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The Land Use Recodification Project

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I. Introduction

The genesis of the Land Use Recodification Project took place about five years ago, when the Legislative Commission on Rural Resources held a series of local government symposia at various places in the state.¹ A number of issues were presented to local government officials, whose input was sought as to what they considered their most pressing problems. As a result, one fact became clear. Regardless of its position of leadership and importance among the states, and its appellation as The Empire State, New York State was near the very bottom in any ranking dealing with land use issues.

Quite simply, at the state level, New York was paying absolutely no attention to planning and zoning issues, comprehensive planning, regional planning, or any other land use problems or solutions² which were a major part of the agendas of most other

* The Land Use Reform Symposium is dedicated to Mr. Coon, who was in the process of writing this article at the time of his death. Mr. Damsky and Dr. Rosen assisted in completing the article so that it could be included in this symposium issue.

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1. NEW YORK STATE LEGISLATIVE COMMISSION ON RURAL RESOURCES, SUMMARY OF ISSUE TOPICS FROM REGIONAL LAND USE ROUNDTABLE MEETINGS, APRIL-OCTOBER 1990 (Dec. 14, 1990) (supported by The State Advisory Committee on Land Use Statutes) [hereinafter ROUNDTABLE MEETINGS, 1990].

2. John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 370-73 (1993). Another commentator has observed that: New York's zoning enabling legislation has remained virtually unchanged since their [sic] adoption in 1926. While a number of amendments have been added, the enabling statutes of the Town Law and Village Law have changed little since the

states.³ Nor had any attention been paid to these issues for a considerable period of time. The only state agency that had been dedicated to these issues, the Office of Planning Coordination,⁴ had, in the early 1970's, the temerity to introduce before the State Legislature (for that time, although it seems not at all radical today) a sweeping recodification of zoning and planning laws. In many instances, these proposed laws advocated shifting the land use authority, in both planning and zoning, from local governments to a higher level, such as the county, or, in some instances, the state.⁵

This proposed legislation was based on a planning study known as Study Document # 4. Study Document # 4 was really meant to be a study document, not an immediate effort to adopt sweeping changes in the planning and zoning statutes. Even so, it drew a swift and vocal reaction from local governments all over the state. In what was viewed by many as a negative response, the State Legislature abolished the Office of Planning Coordination.⁶ The agency was then replaced, with greatly reduced staff and funding, by the Office of Planning Services (the "OPS"),⁷ but the stigma of Study Document # 4 remained. In 1975, this successor agency was also abolished and was not

first statutes were adopted in 1924, utilizing the Standard Zoning Enabling Act.

Obviously, such antiquated enabling statutes do not provide adequate mechanisms for dealing with the complex planning and development problems of today.

Terry Rice, *Statutory Changes Provide for Incentive Zoning*, N.Y. L.J., Nov. 13, 1991, at 40.

3. Douglas R. Porter, *Do State Growth Management Acts Make a Difference? Local Growth Management Measures Under Different State Growth Policies*, 24 LOY. L.A. L. REV. 1015 (1991). States that had adopted growth management statutes were: Florida (FLA. STAT. ANN. §§ 163, 186, 187, 380 (West 1990)); Georgia (GA. CODE ANN. §§ 12-2, 36-70, 45-12, 50-8 (Harrison 1973)); Hawaii (HAW. REV. STAT. §§ 226-1 to -107 (1988)); Maine (ME. REV. STAT. ANN. tit. 30, § 4961 (West 1978)); New Jersey (N.J. STAT. ANN. § 13:18A-8 (West 1991)); Oregon (OR. REV. STAT. § 197 (1985)); Rhode Island (R.I. GEN. LAWS § 45-22 (1988)); Vermont (VT. STAT. ANN. tit. 32, § 4300 (1981)); and Washington (WASH. REV. CODE ANN. § 36.70.350 (Supp. 1990)). See also Porter, *supra*, at 1017 nn.7, 9; Daniel J. Curtin, Jr. & Ann R. Danforth, *Looking Beyond the City Limits: Regional Approaches to the Growth Crisis*, 22 URB. LAW. 701, 706-10 (1990) (discussing regional approaches to growth management in California, Oregon, Minnesota and New Jersey).

4. See Act of June 7, 1966, ch. 528, sec. 1, § 547, 1966 N.Y. Laws 630 (repealed 1971).

5. See E. F. Roberts, *The New Frontier*, 31 SYRACUSE L. REV. 685, 694-96 (1980).

6. Act of April 2, 1971, ch. 75, sec. 11, 1971 N.Y. Laws 115, 121; see also Roberts, *supra* note 5, at 699.

7. Act of April 2, 1971, ch. 75, sec. 1, 1971 N.Y. Laws 115, 115-19 (repealed 1975).

replaced.⁸

In 1975, a few survivors of these planning agencies, together with survivors of other local government agencies which had also fallen to the budget-cutting axe, were brought into the Department of State, and formed a small cadre of local government experts, including planning and zoning, known as the Division of Local Government Services.⁹ Since it was formed, this small group has literally kept advisory services to local governments alive, by answering inquiries, conducting seminars and appearing at local government conferences. Thus, a handful of people are performing the function of entire agencies in advising local government officials of proper zoning procedures, planning devices and other land use matters.

It was this background, and the realization that the state of New York was paying absolutely no attention to zoning or planning at any level of government, that led Senator Charles D. Cook, the Chairman of the Legislative Commission on Rural Resources (the "Commission"), to investigate the possibilities for bringing New York's antiquated planning and zoning statutes into the present century.¹⁰ The Commission is a bipartisan panel, composed of state Senators and Assemblymen.¹¹ In the past, the Commission had concentrated its efforts on rural education and health care.¹² Under the leadership of Executive Director Ronald C. Brach and with the blessing of the entire Commission, the Recodification Project began its work in 1989.¹³

A special counsel, whose career in state government had mostly been confined to planning and zoning issues,¹⁴ was appointed to work with the Counsel of the Commission.¹⁵ The next step was the appointment of an advisory committee.¹⁶ As is

8. Act of July 24, 1975, ch. 464, sec. 16, 1975 N.Y. Laws 669, 685.

9. *Id.* sec. 54, 57, 1975 N.Y. Laws 669, 700-01.

10. Rice, *supra* note 2, at 40.

11. *Id.*

12. *Id.*

13. ROUNDTABLE MEETINGS, 1990, *supra* note 1, at i, iv.

14. The special counsel had been largely associated with the series of state agencies that had been abolished by the State Legislature. See *supra* notes 6-8 and accompanying text.

15. The Counsel of the Commission had served for a number of years as Counsel to the Conference of Mayors and was a recognized expert on local government law.

16. ROUNDTABLE MEETINGS, 1990, *supra* note 1, at i.

known by anyone who has ever dealt with a committee, much less formed one, the ideal is to have a dedicated and knowledgeable group which is small enough to function while at the same time large enough to be representative. The Commission started with an advisory committee of eleven members which soon grew to forty-three members. Realizing the impossibility of working effectively with either number, an advisory committee of twenty-five was finally agreed upon. This group, the State Land Use Advisory Committee (the "Advisory Committee"), which has proven to be extraordinarily effective,¹⁷ is representative of literally all the players in what has been called "The Zoning Game."¹⁸ State agencies such as the Department of State, the Department of Environmental Conservation, the Department of Economic Development, and the Office of Rural Affairs are represented, as are local government groups such as the Association of Towns, the Conference of Mayors, county planning offices and the Temporary Commission on Tug Hill.¹⁹ Also represented are public and private interest groups such as the American Farmland Trust, the Preservation League of New York State, the American Planning Association, the New York Planning Federation, the New York State Builders Association and the New York State Association of Land Surveyors.²⁰ The Government Law Center of Albany Law School and the State University of New York at Albany are active participants, as are a number of

17. Charles D. Cook, *Legislative Proposals Weighed by Commission*, N.Y.L.J., Nov. 17, 1992, at 2. State Senator Cook is the Chairman of the Legislative Commission on Rural Resources.

