the clearance, replanning, reconstruction, and rehabilitation of substandard and unsanitary [sic] areas."³¹¹ This Article further states that:

For and in aid of such provisions, . . . the legislature may: make or contract to make . . . capital or periodic subsidies by the state to any city, town, village or public corporation . . . ; authorize any city, town, village or public corporation to make or contract to make such subsidies to any public corporation . . . ; authorize the contracting of indebtedness for the purpose of providing moneys [for such purposes].³¹²

Based upon the exclusion of counties from this language, it was generally believed that the framers at the 1938 Constitutional Convention deliberately left out counties from the constitutional grant of power, enabling the State Legislature to authorize certain specified political subdivisions to engage in the

that his argument concerning the use of county police power remains unpersuasive because of the Attorney General's failure to reconcile Article 18 with other provisions of the Constitution. Furthermore, the author states that involving the county in low-income housing may further exacerbate the lack of regional affordable housing. If the county has the power to provide affordable housing, the author contends that such facilities will be placed in the areas of the county with the "greatest need and where land is the cheapest" — in areas with the highest percentage of poor. *Id.* at 111. This will in turn, increase the degree of racial as well as economic segregation in a county. *See id.* at 112. Additionally, providing counties with such power may reduce a "municipality's obligation [under present state case law] to zone for low-rent housing where county projects in other communities meets regional housing needs." *Id.*

309. *See Foderaro, supra* note 307.

310. *See* Informal Op. N.Y. Att'y Gen. 4, at 10 (1992).

311. N.Y. CONST. art. XVIII § 1 (1967).

312. *Id.* § 2 (1967).

clearance of slums and creation and maintenance of public housing.³¹³ However, the 1992 Attorney General's opinion demonstrated that this article did not in fact prohibit counties from engaging in the provision of low-cost housing.

Although Article XVIII limits the power to engage in low-cost housing development to those state political subdivisions enumerated, it does not prohibit other political entities from undertaking this purpose if such authority is granted from outside Article XVIII.³¹⁴ Article XVIII was adopted at a time when cities, towns and villages were "primarily instruments of the State without any significant home rule authority."³¹⁵ Thus, it was necessary for the Convention to specifically authorize cities, towns and villages to establish local housing programs.³¹⁶ However, Article XVIII does not restrict counties from engaging in such programs if authority can be found elsewhere in the Constitution.³¹⁷ Section 10 of Article XVIII reads: "This article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and *shall not be construed as imposing additional limitations.*"³¹⁸

As the State Attorney General's opinion notes, counties have been given the authority to adopt affordable housing programs under their home rule authority.³¹⁹

The power of counties to engage in low-cost housing programs falls within the purview of a county's home rule authority. Article IX, section 2(c)(ii)(10) of the Constitution as implemented by Municipal Home Rule Law section 10(1)(ii)(a)(12) provides that counties may adopt local laws concerning the government, protection, order, conduct, safety, health and well-being of persons or property in the local government.³²⁰ Thus, according to the Attorney General's opinion, adopting a local law for the provision of low-cost housing is a legitimate public purpose within the broad delegation of a county's "police power." Such a provision "serves the public

313. See Informal Op. N.Y. Att'y GEN. 4, at 4 (1992).

314. See *id.* at 6.

315. *Id.*

316. See *id.*

317. See *id.*

318. N.Y. CONST. art. XVIII, § 10 (1967) (emphasis added).

319. See Informal Op. N.Y. Att'y Gen. 4, at 6 (1992).

320. See *id.*

health, safety and well-being and protects persons and property, not only in directly providing needed housing to persons of limited income, but also in helping to prevent homelessness, slums and hazards associated with substandard housing conditions."³²¹

In addition to stating that counties have the authority to engage in affordable housing programs, the State Attorney General's opinion also describes the components of such programs that are permissible under state law. First, counties may provide land for, or acquire land necessary for, the programs pursuant to Article IX, section 1(e) of the Constitution.³²² Second, counties may site affordable housing in appropriate locations within the county.³²³ Third, counties may cooperate with cities, towns and villages in the joint provision of such programs under the authority granted to municipal corporations to engage in intermunicipal cooperation.³²⁴ Fourth, counties may appropriate county funds to finance the program.³²⁵

The final aspect of the opinion discusses the ability of counties to finance low-cost housing programs. Under Article VIII, section 2 of the state constitution, counties, cities, towns, and villages or school districts are authorized to contract indebtedness for municipal purposes.³²⁶ "The indebtedness may be contracted within the period of probable usefulness of the subject or purpose for which the indebtedness is issued."³²⁷ However, when added to existing indebtedness for other purposes, the total indebtedness may not exceed seven percent of the average full valuation of taxable real estate of the county.³²⁸ Thus, where an affordable housing program is established as a proper municipal purpose, a county may lawfully expend county funds to finance the program within the seven percent debt authority.³²⁹

321. *Id.*

322. *See id.* at 8.

323. *See id.*

324. *See* N.Y. GEN. MUN. LAW § 119-o(1) (McKinney 1986).

325. *See* Informal Op. N.Y. Att'y Gen. 4, at 8 (1992).

326. *See id.* at 9 (citing N.Y. CONST. art. VIII, § 2 (McKinney 1987)).

327. Informal Op. N.Y. Att'y Gen. 4, at 9 (1992).

328. *See id.* (citing N.Y. CONST. art. VIII, § 4 (McKinney 1987)). In Nassau County the total debt limit is 10%. *See id.*

329. *See id.*

The potential impact of a county low-cost housing program is significant, particularly in those counties with the greatest urbanization. Many taxpayers resent spending money to provide homeless persons with temporary shelter, but they also do not want moderate and low income housing in their neighborhoods.³³⁰ The authority of the county to undertake affordable housing programs may help to overcome this NIMBYism (Not In My Back Yard). By amending a county's comprehensive plan and county official map, counties may be able to site such facilities in the most appropriate locations in the county so long as they conform to municipal zoning districts.³³¹ If, for example, a county chose to site a low-income multi-family dwelling within a town's multi-family zoning district, the town could not legally object simply because the housing unit would be priced below market rates.³³² Thus, working within the existing land use framework since 1992, counties have the authority to begin providing solutions to meet the need for low-income housing.

IV. The Authority of Counties to Exceed the County Law and General Laws to Undertake Land Use Functions

A. *Home Rule in the County Context*

Home rule generally describes those functions and duties traditionally reserved to or undertaken by local governments without state interference.³³³ Such powers may include for example, the authority to establish the length of terms of local offices or the power to zone for particular uses within a municipal jurisdiction. Under Article IX of the state constitution counties are granted the authority to adopt and amend local laws.³³⁴ Where local laws relate to the property, affairs or government of the county, such laws may be adopted where they are consistent with the state constitution and with any general law.³³⁵ Addi-

330. See Foderaro, *supra* note 307.

331. Without the authority to veto municipal zoning decisions, counties are unable to change municipal zoning districts to best locate low-income housing. Thus, counties will be required to work within existing municipal zoning districts to site such facilities.

332. See Foderaro, *supra* note 307.

333. See HANDBOOK, *supra* note 23, at 53.

334. See N.Y. CONST. art. IX, § 2 (McKinney 1987).

335. See *id.*

tionally, counties may also adopt local laws consistent with the constitution and general laws where the legislature has provided the specific authority to do so.³³⁶ Thus, counties are given the express authority from the State Legislature to adopt local laws pertaining to, *inter alia*, the transaction of county business;³³⁷ the acquisition, care, management and use of highways, roads and streets;³³⁸ the levy, collection and administration of local taxes and;³³⁹ the government, protection, order, conduct, safety, health and well-being of persons or property therein.³⁴⁰ This constitutional grant of authority to adopt local laws is implemented by Municipal Home Rule Law section 10.³⁴¹

In addition to the authority to adopt local laws, counties are also granted the express power to adopt, amend, or repeal a county charter under the state constitution subject to a mandatory referendum.³⁴² By adopting a county charter, counties may devise alternative forms of government³⁴³ and provide for the transfer of power to or from a city, town or village within a county as dictated by local needs.³⁴⁴ Furthermore, the adoption of a county charter enables such counties to adopt charter laws³⁴⁵ inconsistent with general state laws, so long as the charter laws are consistent with the state constitution.³⁴⁶ Charter laws are the provisions of a county charter, or county charter amendments, providing for the transfer of a governmental function to or from a city, town or village.³⁴⁷ Through the adoption of a county charter, a county may adopt charter laws establishing certain functions in the county government not present in a

336. See *id.* § 2(c)(ii).

337. See *id.* § 2(c)(ii)(3).

338. See *id.* § 2(c)(ii)(6).

339. See N.Y. CONST. art. IX, § 2(c)(ii)(8).

340. See *id.* § 2(c)(ii)(10).

341. See N.Y. MUN. HOME RULE LAW § 10 (McKinney 1994).

342. See N.Y. CONST. art. IX, § 2 (McKinney 1987); N.Y. MUN. HOME RULE LAW § 33(1) (McKinney 1994).

343. Alternative forms of county government are those that are not suggested by the New York County Law.

344. See HANDBOOK, *supra* note 23, at 56. This authority is implemented by the County Charter Law as set out in Article IV of the Municipal Home Rule Law.

345. See N.Y. MUN. HOME RULE LAW § 33(7) (McKinney 1994). Charter laws may be defined as those laws which comprise the charter establishing the county government. See *id.*

346. See Cole, *supra* note 34, at 727.

347. See N.Y. MUN. HOME RULE LAW § 33(7).

non-charter counties. For example, in *Heimbach v. Mills*, the Second Department upheld a county charter law which authorized the county executive to fix real property equalization rates rather than the board of supervisors as provided by the state Real Property Law.³⁴⁸

Utilizing the adoption of local laws and county charters, both charter and non-charter counties may undertake new land use functions or alter existing land use duties between the county and its municipalities. The following examples illustrate how counties may use these home rule powers in the land use context.