18. See RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 6-7 (1966); RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED*, ch. 4 (1985). The "zoning game" refers to the tensions between parties with conflicting land use interests, such as between local governments zoning through their police powers and citizens attempting to zone through initiative or referendum. David G. Andersen, Comment, *Urban Blight Meets Municipal Manifest Destiny: Zoning at the Ballot Box, the Regional Welfare, and Transferable Development Rights*, 85 NW. U. L. REV. 519, 520-22 (1991). Initiatives allow citizens to directly propose and enact ordinances and other legislation. *Id.* at 519 n.5. Referendums allow citizens to veto measures adopted by legislative bodies. *Id.* at 519 n.6.

19. NEW YORK STATE LEGISLATIVE COMMISSION ON RURAL RESOURCES, *RESTRUCTURING NEW YORK STATE COMMUNITY PLANNING & LAND DEVELOPMENT STATUTES: 1993 LEGISLATIVE PROPOSALS* 2 (Apr. 1993) [hereinafter 1993 Legislative Proposals].

20. *Id.*

private land use attorneys and planners.²¹

The remarkable thing is the harmonious, cooperative functioning of the Advisory Committee from its first meeting to the present time. If a personal note may be interjected here, we perceived at the outset that the recodification effort, besides affording the chance to finally do something about New York State's antiquated land use laws, also afforded a chance to write a book. What we had in mind was something along the lines of Governor Mario Cuomo's *Forest Hills Diary*,²² which gave a day-to-day account of the problems, divisiveness, threats and hostility engendered by the opposing forces engaged in the construction of a low income housing project. Surely, we thought, a potentially explosive mix of developers, environmentalists, land use planners, local government groups, attorneys, state agencies' legislative staffers and others would certainly give rise to the same hostilities, late night phone calls and veiled threats, and perhaps open warfare would surface.

Suffice it to say that none of the above has ever happened. At the end of the first four monthly meetings, we had much less than one full page of notes, and that personal part of the project was reluctantly, but thankfully, abandoned. At all times the spirit has been one of mutual interest and concern, and above all, cooperation. Of course many of the proposals presented to the Advisory Committee have brought forth opposing views, either on a land use or institutional basis, but at all times a spirit of compromise and cooperation has prevailed.

One more important activity should be briefly discussed. Early on in the Recodification Project, the Commission initiated a series of Roundtables, which have proven invaluable.²³ These Roundtables have been held in every part of the state, from Nassau and Suffolk Counties in the east to Erie and Monroe Counties in the west; from the Adirondacks in the north to counties in the Southern Tier.²⁴ These Roundtables, to which

21. *Id.*

22. MARIO M. CUOMO, *FOREST HILLS DIARY: THE CRISIS OF LOW-INCOME HOUSING* (1974).

23. *See, e.g.*, *ROUNDTABLE MEETINGS*, 1990, *supra* note 1, at i.

24. *Id.* at iii. For example, in 1990 meetings were held at Binghamton, Watertown, Cooperstown, Hudson, Waterloo, Batavia, Lake George, White Plains, Huntington and Lake Placid. *Id.*

county and local elected and appointed officials are invited,²⁵ together with land use planners, surveyors and attorneys, represent an interesting (some say startling) innovation in state-local relations. Rather than the usual approach of "the people from the State are here to help you," Commission members and staff, together with Advisory Committee members, attend these meetings with the announced intention of *listening to* the problems and opinions of the attendees, rather than *talking at* the audience to tell what the State perceives as local problems and how the State intends to solve these problems.

It has been found, quite logically, that this approach, innovative though it may be, has given the Commission and the Advisory Committee tremendous input at the local government level as to exactly what land use and zoning problems exist, and the difficulties encountered in using the state enabling legislation to address these problems. The writers' conclusion that the state planning and zoning statutes are a mess becomes even more frighteningly apparent when one sees just how [badly] these statutes work at the local level or, more accurately, do not work.²⁶

II. The Mission of the Recodification Project

To narrow the mission of the Recodification Project, two papers, one addressing the problems to be faced generally²⁷ and the second more specifically,²⁸ were prepared by Commission staff, and were presented at the very first Advisory Committee meeting. These papers, meant to set the stage, outlined what the Commission believed were the basic problems with the New York planning and zoning statutes, in their language and their effects. Both the analysis and approach in the papers remain

25. *Id.* app. at iii.

26. See *infra* notes 48-55 and accompanying text.

27. NEW YORK STATE LEGISLATIVE COMMISSION ON RURAL RESOURCES, STATE ADVISORY COMMITTEE ON LAND USE STATUTES: BACKGROUND INFORMATION FOR REGIONAL LAND USE ROUNDTABLES (material organized by Sheldon Damsky) (hereinafter BACKGROUND INFORMATION).

28. NEW YORK STATE LEGISLATIVE COMMISSION ON RURAL RESOURCES, STATE ADVISORY COMMITTEE ON LAND USE STATUTES, WORKING PAPER #3 - FUNCTIONS, POWERS AND DUTIES OF THE ZONING BOARD OF APPEALS (1989) (material organized by Sheldon Damsky) [hereinafter WORKING PAPER].

pertinent. Therefore, parts II.A. and II.B. summarize these papers. As will be set forth later in this article, a number of the problems initially presented have been solved by new legislation.²⁹ Unfortunately, other problems remain.

A. *General Problems to be Faced*

In 1989, as now, zoning was so beset with problems, at all levels of government, that it was difficult to know where to start in listing them, much less in offering solutions.³⁰ In the first paper, the approach taken was to briefly discuss two major concerns that permeate land use controls,³¹ then to go to more specific concerns that impact local zoning and planning practices.³² For proper perspective, two major problems must be discussed first: (1) years of neglect of land use and planning concerns and (2) the basic concept of zoning. Without a working resolution of these fundamental problems, it may be difficult, if not impossible, to address local issues.

1. *Major Concerns*

First, except for the effort that this Advisory Committee and the Commission embarked upon, there had been absolutely no attention given to planning and land use practices at the state level for at least fifteen years prior to 1989.³³ Neither the executive nor legislative branches had even paid lip service to the growing problems caused by a total absence of planning; nor had they recognized the importance of coordinated land use, health, environmental and transportation planning.³⁴ Even in a strong home rule state,³⁵ local governments cannot act in a vac-

29. See *infra* part IV.

30. BACKGROUND INFORMATION, *supra* note 27, at 1. See also State-wide opinion survey of stakeholders in New York land use system, conducted by McKinsey & Co., Inc. in the first quarter of 1993, cited in Nolon, *supra* note 2, at 413 n.349.

31. BACKGROUND INFORMATION, *supra* note 27, at 1.

32. *Id.*

33. *Id.*

34. *Id.*

35. Under New York's Municipal Home Rule Law, local governments are authorized to adopt and amend local laws relating to real property, provided that those laws are not inconsistent with the state constitution or general state statutes. N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1969). See generally Jill Devine, Note, *Golden v. Planning Board of Ramapo Revisited: Old Lessons for New Problems*, 12 PACE L. REV. 107, 125-32

uum like independent principalities, with no thought of the overall effect of their actions on others, or of the effect of others' actions on them.³⁶

Second, as in 1989, it is absolutely essential that the basic concept of zoning be reexamined.³⁷ There is a trend to place an increasing number of problems at zoning's doorstep for solution, when in actuality they perhaps should not be there at all.³⁸ Such problems may, in fact, confuse or weaken traditional zoning.