B. *Decreasing or Augmenting a County Planning Board's Review Authority*

Through amendments to a charter county administrative code, charter counties may provide that a referring municipal body only need a simple majority to override the determination of a county planning board, thus lessening the board's authority. For example, in Westchester County, an amendment to the County Administrative Code stipulates that to override a Westchester County Planning Board determination, the referring municipal body only needs a simple majority to act.³⁴⁹ This amendment has subsequently been upheld by the state courts. In *208 East 30th Street Corp. v. North Salem*,³⁵⁰ the Appellate Division for the Second Department stated that although the amendment is in conflict with General Municipal Law section 239-m, the Westchester provision controls, since such a special statute repeals a conflicting general statute insofar as the special act applies.³⁵¹

In addition to limiting county planning board authority, such authority may also be augmented by amending the governing law of a county. In 1972, the New York Court of Appeals

348. See Cole, *supra* note 34, at 727 (citing *Heimbach v. Mills* 67 A.D.2d 731, 412 N.Y.S.2d 668 (1979)).

349. See Peter Q. Eschweiler, *In Accordance With a Comprehensive Plan, The Need for Planning Consistency in New York State*, 10 PACE ENVTL. L. REV. 603, 633-36 (1993) (citing WESTCHESTER COUNTY ADMINISTRATIVE CODE § 277.61 (1979)).

350. 88 A.D.2d 281, 452 N.Y.S.2d 902 (2d Dep't 1982).

351. See *id.* at 285-86, 452 N.Y.S.2d at 905. See also *Bloom v. Yorktown*, 80 A.D.2d 823, 436 N.Y.S.2d 355 (2d Dep't 1981).

stated that an amendment to Suffolk County's Charter, by double referendum, validly provided veto power to the Suffolk County Planning Commission.³⁵² Section 1330 of the County Charter, which set out the procedure for county review of zoning ordinance enactments and amendments affecting property within 500 feet of village or town boundaries, omitted any provision giving the referring municipal body any power to override the Planning Commission's review determination.³⁵³ Thus, where two-thirds of the total members of the Suffolk County Planning Commission disapproved a proposed action, the action could not be overturned by a majority plus one of the referring municipal body. This gave the Planning Commission veto power over zoning ordinance enactments and amendments. With such authority, most planning and zoning decisions ultimately rested with the Suffolk County Planning Commission which could disapprove a proposed action because of potential inter-community impact.

C. *Adopting Other County Programs — the Suffolk County Farmland Preservation Program*

The adoption of local laws may also permit a county to undertake new programs which impact the development potential of lands within their jurisdiction. In 1974, Suffolk County adopted a local law providing the county with the ability to purchase the development rights of agricultural lands.³⁵⁴ Its purpose, and that of subsequent amendments, is to protect and conserve agricultural lands, open spaces and open areas, as well as encourage the improvement of agricultural lands for the production of food.³⁵⁵ Since enacting the program, Suffolk County has effectively taken 6,000 acres out of development.³⁵⁶

352. See *Town of Smithtown v. Howell*, 31 N.Y.2d 365, 292 N.E.2d 10, 339 N.Y.S.2d 949 (1972).

353. See *id.* at 372-73, 292 N.E.2d at 15, 339 N.Y.S.2d at 955.

354. See *County of Suffolk, N.Y.* [1974] N.Y. Local Laws No. 19. Presently, the Suffolk County Farmland Preservation Program is codified at section 8-1 of the Suffolk County Administrative Code.

355. See *id.*

356. See *Suffolk County Farmland Preservation Program* (visited Sept. 30, 1996) <<http://www.nyslgti.gen.ny.us/nylocal/Suffolk/planning/farmland.html>> (text on file with author).

The Suffolk County program is premised on the purchase of development rights.³⁵⁷ When authorized by the County Legislature, the Suffolk County Executive may request offers to sell development rights to private agricultural lands.³⁵⁸ Upon receiving offers for sale, the County Executive has the market value of the development rights appraised and then reports on the matter to the County Legislature.³⁵⁹ The County Legislature then holds a public hearing on the question of acceptance of the offer(s).³⁶⁰ Within thirty days of the public hearing the County Legislature must reach a decision whether or not to purchase the development rights offered.³⁶¹ Once acquired, the development rights remain unalienable, unless authorized by local law upon the recommendation of the Farmland Committee,³⁶² an agency of the Suffolk County Government established by the program.³⁶³

V. County-Municipal Cooperation to Undertake Land Use Functions

As the above discussion attempts to demonstrate, county governments have little substantive regulatory land use authority.³⁶⁴ Primarily, county governments undertake advisory and assistance duties in the hope of promoting sound land use policy. However, many land use issues, such as the conservation of natural resources, the availability of affordable housing and adequate public transportation, and the promotion of sustainable economic development are broader than any one municipality. These issues tend to be regional and require the attention and

357. See SUFFOLK COUNTY ADMINISTRATIVE CODE § 8-3 (1993).

358. See *id.*

359. See *id.*

360. See *id.*

361. See *id.*

362. See SUFFOLK COUNTY ADMINISTRATIVE CODE § 8-4(a). Although ultimate decisions regarding the purchase of development rights rest with the County Legislature, the Farmland Committee is charged with a variety of duties to ensure the success of the program. See *id.* § 8-3. The Committee acts as both an advisory board to the County Legislature concerning which lands to consider for purchase, see *id.* § 8-5(E)(1), and also serves as a review board for the granting of permits dealing with the erection of structures, see *id.* § 8-5(E)(4), and operation of farm stands, see *id.* § 8-5(E)(5), on program properties.

363. See SUFFOLK COUNTY ADMINISTRATIVE CODE § 8-5.

364. See *supra* notes 89-275 and accompanying text.

cooperation of many municipalities simultaneously if solutions to these issues are to be found.³⁶⁵ One means of addressing such issues is through intermunicipal cooperation whereby counties play an active role in the planning and regulation of land uses.

A. *Intermunicipal Cooperation Generally*

Over the last thirty-six years, the State legislature has enacted several statutes to promote local cooperation concerning land use planning and regulation. Together these statutes provide a flexible framework of authority that encourages municipalities to enter into intermunicipal agreements to enhance their planning and regulating efforts.

In 1960, the New York Legislature enacted Article 5-G of the General Municipal Law.³⁶⁶ This statute provides municipal corporations³⁶⁷ with express statutory authority to enter into, amend, cancel and terminate intermunicipal agreements for the performance of their respective functions, powers and duties.³⁶⁸ These compacts may establish that functions be carried out jointly by all participating municipal corporations (joint agreements) or specify that one municipal corporation act for the benefit of all (service agreements).³⁶⁹ Additionally, each party must have the authority to perform independently that particular function which is the subject of the agreement.³⁷⁰ For instance, a town and village can cooperate to restore a historic covered bridge because both municipalities have the authority to undertake the restoration individually.³⁷¹ However, two municipalities may not adopt a single zoning ordinance since neither has the power to regulate land uses beyond its jurisdiction.³⁷² On

365. See *Governance in Erie County — A Foundation for Understanding and Action, Service Profile #1: Planning* (visited Sept. 30, 1996) <http://www.arch.buffalo.edu/~govern/gov_report/chapter_8_planning.html>.

366. See N.Y. GEN. MUN. LAW § 119-o (McKinney 1986).

367. Municipal corporations are defined as “a county outside of the city of New York, a city, a town, a village, a board of cooperative educational services, fire district or a school district.” *Id.* § 119-n(a) (McKinney Supp. 1997).

368. See *id.* § 119-o(1) (McKinney 1986).

369. See NEW YORK STATE DEPARTMENT OF STATE, LOCAL GOVERNMENTAL TECHNICAL SERIES: INTERGOVERNMENTAL COOPERATION, 5 (on file with author).

370. See N.Y. GEN. MUN. LAW § 119-o(1).

371. See 82 Op. N.Y. Comp. 143 (1982).

372. See 84 Op. N.Y. Comp. 50 (1984).

the other hand, two municipalities may adopt identical zoning ordinances and then enter into an intermunicipal agreement for the provision of a joint enforcement officer.³⁷³

Whether joint or service compacts, all intermunicipal agreements may include a variety of provisions to carry out an agreement.³⁷⁴ Section 119-o(2) of the General Municipal Law stipulates that such agreements may include provisions for the apportionment of costs and/or revenues associated with the agreement, accounting and custody of funds, personnel matters, acquisition, disposition, or control of real or personal property, claims for federal or state aid, apportionment of liability, periodic review of the agreement, dispute resolution, and the like.³⁷⁵

Intermunicipal agreements may be created for a variety of reasons. For example, a county may enter into a cooperative agreement to maintain a joint payroll account and prepare payroll checks for seven towns within the county,³⁷⁶ or two villages may agree to provide joint police services to assist one another in law enforcement.³⁷⁷ This authority to create intermunicipal agreements has also been used for cooperation concerning land use planning. For example, in 1981, the towns of Florence, Montague, Pinckney, Turin, and West Turin, and the Village of Turin entered into an intermunicipal agreement to create a joint zoning board of appeals.³⁷⁸ Similarly, this authority has been used to designate a single building inspector for contiguous municipalities.³⁷⁹

In 1992, the State Legislature enacted additional legislation to encourage further intergovernmental cooperation concerning comprehensive planning and land use regulation.³⁸⁰ This enactment responded to a statewide concern that individ-

373. See generally Joseph Stinson and Jeffrey LeJava, *Utilizing Intermunicipal Agreements in Land-Use Decision Making*, Land Use Law Center (July 1996) <<http://joshua.law.pace.edu:80/landuse/imas.html>>.