For example, there is a great and ever-increasing need for "affordable" housing: housing for the elderly, housing for those seeking their start in life, housing for low and moderate income families and singles, and housing for the homeless.³⁹ No one in our society disputes these needs, but the overriding question before us is — is it a function, or purpose, of zoning to meet these needs? Put another way, is zoning a mechanism whereby various uses of land may be brought into harmony with one another, or is it a social engineering mechanism whereby socio-economic dilemmas are addressed?⁴⁰

Another major problem is that in many instances modern society and traditional zoning do not blend harmoniously.⁴¹ It is axiomatic that if a land use cannot be, or is not adequately de-

(1992) (discussing New York's strong home rule tradition and contrasting it with the state-wide land use schemes of other states, including Florida, Oregon, Hawaii and Maine).

36. BACKGROUND INFORMATION, *supra* note 27, at 1.

37. *Id.* See also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding the constitutionality of a town ordinance "establishing a comprehensive zoning plan for regulating and restricting the location" of various classes of commercial and residential buildings). Traditional zoning, where land uses are kept in sharply segregated zones, is called "Euclidean" zoning, after this case. For critiques of Euclidean Zoning, see generally ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP (Charles M. Haar & Jerold S. Kayden, eds., 1989); DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 71 (1971); 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 9.17, at 153 (3d ed. 1986); Jesse Dukeminier Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 Ky. L.J. 273, 337 (1962).

38. BACKGROUND INFORMATION, *supra* note 27, at 1. See *infra* notes 39-47 and accompanying text.

39. BACKGROUND INFORMATION, *supra* note 27, at 1-2. See also John R. Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 FORDHAM URB. L.J. 383, 384 (1989).

40. BACKGROUND INFORMATION, *supra* note 27, at 2.

41. BACKGROUND INFORMATION, *supra* note 27, at 2. See generally JANE JACOBS, *THE DEATH AND LIFE OF THE GREAT AMERICAN CITIES* (1961).

fined, it cannot be effectively regulated.⁴² In the past, this matter of definition did not, for the most part, present major problems. Grocery stores sold foodstuffs; meat was purchased at a butcher shop; medicines were bought at the drug store and gasoline at a gas station. Today, however, this is not the case. Now, it is not at all unusual to pull into a gas station/convenience store and, while the oil is being checked, shop for groceries, aspirin, video tapes and flowers.⁴³

While we know that zoning may not be used to control competition,⁴⁴ how is a small town or village to react to a modern shopping center on the outskirts of town, that fills all of our needs, but at the same time drives long-established traditional stores on the main street out of business and turns a thriving downtown business district into a wasteland of empty stores and "For Rent" signs?⁴⁵

These (and of course there are more) examples illustrate the need to address basic conceptual problems that are causing increasing quandaries in land use planning and zoning regulations.⁴⁶ There are of course many other concerns, both at the state and local level, that are equally troublesome and equally important.⁴⁷

2. *State Land Use Statutes — a Need for Recodification*

Simply stated, the New York land use statutes are a mess. Since first adapted from the U.S. Department of Commerce Model in the 1930's, they have never been comprehensively reviewed.⁴⁸ At most they have been added to in a patchwork fash-

42. BACKGROUND INFORMATION, *supra* note 27, at 2.

43. *Id.*

44. See *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of North Hempstead*, 69 N.Y.2d 406, 415, 508 N.E.2d 130, 134, 515 N.Y.S.2d 418, 422 (1987) (stating that "zoning laws do not exist to insure limited business competition"). See also *Hempturn Realty Corp. v. Larkin*, 197 N.Y.S.2d 644, 647 (Sup. Ct. Nassau County 1959).

45. BACKGROUND INFORMATION, *supra* note 27, at 2. See also *Bartram v. Zoning Comm'n of Bridgeport*, 68 A.2d 308 (Conn. 1949) (discussing the impact on the downtown area of providing an outlying shopping area).

46. BACKGROUND INFORMATION, *supra* note 27, at 2.

47. *Id.*

48. *Id.* at 2-3. The Standard City Planning Enabling Act was proposed by the Department of Commerce in 1928. ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928).

ion, resulting in a lack of cohesion and in many instances limited utility.⁴⁹

For example, the land use statutes have never contained a definition section.⁵⁰ Nor have discrete sections defined terms used therein. Words and phrases that are key components to land use are not defined, and in many instances are not even mentioned. Variances, special permits, nonconforming uses, planned unit development, and a host of other important zoning tools and mechanisms are nowhere mentioned, much less defined, in state statutes.⁵¹

Other important concepts are mentioned, but in such a fashion as to obfuscate, not clarify. For example, state statutes contain two fundamental planning and zoning precepts, the "comprehensive plan"⁵² and the "master plan."⁵³ The first precept, the comprehensive plan, is treated as a nebulous concept in the statutes, with the shibboleth that zoning must be "in accordance with a comprehensive plan"⁵⁴ as its sole reference. Practitioners and local officials are left with nothing but case law to determine just what a comprehensive plan or master plan is.⁵⁵

The courts early on initiated the confusion by finding that "[i]t is easier to determine what a 'comprehensive plan' is not, than to define what it is."⁵⁶ Following this somewhat less than definitive, initial clarification, the court continued:

[I]t is not necessarily a 'master plan' such as may be drafted by a municipality before embarking on a program of capital improvements; . . . nor need it be a written plan. The comprehensive plan

49. BACKGROUND INFORMATION, *supra* note 27, at 3.

50. *Id.*

51. *Id.*

52. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

53. Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955). "[Master plan] is the term most frequently employed. 'Comprehensive plan,' 'general plan,' 'municipal plan,' 'city plan,' 'long range plan,' or just plain 'plan' are also used. But the differing nomenclature appears to have no functional significance." *Id.* at 354 n.4.

54. *Udell v. Hass*, 21 N.Y.2d 463, 468, 235 N.E.2d 897, 901, 288 N.Y.S.2d 888, 893 (1968) (quoting the phrase from the former § 177 of the Village Law of 1909, now N.Y. VILLAGE LAW § 7-704 (McKinney Supp. 1993)).

55. See *infra* notes 56-65 and accompanying text.

56. *Place v. Hack*, 34 Misc. 2d 777, 780, 230 N.Y.S.2d 583, 587 (Sup. Ct. Wayne County 1962).

in New York and most jurisdictions is neither a written document nor a 'plan' in the usual sense of that term, unless an underlying purpose to control land use for the benefit of the whole community may be regarded as such.⁵⁷

In *Udell v. Haas*,⁵⁸ the Court of Appeals emphasized the importance of the comprehensive plan without any attempt to further clarify the nature or character of exactly what the increasingly mythical beast actually is:

[I]n exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community. (*DeSena v. Gulde*, 24 A.D.2d 165, 265 N.Y.S.2d 239 (2d Dep't 1965)). Thus, the mandate of the Village Law (Sec. 177) is not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.⁵⁹

More recently, many cases have expanded upon the concept of the comprehensive plan, still without reaching any definition. In *Town of Bedford v. Village of Mount Kisco*,⁶⁰ the Court of Appeals opined that "[t]he obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan."⁶¹

Finally, another leading case added another important element to the concept or, if you prefer, to the puzzle. In *Berenson v. Town of New Castle*,⁶² which is also a leading case in the field of exclusionary zoning, the court expanded the comprehensive plan requirement by adding a two-pronged test. First, the planning board must have provided an appropriate development

57. *Id.* at 780, 230 N.Y.S.2d at 587 (citations omitted) (quoting David A. Yaffe & Herbert N. Cohen, Note, *Spot Zoning and the Comprehensive Plan*, 10 SYRACUSE L. REV. 303, 304, 305 (1959)).

58. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

59. *Id.* at 469, 235 N.E.2d at 901, 288 N.Y.S.2d at 893-94.

60. 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973).

61. *Id.* at 188, 306 N.E.2d at 159, 351 N.Y.S.2d at 136.

62. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

plan, tailored to the characteristics of its community.⁶³ Second, the plan must consider regional housing needs:

There must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met. Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality. Thus, the court in examining an ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities.⁶⁴

In *Berenson*, the Court of Appeals added two more undefined elements, "regional" and "needs"⁶⁵ to an already thoroughly undefined term, the "comprehensive plan," which cannot by any stretch of the imagination be considered as clarification.

Although it should be obvious at this point that the last thing needed is further confusion, that is unfortunately what is needed to prove the point. State statutes contain not only the comprehensive plan requirement,⁶⁶ but also that of the master plan.⁶⁷ We have seen that the comprehensive plan is at best a nebulous concept, since it need not be a written document nor

63. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680-81.

64. *Id.* at 110-11, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

65. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

66. N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1993); N.Y. TOWN LAW § 263 (McKinney 1987); N.Y. VILLAGE LAW § 7-741 (McKinney Supp. 1993). A comprehensive plan is defined as:

the materials, written and/or graphic, including, but not limited to maps, charts, studies, resolutions, reports and other descriptive material as may be appropriate, that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the [city, town or village] and which, among other things, serve as a basis for functional plans, land use regulation, infrastructure development, public and private investment.

N.Y. GEN. CITY LAW § 20-g(3)(b); N.Y. TOWN LAW § 284(3)(b) (McKinney Supp. 1993); N.Y. VILLAGE LAW § 7-741(3)(b).

67. N.Y. GEN. CITY LAW § 28-a (McKinney 1989 & Supp. 1993); N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1993); N.Y. VILLAGE LAW § 7-722 (McKinney 1973 & Supp. 1993). The parallel language in each statute reads, "[t]he planning board may prepare and change, a comprehensive master plan for the development of the entire area of the [city, town, village]" N.Y. GEN. CITY LAW § 28-a; N.Y. TOWN LAW § 272-a; N.Y. VILLAGE LAW § 7-722.

be adopted with any procedural formality. The statutory references to the "comprehensive master plan" may be more concrete as to what it should contain (primarily capital projects), but there is no indication, either in statute or judicial decision, as to its exact purpose, its relation, if any, to the comprehensive plan, or its legal force and effect. The writers freely admit that in fifty years (combined, we hasten to add) of dealing almost exclusively with planning and zoning issues, they have absolutely no idea of what a master plan is.

3. *The Courts: Legislating In A Vacuum*

Increasingly, the lack of clarity in state statutes has required the courts to actually legislate land use law.⁶⁸ While the courts have on several occasions eschewed the role of a legislative body or a planning agency,⁶⁹ statutory interpretation has led to this result, in many instances with less than happy consequences.⁷⁰ This is not to cast blame on the courts, which are left little choice in the face of legislative reluctance to address land use statutes and issues over the years.

An example of this lack of clarity is the role of the courts, and indeed of zoning itself, in what may be social rather than land use issues.⁷¹ "The plight of the disadvantaged, the homeless and those in desperate need of affordable housing is more and more being heard in the courts as a land use issue."⁷² Public involvement is growing and becoming increasingly militant.⁷³ Slow growth and no growth advocates, neighborhood groups, environmental activists and others are heard from these days as much as those who hold public office.⁷⁴ Acronyms such as NIMBY (not in my back yard) and LULU (locally unwanted land use) are becoming rallying cries for many formerly diverse interests.⁷⁵ The lack of attention to these modern problems and a failure to

68. BACKGROUND INFORMATION, *supra* note 27, at 3.

69. See, e.g., *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 332, 491 N.Y.S.2d 396, 402 (2d Dep't 1985).

70. BACKGROUND INFORMATION, *supra* note 27, at 3-4.

71. *Id.* at 4.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

recognize the need for regional approaches to local land use issues can only result in forcing the courts to become what they least want to become, and are least suited for — super-legislative bodies.⁷⁶

Further, in reviewing the land use statutes, one must bear in mind that these statutory provisions are administered primarily by lay persons.⁷⁷ Local planning boards and zoning boards of appeals, particularly in rural areas, do not have access (or means) to attorneys knowledgeable in land use law.⁷⁸ It is at this point then — the local government level — that all of the problems we have discussed, and others, come into play.⁷⁹

4. *Local Land Use Administration*

It is at the local level that the tensions created by changing times and changing concepts are focused in land use planning and zoning practices.⁸⁰ The many forces at work in our modern society seem at times to be in conflict with one another.⁸¹ These problems are being addressed at the local level with increasing difficulty.⁸²

As late as 1974, the United States Supreme Court, in *Village of Belle Terre v. Boraas*,⁸³ noted that “[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.”⁸⁴ There are obviously many municipalities that wholeheartedly agree with this language (to say nothing of the sentiment) and wish only to maintain their rural character, appearance and traditions, even if within a major urban conurbation.⁸⁵ Still, communities are faced not only with increasing development pressures, but with court decisions requiring that regional

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. 416 U.S. 1 (1974).

84. *Id.* at 9; see also BACKGROUND INFORMATION, *supra* note 27, at 4.

85. BACKGROUND INFORMATION, *supra* note 27, at 5.

needs be taken into account in comprehensive plans,⁸⁶ and others in which courts denounce exclusionary zoning.⁸⁷

Increasingly, local governments, faced with land use planning concepts and purposes that are seemingly in conflict, are not using land use controls to look to the future, but rather as defensive measures.⁸⁸ *Ad hoc* zoning amendments,⁸⁹ moratoria,⁹⁰ and the State Environmental Quality Review Act (SEQRA)⁹¹ are used to stop development for which the community is ill prepared or just does not want, rather than to accommodate it.⁹²

Exacerbating this problem is the fact that many local officials, both elected and appointed, who administer zoning have little, if any, training or education in the subject.⁹³ In addition, the constant turnover in office impedes the building up of any reservoir of knowledge and experience over a period of time.⁹⁴ Thus, the increasing volume of case law, its complexity, and the

86. See, e.g., *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110-11, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975); BACKGROUND INFORMATION, *supra* note 27, at 5.

87. See, e.g., *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 375, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 149 (1972); BACKGROUND INFORMATION, *supra* note 27, at 5.

88. BACKGROUND INFORMATION, *supra* note 27, at 5.

89. See, e.g., *Udell v. Haas*, 21 N.Y.2d 463, 473-74, 235 N.E.2d 897, 903, 288 N.Y.S.2d 888, 897 (1968) (village attempted to rezone the plaintiff's property from business to residential after the plaintiff submitted plans to build a bowling alley and a store on the property).

90. See, e.g., *Albrecht Realty Co. v. Town of New Castle*, 8 Misc. 2d 255, 256, 167 N.Y.S.2d 843, 844 (Sup. Ct. Westchester County 1957) (holding that a town's moratorium on building permits, with no set end, was void because the enabling statute did not authorize "a direct regulation of the rate of growth"); see also *Golden*, 30 N.Y.2d at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155 (upholding development in accordance with master plan and capital budget that could effectively postpone the granting of particular building permits for as long as eighteen years); *Noghrey v. Acampora*, 152 A.D.2d 660, 660, 543 N.Y.S.2d 530, 531 (2d Dep't 1989) (holding that an enabling statute may permit moratoria while a comprehensive plan is being adopted); *Lisa F. Foderaro, Ban on Sewer Connections Unnerves Builders*, N.Y. TIMES, Nov. 20, 1989, at B6 (moratorium on new sewer mains).

91. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1993).

92. See *supra* notes 88-91 and accompanying text. The possible eighteen-year suspension of development in Ramapo was upheld by the Court of Appeals because it saw the town's plan as a mechanism for accommodating growth, rather than excluding it. "They seek, not to freeze population at present levels but to maximize growth by the efficient use of land, and in so doing testify to this community's continuing role in population assimilation." *Golden v. Planning Bd.*, 30 N.Y.2d 359, 379, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152-53 (1972).

93. BACKGROUND INFORMATION, *supra* note 27, at 5.

94. *Id.*

lack of experienced officials and knowledgeable attorneys to assist them, makes it almost impossible for local officials to deal with the pressures of development.⁹⁵

An excellent example of this conclusion is the unemployment insurance case *In re Field Delivery Serv., Inc.*⁹⁶ *Field* established the rule that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious."⁹⁷ This ruling was made applicable to planning and zoning boards of appeals in 1986 in *Knight v. Amelkin*,⁹⁸ but by way of such an obscure reference that many local officials and attorneys were not (and many still are not) aware of its holding. This is to say nothing of the substantial departure the holding made from well-established law that each case is to be decided on its own facts.⁹⁹

B. Concrete Goals

The first paper presented to the then newly-formed Advisory Committee dealt with major changes in the area of planning and land use law.¹⁰⁰ The second paper, which continued to deal with the problems facing any recodification effort, built on the first and addressed the goals of the Commission and the Advisory Committee in more concrete terms.¹⁰¹ This paper focused on more cosmetic and substantive changes, rather than on comprehensive planning. Among other concerns, the second paper addressed the lack of definitions for important terms and concepts inherent in the practice of land use control, particularly the term "variance".¹⁰²

The local government enabling statutes have long provided

95. *Id.*

96. 66 N.Y.2d 516, 488 N.E.2d 1223, 498 N.Y.S.2d 111 (1985).

97. *Id.* at 516-17, 488 N.E.2d at 1226, 498 N.Y.S.2d at 113.

98. 68 N.Y.2d 975, 977, 503 N.E.2d 106, 106, 510 N.Y.S.2d 550, 550 (1986).

99. BACKGROUND INFORMATION, *supra* note 27, at 5.

100. *Id.*

101. See WORKING PAPER, *supra* note 28.

102. *Id.* at 1 (focusing on the power of zoning boards of appeal in granting variances per Town Law § 267). "A variance is an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance." 3 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 20.02, at 365 (3d ed. 1986).

that zoning boards of appeals may grant variances.¹⁰³ Variances from zoning regulations could be granted if there were "practical difficulties or unnecessary hardship," without any distinction between the type of variance involved.¹⁰⁴ In the landmark case of *Otto v. Steinhilber*,¹⁰⁵ the Court of Appeals held that the term "unnecessary hardship"¹⁰⁶ applied only to variances in the use of premises.¹⁰⁷ The court enunciated three elements of proof, all of which had to be found to justify the grant of a variance on the ground of unnecessary hardship.¹⁰⁸ The most significant of these elements, and quite possibly the hardest for the applicant to show, is that the property "cannot yield a reasonable return if used only for a purpose allowed in that zone."¹⁰⁹ Other Court of

103. The language of N.Y. VILLAGE LAW § 179-b, in 1939 provided:

Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of the buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.

See Act of May 21, 1923, ch. 564, sec. 1, § 179-b, 1923 N.Y. Laws 855, 858, *quoted in* *Otto v. Steinhilber*, 282 N.Y. 71, 75-76, 24 N.E.2d 851, 852-53 (1939). It should be noted that the word "variance" was not used in the statute. Instead, the language relied on was "vary or modify."

104. See Act of May 21, 1923, ch. 564, sec. 1, § 179-b, 1923 N.Y. Laws 855, 858; *supra* note 103.

105. 282 N.Y. 71, 24 N.E.2d 851 (1939).

106. *Id.* at 75, 24 N.E.2d at 852. "In order to prevent the oppressive operation of the zoning law in particular instances, when the zoning restrictions are otherwise generally reasonable, the zoning laws usually create a safety valve under the control of a Board of Appeals, which may relieve against 'unnecessary hardship' in *particular instances*." *Id.*

107. The term "use variance" was not used in *Otto*. In a later case that was affirmed by the Court of Appeals, the Appellate Division explained that the 'unnecessary hardship' "language in the *Otto* opinion is intended to apply to a variance in the use of premises and not to a variance in the area upon which a building may be constructed." *Village of Bronxville v. Francis*, 1 A.D.2d 236, 238, 150 N.Y.S.2d 906, 908-09 (2d Dep't), *aff'd*, 1 N.Y.2d 839, 135 N.E.2d 724, 153 N.Y.S.2d 220 (1956).

108. *Otto*, 282 N.Y. at 76, 24 N.E.2d at 853. The court explained: to grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality. *Id.*

109. *Id.*

Appeals cases held that a self-created hardship was a more significant or determining factor in the decision to grant or not to grant a use variance.¹¹⁰

In *Village of Bronxville v. Francis*,¹¹¹ the court held that an area variance should be granted upon a mere showing of "practical difficulties."¹¹² Three years later, the case of *Wachsberger v. Michalis*¹¹³ set forth guidelines to be used in determining whether an area variance should be granted.¹¹⁴ These guidelines were followed by later cases¹¹⁵ and placed into the text of virtually every municipal zoning law in New York. Unlike the use variance tests, all of which had to be met, the *Wachsberger* rules were guidelines for zoning boards of appeals to follow in balancing the individual difficulty to be avoided against the public good.¹¹⁶

110. See *DeSena v. Board of Zoning Appeals of Hempstead*, 45 N.Y.2d 105, 108, 379 N.E.2d 1144, 1145, 408 N.Y.S.2d 14, 15 (1978) (self-created nature of difficulty is less significant in consideration of an area variance than of a use variance); *Hoffman v. Harris*, 17 N.Y.2d 138, 145, 216 N.E.2d 326, 330, 269 N.Y.S.2d 119, 124 (1966) (purchase of property with notice of a self-imposed hardship bars granting of a use variance, but not of an area variance); *Clark v. Board of Zoning Appeals of Hempstead*, 301 N.Y. 86, 89, 92 N.E.2d 903, 903 ("one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of 'special hardship'"), *cert. denied*, 340 U.S. 933 (1950).

111. 1 A.D.2d 236, 150 N.Y.S.2d 906 (2d Dep't), *aff'd*, 1 N.Y.2d 839, 135 N.E.2d 724, 153 N.Y.S.2d 220 (1956).

112. *Id.* at 238, 150 N.Y.S.2d at 909.

113. 19 Misc. 2d 909, 912, 191 N.Y.S.2d 621, 624 (Sup. Ct. Nassau County 1959), *aff'd*, 18 A.D.2d 921, 238 N.Y.S.2d 309 (2d Dep't 1963).

114. *Id.* at 912, 191 N.Y.S.2d at 624. The court explained:

[i]n its determination [of whether an area variance should be granted] the board should consider (1) how substantial the variation is in relation to the requirement; (2) the effect, if the variance is allowed, of the increased population density thus produced on available governmental facilities (fire, water, garbage and the like); (3) whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created; (4) whether the difficulty can be obviated by some method, feasible for the applicant to pursue, other than a variance; and (5) whether in view of the manner in which the difficulty arose and considering all of the above factors the interests of justice will be served by allowing the variance.

Id.