374. See N.Y. GEN. MUN. LAW § 119-o(2) (McKinney 1986).

375. See *id.*

376. See Op. N.Y. Comp. 244-A (1979).

377. See Informal Op. N.Y. Att'y Gen. 183-88 (1983).

378. See NEW YORK STATE DEPARTMENT OF STATE, CONSOLIDATION CASE STUDIES: ZONING BOARD SERVES SIX LOCAL GOVERNMENTS, 1 (on file with author).

379. See Op. N.Y. Comp. 50 (1984).

380. See LEGISLATIVE COMMISSION ON RURAL RESOURCES, Memorandum of Assemblyman Bill Mayer in support of Assembly Bill No. A.9805-A (May 5, 1992). The amendments are found at N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1997),

ual municipal actions to enhance and protect local communities through municipal land use authority were ineffective.³⁸¹ The General City Law, Town Law, and Village Law were amended to provide express statutory authority for municipalities to enter into intermunicipal agreements for the preparation of comprehensive plans, and the enactment and administration of land use regulations.³⁸² Furthermore, although not exhaustive, these amendments illustrate various intergovernmental land use compacts permissible under New York law, including the authority to create intermunicipal planning boards, zoning boards of appeals, comprehensive plans, land use regulations, intermunicipal overlay districts and programs for land use administration and enforcement.³⁸³

Although these statutes provided a general structure for initiating cooperative land use planning efforts, they failed to create a mechanism through which municipalities faced with limited financial resources could engage in professional planning activities. Municipal officials recognized that without such a mechanism cooperative planning efforts would be difficult.³⁸⁴ As a result, the State Legislature amended its 1992 enactments in 1993.³⁸⁵

Through the 1993 amendments, the State Legislature modified General Municipal Law section 119-u, General City Law section 20-g, Town Law section 284, Village Law section 7-741 and County Law section 239-d. These amendments allow municipalities to enter into intermunicipal agreements with counties to receive professional planning services through county planning agencies.³⁸⁶ In this way, municipalities lacking the financial and human resources to engage in professional plan-

N.Y. TOWN LAW § 284 (McKinney Supp. 1997) and N.Y. VILLAGE LAW § 7-741 (McKinney 1995).

381. See LEGISLATIVE COMMISSION ON RURAL RESOURCES, Memorandum of Assemblyman Bill Mayer in support of Assembly Bill No. A.9805-A (May 5, 1992).

382. See N.Y. GEN. CITY LAW § 20-g(1) (McKinney Supp. 1997); N.Y. TOWN LAW § 284(1) (McKinney Supp. 1997); N.Y. VILLAGE LAW § 7-741(1) (McKinney 1995).

383. See N.Y. GEN. CITY LAW § 20-g(4); N.Y. TOWN LAW § 284(4); N.Y. VILLAGE LAW § 7-741(4).

384. See LEGISLATIVE COMMISSION ON RURAL RESOURCES, Memorandum in support of Senate Bill No. S.3203-B and Assembly Bill No. A.5476-B, 2 (1992).

385. See July 6, 1993, Ch. 242, § 119-u, N.Y. Laws 645 (McKinney).

386. See *id.*

ning activities can receive assistance from county planning agencies to carry out their land use functions. Pursuant to these amendments, a county planning agency can act in an advisory capacity, assist in the preparation of a comprehensive plan, assist in the preparation of land use regulations, and participate in the formation of individual or joint administrative bodies.³⁸⁷ Generally, the 1993 amendments codified the planning assistance that many county planning departments were already undertaking.³⁸⁸ However, the codification specifically illustrates the capacity for county involvement. Moreover, by providing examples of county planning assistance, the State Legislature has demonstrated the importance it places on county involvement in the state land use scheme.

B. *Examples of County-Municipal Intermunicipal Agreements*

1. *Walnut Creek Water Resource Development Agreement*

In December of 1992, Chautauqua County and the Village of Forestville entered into an intermunicipal agreement whereby the County Health Department's Division of Environmental Health Services, would monitor flow and water quality of Walnut Creek on behalf of the Village.³⁸⁹ The Village sought to utilize the hydrologic expertise of the County because the Village had experienced severe water quantity shortages and water quality problems at Walnut Creek.³⁹⁰ Under the agreement, the Division of Environmental Health Services was to "conduct stream gauging at various locations along Walnut Creek during low flows to evaluate overall quantity of water available from the watershed."³⁹¹ Additionally, the Division of Environmental Health Services was to investigate the possibility of deepening springs feeding Walnut Creek.³⁹² This investigation would have included the excavation of a 10 to 15 foot test hole at Hall Spring to evaluate lithology, ground water level

387. See N.Y. GEN. MUN. LAW § 119-u(2)(b) (McKinney Supp. 1996).

388. See Phillips, *supra* note 131.

389. See Walnut Creek Water Resource Development Agreement, 1-2 (December 1992) (on file with author).

390. See *id.* at 1.

391. *Id.* at 1-2.

392. See *id.* at 2.

and ground water recovery.³⁹³ The Division would have also drilled and installed a series of piezometers to collect sediment samples and monitor water levels.³⁹⁴

2. *Horizons Waterfront Commission Intermunicipal Cooperation Agreement*

In 1989, one county, three cities, four towns and the Niagara Frontier Transportation Authority formed the Horizons Waterfront Commission, a public benefit corporation and subsidiary of the New York State Urban Development Corporation.³⁹⁵ The Commission, which is now defunct,³⁹⁶ was created to develop and revitalize 90 miles of Erie County shoreline.³⁹⁷ The communities to the agreement³⁹⁸ acknowledged that waterfront revitalization was essential to the region, and would create unparalleled opportunities for recreation, housing, transportation, and commercial and industrial uses.³⁹⁹ To realize these opportunities the communities recognized the necessity for a cooperative, unified planning and implementation process.⁴⁰⁰

The Commission itself was comprised of officials from all levels of government.⁴⁰¹ There were 15 voting members and 18 ex-Officio members of the Commission.⁴⁰² Voting members were drawn from each level of government with seven members appointed by the Erie County executive (one from each of the seven municipalities), three members appointed by the Buffalo City mayor, two members appointed by the Governor of New

393. *See id.*

394. *See* Walnut Creek Water Resource Development Agreement, at 2 (December 1992).

395. *See* Horizons Waterfront Commission Intermunicipal Cooperation Agreement, 1 (1989) [hereinafter Horizons] (on file with author).

396. As a state agency, funding for the Horizons Waterfront Commission was cut by the Pataki Administration in early 1995. *See* Jon R. Sorensen, *Pataki to Scrap Horizons Panel, New Development Office Will Handle Waterfront*, BUFFALO NEWS, Mar. 3, 1995, at A1, available in 1995 WL 5449994.

397. *See* Horizons, *supra* note 395, at 1.

398. Parties to the agreement are the towns of Brant, Evans, Hamburg, and Tonawanda, the cities of Buffalo, Tonawanda and Lackawanna, Erie County and the Niagara Frontier Transportation Authority. *See id.*

399. *See id.*

400. *See id.*

401. *See id.* at 2.

402. *See* Horizons, *supra* note 395, at 2.

York State, and one member each appointed by the Buffalo Common Council, the Erie County Legislature, and the Niagara Frontier Transportation Authority.⁴⁰³ Nonvoting members consisted of representatives from the economic agencies of each of the parties to the agreement, as well as other county agencies, business groups, state agencies and the federal government.⁴⁰⁴

Under the agreement, the Commission was given significant authority to carry out its mandate. The Commission had the power to develop, adopt and update a single regional master plan for Erie County's waterfront, the Horizons Waterfront Master Plan (HWMP).⁴⁰⁵ After adoption, the HWMP was to be given full legal force and effect by the parties.⁴⁰⁶ This included "making changes to any official maps, zoning maps, and comprehensive plans and amending all zoning, development and land use laws and ordinances accordingly."⁴⁰⁷ The parties were also to repeal any inconsistent or contrary provisions of their respective laws.⁴⁰⁸ In addition to its planning authority, the Commission had the power to "receive and distribute state, federal and other funds to carry out waterfront development projects."⁴⁰⁹ It also had the authority to coordinate the activities of all governmental entities, as well as "coordinate and focus private investment and development efforts along the Erie County waterfront."⁴¹⁰ Furthermore, as a subsidiary of the New York State Urban Development Corporation, the Commission had the power of eminent domain and the ability to bypass local

403. *See id.*

404. *See id.*

405. *See id.* at 2-3.

406. *Id.* at 4. Section 5 on page 4 provides in part:

In addition, the Parties agree that, to the extent each deems appropriate, in the conduct of regulating land use and development of all types within their respective jurisdictions, and in the conduct of their proprietary affairs, including the improvements of infrastructure, the development of public facilities, the disposal of publicly held lands, and the promulgation of renewal plans, and in their contracts and agreements with others, pledge to take [whatever] action is necessary pursuant to local laws, ordinances, rules and regulations of the Parties, and pursuant to state statutes in order to give the HWMP and any subsequent amendments thereto *full legal effect and force*. *See Horizons, supra* note 395, at 4 (emphasis added).

407. *Id.* at 3.

408. *See id.*

409. *Id.* at 1.

410. *Id.* at 2.

zoning laws.⁴¹¹ These last two powers gave the Commission significant authority to carry out projects which could not be effectively and appropriately carried out by a local government.

Erie County played an important role in the Commission since its foundation. To begin with, Erie County Executive, Dennis Gorski, was the impetus behind the Commission's creation.⁴¹² Erie County was also to incorporate the HWMP into a partial county official map.⁴¹³ Through this incorporation the lands set aside for public facilities and other projects devised by the Commission would no longer be available for private development unless a use variance was granted by the zoning board of appeals of the appropriate municipality.⁴¹⁴ Most importantly, in exercising its review authority under sections 239(g) through 239(n) of the General Municipal Law, the County was to assure that all such matters coming before the County were in conformity with the HWMP.⁴¹⁵ In this manner, the County was given significant responsibility to ensure the integrity of the HWMP. If the municipalities could simply disregard the HWMP, its purpose and that of the Commission would be thwarted.