115. See, e.g., *Children's Hosp. of Buffalo v. Zoning Bd. of Appeals of Buffalo*, 181 A.D.2d 1056, 1057-58, 582 N.Y.S.2d 317, 318 (4th Dep't 1992); *Franchise Realty Interstate Corp. v. Pisaturo*, 75 A.D.2d 1003, 1004, 429 N.Y.S.2d 127, 128 (4th Dep't 1980); *Cohalan v. Schermerhorn*, 77 Misc. 2d 23, 28, 351 N.Y.S.2d 505, 512 (Sup. Ct. 1973).

116. See *Children's Hosp.*, 181 A.D.2d at 1058, 582 N.Y.S.2d at 318 ("Once the applicant demonstrates practical difficulties, the municipality must prove that relevant

Then in the 1967 case, *Fulling v. Palumbo*,¹¹⁷ the Court of Appeals introduced the "significant economic injury" rule for area variances.¹¹⁸ In effect, it said that where a property owner would suffer such injury, an area variance would be granted unless the municipality met its burden of showing that the public health, safety and welfare would be served by upholding the application of the regulation.¹¹⁹ *Fulling* threw the hitherto relatively easy law of area variances into hopeless confusion.¹²⁰ It was impossible to determine if the *Fulling* doctrine replaced "practical difficulties," was "practical difficulties," or ran side-by-side with "practical difficulties."¹²¹ To add to this confusion, some sixty years after the term "practical difficulties" was introduced in state statute, cases such as *Human Dev. Servs. of Port Chester v. Zoning Bd. of Appeals of Port Chester*,¹²² observed that "[t]he contours of the term 'practical difficulties' have yet to be definitively identified."¹²³ However, these contours were addressed by the Court of Appeals in *Doyle v. Amster*,¹²⁴ where the court explained that "practical difficulty" could generally be established by proof that a property owner cannot utilize the property without violating existing zoning restrictions.¹²⁵ Although *Fulling* has been effectively overruled by this decision,¹²⁶ the *Doyle* court expressly recognized that "practical difficulty" was not subject to precise definition.¹²⁷

public health, safety and welfare concerns outweigh the applicant's difficulties and require strict adherence to the applicable zoning standard.").

117. 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967), *overruled in part by Doyle v. Amster*, 79 N.Y.2d 592, 594 N.E.2d 911, 584 N.Y.S.2d 417 (1992).

118. *Id.* at 33, 233 N.E.2d at 274, 286 N.Y.S.2d at 252.

119. *Id.*

120. *See National Merritt, Inc. v. Weist*, 41 N.Y.2d 438, 442, 361 N.E.2d 1028, 1032, 393 N.Y.S.2d 379, 383 (1977) (holding that the manner in which the financial hardship arises is a relevant factor which may be considered by the board in granting an area variance); *Cowan v. Kern*, 41 N.Y.2d 591, 598, 363 N.E.2d 305, 309, 394 N.Y.S.2d 579, 583 (1977) (citing *National Merritt* with approval).

121. *See supra* text accompanying note 112.

122. 110 A.D.2d 135, 493 N.Y.S.2d 481 (2d Dep't 1985), *aff'd*, 67 N.Y.2d 702, 490 N.E.2d 846, 499 N.Y.S.2d 927 (1986).

123. *Id.* at 139, 493 N.Y.S.2d at 485 (quoting *Fuhst v. Foley*, 45 N.Y.2d 441, 445, 382 N.E.2d 756, 757, 410 N.Y.S.2d 56, 57 (1978)).

124. 79 N.Y.2d 592, 594 N.E.2d 911, 584 N.Y.S.2d 417 (1992).

125. *Id.* at 595-96, 594 N.E.2d at 913-14, 584 N.Y.S.2d at 419-20.

126. *Id.* at 596, 594 N.E.2d at 914, 584 N.Y.S.2d at 420.

127. *Id.* at 595, 594 N.E.2d at 913, 584 N.Y.S.2d at 419.

III. Goals of the Project

A project whose goal is the recodification and updating of land use laws must, of necessity, set a number of different goals and pursue a number of different approaches. This is because a number of statutes are presently adequate for their purposes, but need cosmetic changes to increase their utility; others require changes that, while more than cosmetic, are actually clarifying or simplifying amendments and not really substantive. Still other statutes require major overhauls so that they can be understood and applied by local officials, reflect current planning objectives, and be in keeping with current judicial interpretation. Finally, there are major issues in the area of planning and land use law that are at the very foundation of our statutes and practice that have never been addressed in state statutes.

A. *Cosmetic Changes*

Examples of cosmetic changes would be those statutes dealing with the procedure for the adoption of zoning regulations and the approval of subdivision plats.¹²⁸ Problems with these statutes consist largely of long, run-on sentences in seemingly endless paragraphs. A simple rearrangement of these provisions would make them easier to follow, and, therefore, easier to apply. The changes in Town Law section 265¹²⁹ that were adopted in 1990, illustrate this process.¹³⁰

128. See, e.g., N.Y. TOWN LAW §§ 264, 276-278 (McKinney Supp. 1993); N.Y. VILLAGE LAW §§ 7-706, 7-728, 7-730 (McKinney Supp. 1993).

129. N.Y. TOWN LAW § 265 (McKinney Supp. 1993).

130. The pre-1990 language was:

Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed by ordinance. In case, however, of a protest against such change signed by the owners of twenty per centum or more, either of the area of the land included in such proposed change, or of that immediately adjacent extending one hundred feet therefrom or of that directly opposite thereto, extending one hundred feet from the streetfrontage of such opposite land, such amendment shall not become effective except by the favorable vote of at least three-fourths of the members of the town board.

N.Y. TOWN LAW § 265 (McKinney 1987). The comparable language in the present legislation reads:

1. Such regulations, restrictions and boundaries may from time to time be amended. Such amendment shall be effected by a simple majority vote of the town board, except that any such amendment shall require the approval of at least three-fourths of the members of the town board in the event such amendment is

Some of the changes in section 265 of the Town Law (section 7-708 of the Village Law) also exemplify changes of the second type, those that are more than cosmetic, but less than substantive.¹³¹ There is no quarrel with the statutory concept that protests received from a certain percentage of property owners within a certain distance of the affected property require an extraordinary vote of the legislative body before final passage.¹³² The difficulty, however, is that the lack of clarity with respect to exactly who may bring such protest and how the distance from the affected property is actually measured has resulted in confusion since the statute has been on the books.¹³³ A simple amendment clarifying these points would not change the thrust of the statute, but would make it more comprehensible and easier to apply.

B. Substantive Changes

The third group contains those statutes that require substantive change, either to reflect modern development in the areas covered, or because subsequent judicial and administrative interpretation has shrouded the original or amended statutory provisions in doubt and confusion. For example, while the rules governing the granting of *use* variances have been consistent since 1939 when they were first established in *Otto v.*

the subject of a written protest, presented to the town board and signed by:

- (a) the owners of twenty percent or more of the area of land included in such proposed change; or
- (b) the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or
- (c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

N.Y. TOWN LAW § 265(1)(a)-(c) (McKinney Supp. 1993) (enacted by Act of July 18, 1990, ch. 606, sec. 1, 1990 N.Y. Laws 1279, 1279-80).

131. N.Y. TOWN LAW § 265. Parallel language is found in N.Y. VILLAGE LAW § 7-708 (McKinney Supp. 1993).

132. N.Y. TOWN LAW § 265(1)(a)-(c). See generally Eleanor Steinholtz, Comment, *Procedural Requirements for Enactment, Amendment and Repeal of Zoning Ordinances in New York State*, 15 SYRACUSE L. REV. 60, 67-69 (1963).