During its existence from 1989 to 1995, the Commission's work focused primarily on planning.⁴¹⁶ In addition to devising and adopting the HWMP, the Commission undertook a variety of planning initiatives throughout the region. For example, in 1992, the Commission unveiled a 155,000-square foot Buffalo Harbor Center which would serve as one of the region's attractions.⁴¹⁷ The Center would house a Great Lakes museum, aqua-

411. See Greg Steinmetz, *A State Panel that Gives Locals Power*, *NEWSDAY* (Nassau and Suffolk edition), Monday, Mar. 4, 1991, at 32, available at 1991 WL 3996262.

412. See Editorial, *Foundation is in Place; Now Get Waterfront Moving With Horizons Out, City Must try to Deliver*, *BUFFALO NEWS*, Oct. 1, 1995, at F8, available at 1995 WL 5504575.

413. See Horizons, *supra* note 395, at 4.

414. See *id.*

415. See *id.*

416. See James Fink, *Horizons' Waterfront Includes Aquarium and Theater*, *BUSINESS FIRST-BUFFALO*, Nov. 23, 1992, at section 1, available in 1992 WL 3124393. See also Mike Vogel, *Horizons Planning \$1.2 Million Project for Hamburg Shoreline*, *Buffalo News*, Sept. 24, 1992, available at 1992 WL 3659663.

417. See Fink, *supra* note 416.

rium, planetarium and an Imax theater.⁴¹⁸ The Commission also planned less capital intensive projects such as a waterfront promenade in Hamburg.⁴¹⁹ Additionally, the Commission sought to increase public access to the region's waterways. One of its first accomplishments was the revitalization and reopening of Lake Erie Beach in the Town of Evans.⁴²⁰ However, as progress was being made in waterfront redevelopment, funding provided by the state was cut.⁴²¹ The Commission's work was to be carried on as part of the functions of a new economic development office for Western New York State.⁴²²

3. *Tompkins County-Town of Covert, Seneca County Intermunicipal Agreement*

Intermunicipal cooperation may also be utilized by a county to address regional traffic concerns. In October of 1995, Tompkins County and the Town of Covert, Seneca County entered into an intermunicipal agreement where Tompkins County would extend TOMTRAN public transportation services to Seneca.⁴²³ In exchange for providing public transportation to Seneca residents to and from the City of Ithaca, Tompkins County has been able to reduce the traffic congestion through the Route 96 bridge construction area.

VI. Expanding the County Role

Although intermunicipal cooperation between counties and municipalities may provide for slightly more consideration of interjurisdictional land use issues, without augmenting existing law, both intercommunity impacts and county-wide issues will not be properly addressed. Unfortunately, use of intermunicipal agreements remains voluntary and their utiliza-

418. *See id.*

419. *See id.*

420. *See* Editorial, *Look, a Beach! Horizons and County Off to a Good Start and Don't Let City's Beach Languish, Either*, BUFFALO NEWS, May 28, 1992, at B2, available in 1992 WL 3636941.

421. *See* Sorensen, *supra* note 396.

422. *See id.*

423. *See* Resolution No. 224 - *Authorizing an Intermunicipal Agreement Between Tompkins County and Town of Covert - TOMTRAN Public Transportation Service* (visited Jan. 26, 1997) <<http://www.co.tompkins.ny.us/bor/resolutions/r224-95.html>>.

tion in land use policy has not been extensive.⁴²⁴ Thus, where local governments do not desire to cooperate with neighboring communities or the county, reducing the regional impact of improper land use decisions will remain elusive. This was clearly illustrated in *Town of Bedford v. Village of Mount Kisco*.⁴²⁵ However, by expanding the county's review authority, interjurisdictional impacts of land use decisions will be addressed.

Presently, under General Municipal Law sections 239-m and 239-n, county planning boards act purely in an advisory fashion.⁴²⁶ Although overriding a county planning board determination requires a majority plus one vote of the referring municipal agency, there generally seems to be little difficulty in obtaining such a vote. To ensure that intercommunity impacts are addressed, a county planning board could have final review authority under sections 239-m and 239-n. Referring municipal agencies would be required to forward those proposed projects presently reviewable under section 239-m(3)(b) and 239-n(3)(a) to a county planning board. The board would then review the project for inter-community impacts pursuant to section 239-l⁴²⁷ and for consistency with the comprehensive plans of the adjoining municipalities. The board would then either approve, approve with modification, or disapprove the project. If the board believed that the proposed project's impacts required mitigation, it could so stipulate in written recommendations to the municipal agency. The municipal agency would then be required to ensure that the project sponsor implement the mitigation measures. Through this process, the county planning board would be able to coordinate local land use decisions while simultaneously reviewing projects for consistency with county needs.

Providing a county with this substantive review authority requires amending the General Municipal Law. Where the State Legislature has believed it necessary to delegate land use authority to regional bodies to address state-wide concerns it

424. See Stinson & LeJava, *supra* note 373.

425. 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973).