133. See Steinholtz, *supra* note 132, at 67-69; see also N.Y. TOWN LAW § 265(1)(a)-(c).

Steinhilber,¹³⁴ the exact opposite is true with respect to area variances.¹³⁵ From the relatively simple suggestions set forth for zoning boards of appeals to follow in *Wachsberger v. Michalis*,¹³⁶ this body of law has progressed through *Doyle v. Amster*,¹³⁷ to total confusion, with no scholar, lawyer, or local official comfortably sure of the rules governing these variances. Thus, the question is whether the requirements for the granting of area variances, as well as other problem areas, should be clarified by legislation.¹³⁸

C. Major Changes

Finally, we have the remaining category of what may be termed major legislation: those concepts and issues that reflect modern problems and concerns, and are nowhere (or are inadequately) addressed by existing statutes. Among these would be affordable housing, open space, agricultural lands, impact fees, locally unwanted uses, authority of various levels of government and a host of others.

IV. Statutory Reform Efforts

It is hoped that the above will serve as both background and prologue to the actual efforts of the Commission, Commission Staff, the Advisory Committee and the participants at the various Roundtables. It is at this point that we can turn to the efforts aimed at actually recodifying the planning and zoning en-

134. 282 N.Y. 71, 24 N.E.2d 851 (1939); see *Foland v. Zoning Bd. of Appeals of Bethlehem*, 26 Misc. 2d 1093, 1094, 207 N.Y.S.2d 607, 608 (Sup. Ct. 1960) (holding that because a use variance allows property to be used in a way that conflicts with the zoning ordinance, the power to grant use variances should be exercised rarely and requires a showing of unnecessary hardship); *Consolidated Edison Co. v. Hoffman*, 43 N.Y.2d 598, 607, 374 N.E.2d 105, 109, 403 N.Y.S.2d 193, 197 (1978) (affirming the standard of *Otto* for use variances, but modifying it when dealing with the specific needs of a public utility).

135. See *National Merritt, Inc. v. Weist*, 41 N.Y.2d 438, 442-44, 361 N.E.2d 1028, 393 N.Y.S.2d 379, 382-84 (1977).

136. 19 Misc. 2d 909, 191 N.Y.S.2d 621 (Sup. Ct. 1959), *aff'd*, 18 A.D.2d 921, 238 N.Y.S.2d 309 (2d Dep't 1963). See *supra* notes 113-16 and accompanying text.

137. 79 N.Y.2d 592, 594 N.E.2d 911, 584 N.Y.S.2d 417 (1992).

138. The requirements for the granting of an area variance were clarified by Act of June 30, 1992, ch. 248, 1992 N.Y. Laws 927. See *infra* notes 178-97 and accompanying text.

abling statutes. Obviously (and some times unfortunately) the only way to measure these efforts is not by good intentions or amount of effort, but rather by success in having proposals enacted into law.

A. 1990

The first year of the Recodification Project was spent in organizing the effort, defining its goals and determining the best way to achieve these goals. As a result, very few ideas or proposals were actually translated into proposed bills. Out of these few that did become bills, none were enacted into law. This was not due to a lack of effort to advance these proposals. Rather, it was probably due to the newness of the Recodification Project and the fact that legislators and legislative staff had not recognized that a serious recodification effort was underway. Also, the Commission faced the historic reluctance of the State Legislature to address land use issues.¹³⁹ Whatever the reason, of the few bills offered in 1990, none were passed.

B. 1991

The next year, 1991, was happily, a different story. The work of the Advisory Committee, appearances by Commission staff before Senate and Assembly standing committees to which various bills were assigned, and the establishment of an effective liaison between the Commission and Senate and Assembly program staff, provided a more effective forum and resulted in frequent meetings to discuss the reasoning behind and the merits of new proposals.

In 1991 four Commission bills achieved passage by both houses and were signed into law by Governor Cuomo.¹⁴⁰ At this juncture two points must be made. First, almost without exception, Commission bills carry a one year delay in their effective dates. The reason for this delay is to prevent local governments from being caught by surprise by new legislation. Another pur-

139. See *supra* note 2 and accompanying text.

140. Act of June 21, 1991, ch. 185, 1991 N.Y. Laws 456 (S. 3423, A. 5472); Act of July 26, 1991, ch. 629, 1991 N.Y. Laws 1231 (S. 3589-A, A. 5984-A); Act of July 26, 1991, ch. 657, 1991 N.Y. Laws 1318 (A. 5985-B); Act of Aug. 2, 1991, ch. 692, 1991 N.Y. Laws 1364 (S. 3526-A, A. 5858-A).

pose is to give groups such as the Planning Federation, the Conference of Mayors, the Association of Towns, and agencies such as the Department of State and the Department of Environmental Conservation, all of which conduct local government training programs, to include in their conferences and seminars discussions of any new land use legislation before it becomes effective. Second, the following discussion of the bills will make no effort to attach particular importance to any piece of legislation as compared to any other. The grouping or discussion should not be considered by the reader to carry any implication that one bill is more important than any other.

As stated, the 1991 legislative session saw the passage and signing into law of four bills.¹⁴¹ It can be seen that this in itself was of tremendous importance to the Commission and the Recodification Project itself. It showed, in addition to the intrinsic importance of any particular bill, that the State Legislature, program staff and committee staff had been made aware that a genuine recodification effort was underway and that recognition of the Project should be afforded at their levels. This was considered as important an accomplishment as was the success of any particular piece of legislation.

The first bill for discussion provided that members of municipal boards, bureaus or commissions (including but not limited to legislative bodies), planning boards, or zoning boards of appeals, may serve as members of county or regional planning boards.¹⁴² This bill was believed necessary because an Opinion of the Attorney General¹⁴³ had decided that such dual membership created a "direct and substantial conflict of interest."¹⁴⁴ This Opinion, and one which modified it somewhat,¹⁴⁵ caused great consternation among members of local and county planning boards, whose reasoning was that local board members who also served on county boards would be peculiarly possessed of the necessary knowledge of local problems to enhance their efforts at the county or regional level. Zoning consultants, planners and

141. See *supra* note 140 and accompanying text.

142. Act of June 21, 1991, ch. 185, 1991 N.Y. Laws 456 (codified as amended at N.Y. GEN. MUN. LAW §239-b (McKinney Supp. 1993)).

143. 89-36 Op. Att'y Gen. 112 (1989).

144. *Id.* at 113.

145. 90-56 Op. Att'y Gen. 1099 (1990).

land use attorneys in both the public and private sector were flooded with phone calls and letters asking that something be done to allow such dual membership. Chapter 185 (which because of its importance and the fact that it was easy to understand, carried an immediate effective date) provided that solution.

Another measure adopted in 1991 related to the procedural requirements necessary for the adoption of town and village zoning regulations.¹⁴⁶ As is the case with many land use statutes which were amended or replaced in the Recodification Project, section 264 of the Town Law and section 7-706 of the Village Law, both relating to procedure, were first rearranged and reparagraphed in a more logical manner to make them easier to use and understand.¹⁴⁷ Many of these statutes can be improved by merely doing away with the legislative penchant for placing endless sentences in interminable paragraphs. We have often remarked (to the general agreement of the audience) that the first radical innovation of the Commission staff was to introduce paragraphs and punctuation to existing statutes, which might well be as helpful as innovative substantive amendments.

In any event, few major substantive changes were made to the procedural statutes.¹⁴⁸ However, some of these substantive changes deserve mention. First, as was done with each bill prepared by the Commission staff, reference has been made to the necessity of conformance of local actions to the mandates of section 239-m of the General Municipal Law (county referral of certain local actions)¹⁴⁹ and compliance with SEQRA.¹⁵⁰ This does

146. Act of July 26, 1991, ch. 657, sec. 1-3, 1991 N.Y. Laws 1318, 1318-20 (codified as amended at N.Y. TOWN LAW §§ 133, 264, 265), sec. 4, 1991 N.Y. Laws 1318, 1320-21 (codified as amended at N.Y. VILLAGE LAW § 7-706).