426. See *supra* notes 135-175 and accompanying text.

427. For factors examined by a county planning board, see *supra* note 142 and accompanying text.

has done so. For example, in 1971, the State Legislature established the Adirondack Park Agency⁴²⁸ as an independent state agency to conserve, protect, and develop nearly six million acres of land.⁴²⁹ It shares control over land use with local governments.⁴³⁰ Local governments retain jurisdiction over local decisions,⁴³¹ while the Adirondack Park Agency has authority over projects of park-wide significance.⁴³² Similarly, in 1993 the Long Island Pine Barrens Protection Act⁴³³ was adopted creating a Central Pine Barrens Joint Planning and Policy Commission.⁴³⁴ The Commission has adopted a regional comprehensive plan which balances conservation and development within the Central Pine Barrens region.⁴³⁵ Municipal comprehensive plans are required to conform with the regional comprehensive plan,⁴³⁶ and revisions of all local plans to satisfy the consistency requirement must be approved by the Commission.⁴³⁷ Because the present state land use system fails to address inter-community impacts and is unable to devise solutions to regional land use issues, the need for county review of particular projects may be deemed an area of state-wide concern requiring legislative intervention.

Understandably, municipal officials would view this change in the law as usurping their statutorily delegated land use authority. However, municipal officials would still retain most of their substantive power and have the ability to review county planning board determinations in a court of law. First, only those projects presently subject to county review would require referral to the county planning board. The proposed project must fit within the scope of either section 239-m(3)(B) or section 239-n(3)(A). Second, as under section 239-m(3)(C) and section 239-n(3)(B), counties would retain the authority to reach agreements with municipalities in their jurisdiction to provide that

428. Act of June 25, 1971, ch. 706, N.Y. Laws 1133 (McKinney).

429. See Salkin, *supra* note 3, at 531.

430. See *id.* at 531; N.Y. EXEC. LAW § 808 (McKinney 1996).

431. See N.Y. EXEC. LAW § 801.

432. See *id.* § 804.

433. Act of July 13, 1993, ch. 262, N.Y. Laws 735 (McKinney); Act of July 13, 1993, ch. 263, N.Y. Laws 757 (McKinney).

434. See Act of July 13, 1993, ch. 262, N.Y. Laws 735 (McKinney).

435. See N.Y. ENVTL. CONSERV. LAW § 57-0119 (McKinney 1997).

436. See *id.* § 57-0123(1).

437. See *id.*

certain projects are of local concern and thus not subject to referral. Third, because a county planning board determination would be a final administrative action, it would be subject to judicial review pursuant to Article 78 of the New York Civil Practice Law and Rules. Thus, if a municipality believed that a county determination was arbitrary or capricious, or not within the scope of the law, such a determination could be reviewed and overturned if necessary. Fourth, municipalities which strongly object to such county review, may, if they have not already done so, adopt a county charter and provide final review authority to municipal agencies. For example, three months after the adoption of General Municipal Law sections 239-m and 239-n in 1960,⁴³⁸ Westchester County amended its county charter to "limit the negative aspects of the effects of a county comment on local action."⁴³⁹ Given these factors, municipalities would not be completely hand tied by amending the General Municipal Law.

In addition to addressing intercommunity impacts, providing the county with final review authority will also allow the county to adopt regional solutions to intermunicipal problems. As illustrated in the wetland example discussed in the introduction, a single municipality may easily thwart the protection measures implemented by adjoining municipalities by not accounting for the intercommunity impacts of proposed projects within its jurisdiction. However, by giving the county final review authority, the county planning board could influence one municipality to coordinate its development efforts with the preservation measures of the adjoining municipalities. The municipalities could then utilize the county's professional planning staff to devise a regional plan to allow sustainable growth in the wetland watershed area while also protecting the valuable natural resource.

VII. Conclusion

Although amending the General Municipal Law is necessary to provide county planning boards with more substantive review authority, the present political climate will make such

438. See Eschweiler, *supra* note 349, at 633-36.

439. See *id.* at 635.

revision difficult. Municipal officials concerned with the growth and development of their respective municipalities view their statutorily delegated land use authority as the tool to achieve desired growth. Requiring final county review of local decisions in this area conflicts head on with the control presently exercised by municipal officials. Any attempt to shift this authority away from local governments will be vehemently opposed. To alter the political climate, local officials will need to be educated concerning the intercommunity impact of their land use decisions, and local citizens must understand the need for greater county involvement in land use decision-making. Until this political climate begins to change, county planning boards and county planning departments must continue in their assistance role and promote the use of intermunicipal agreements to achieve coordination and cooperation among neighboring municipalities.

*Jeff LeJava**

* The author would like to thank his family for their continued support and love throughout his academic career, and would also like to thank Professor John Nolon for his insight and help with this comment. Thank you also to Michael Hahn and his Law Review group for their hard work and patience while editing this comment. Finally, thank you to Emily whose love and support over the last year and a half made this article possible.