147. *Id.* sec. 2, 1991 N.Y. Laws 1318, 1318-19 (codified as amended at N.Y. TOWN LAW § 264), sec. 4, 1991 N.Y. Laws 1318, 1320-21 (codified as amended at N.Y. VILLAGE LAW § 7-706). See *supra* notes 128-30 and accompanying text.

148. See Act of July 26, 1991, ch. 657, 1991 N.Y. Laws 1318.

149. N.Y. GEN. MUN. LAW §239-m (McKinney 1984). See, e.g., Act of July 26, 1991, ch. 657, sec. 2, 1991 N.Y. Laws 1318, 1319 (amending Town Law § 264 to include compliance with Gen. Mun. Law § 239-m), sec. 4, 1991 N.Y. Laws 1318, 1320 (amending Village Law § 7-706 to include compliance with Gen. Mun. Law § 239-m).

150. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1993). See, e.g., Act of July 26, 1991, ch. 657, sec. 2, 1991 N.Y. Laws 1318, 1319 (amending Town Law § 264 to include compliance with SEQRA), sec. 4, 1991 N.Y. Laws 1318, 1320-21 (amending Village Law § 7-706 to include compliance with SEQRA).

not represent a substantive statutory change, but rather serves as an often needed reminder to local officials and municipal attorneys.

One important substantive change allows the publication of a summary or abstract of any town or village zoning amendments, rather than the full text, which has always been a financial burden to local governments.¹⁵¹ While case law has held this to be permissible if authorized by local law,¹⁵² this change represents the first time that a statute makes such provision. In addition, the amendment provides that, for towns, an ordinance shall take effect upon its filing in the office of the town clerk, rather than a certain number of days after publication.¹⁵³ For villages, the local law shall take effect upon its filing with the Secretary of State.¹⁵⁴

In addition to these two measures, two Commission proposals of major importance were signed into law in 1991.¹⁵⁵ The first dealt with a subject that had rarely been mentioned in case law and never in state statute — incentive zoning.¹⁵⁶ The only reference in case law to incentive (or bonus) zoning of which the authors are aware appears in *Asian Americans For Equality v. Koch*,¹⁵⁷ a case which involved the comprehensive plan and exclusionary zoning. In any event, the court saw fit not only to discuss the mechanism, but to define it:

Incentive zoning is based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive. The economic incentive frequently used . . . is the allowance of greater density within a proposed

151. Act of July 26, 1991, ch. 657, sec. 3, 1991 N.Y. Laws 1318, 1319-20 (codified as amended at N.Y. TOWN LAW § 265(2)), sec. 4, 1991 N.Y. Laws 1318, 1321 (codified as amended at N.Y. VILLAGE LAW § 7-706(5)).

152. *See* Town of Clifton Park v. C.P. Enters., 45 A.D.2d 96, 97, 356 N.Y.S.2d 122, 124 (3d Dep't 1974).

153. Act of July 26, 1991, ch. 657, sec. 3, 1991 N.Y. Laws 1318, 1319-20 (codified as amended at N.Y. TOWN LAW § 265(2)).

154. *Id.* sec. 4, 1991 N.Y. Laws 1318, 1321 (codified as amended at N.Y. VILLAGE LAW § 7-706(7)).

155. Act of July 26, 1991, ch. 629, 1991 N.Y. Laws 1231 (S. 3589-A, A. 5984-A); Act of Aug. 2, 1991, ch. 692, 1991 N.Y. Laws 1364 (S. 3526-A, A. 5858-A). *See supra* note 140.

156. Act of July 26, 1991, ch. 629, sec. 1, 1991 N.Y. Laws 1231, 1232 (codified at N.Y. VILLAGE LAW § 7-703 (McKinney Supp. 1993)), sec. 2, 1991 N.Y. Laws 1231, 1232-34 (codified at N.Y. TOWN LAW § 261-b (McKinney Supp. 1993)).

157. 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988).

building, more floor area than permitted under general zoning rules, if developers provided certain amenities for the community. The amendment awards bonus points which entitle developers to expand their construction in return for increased construction of other, uneconomic projects such as low-cost housing, slum rehabilitation or public facilities.¹⁵⁸

Simply stated, this form of zoning, which has been used mostly in large cities in New York, allows the municipality to offer a developer an additional number of floors, greater floor area, a larger number of units, etc., in a building or development, over that allowed by the applicable zoning regulations. In exchange, the developer agrees to construct, for example, a theater, atrium or vest pocket park. In New Jersey the device is frequently used to permit a developer to exceed the zoning restrictions in apartment complexes, on the condition that a certain percentage of the dwelling units are made available to those of low or moderate income.¹⁵⁹

The new legislation amends both the Town Law by adding a new Section 261-b,¹⁶⁰ and the Village Law, by adding a new Section 7-703.¹⁶¹ These sections define incentive zoning and establish a process for its authorization and implementation.¹⁶² Although not a part of the 1991 legislation, incentive zoning was authorized for cities by chapter 247 of the Laws of 1992, which became effective immediately.¹⁶³

Finally, as far as 1991 is concerned, one other measure achieved passage,¹⁶⁴ which in our opinion, represents the most

158. *Id.* at 129, 527 N.E.2d at 269, 531 N.Y.S.2d at 786.

159. *See* Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (Mount Laurel I).

160. Act of July 26, 1991, ch. 629, sec. 2, 1991 N.Y. Laws 1232, 1232-34 (codified as amended at N.Y. TOWN LAW § 261-b).

161. *Id.* sec. 1, 1991 N.Y. Laws 1231, 1232 (codified as amended at N.Y. VILLAGE LAW 7-703).

162. N.Y. TOWN LAW § 261-b; N.Y. VILLAGE LAW § 7-703. Both sections are entitled "Incentive zoning; definitions, purpose, conditions, procedures." These sections allow a town or village board to provide for a system of zoning incentives or bonuses to advance the town or village's comprehensive plan and any other community planning mechanism or land use technique. N.Y. TOWN LAW § 261-b(2); N.Y. VILLAGE LAW § 7-703(2).

163. Act of June 30, 1992, ch. 247, sec. 1, 1992 N.Y. Laws 925, 925-27 (codified at N.Y. GEN. CTY LAW § 81-b (McKinney Supp. 1993)).

164. Act of Aug. 2, 1991, ch. 692, 1991 N.Y. Laws 1364 (S. 3526-A, A. 5858-A). *See supra* note 140.

sweeping statutory change since the original planning and zoning laws were put on the books. Chapter 692 of the Laws of 1991 (effective July 1, 1992) repealed Town Law section 267, and Village Law section 7-712, which pertained to the functions, powers and duties of zoning boards of appeals, and replaced them with new sections.¹⁶⁵ Although this is not a strict mathematical computation, the most cursory look at the annotations in the statute books reveals that most of the planning and zoning litigation involves zoning boards of appeals, and this litigation primarily involves variances.¹⁶⁶ If there were indeed any statutes that cried out for overhaul and clarification, these were such statutes.¹⁶⁷

Against this brief background, the most important changes in the new statutes concern variances. New Town Law, section 267-b(2)¹⁶⁸ and Village Law, section 7-712-b(2)¹⁶⁹ codify the New York case law, starting with *Otto*, to establish criteria for the granting of use variances.¹⁷⁰ The codification enunciates the rules the courts have developed over the last fifty years.¹⁷¹ An applicant for a use variance must demonstrate "unnecessary hardship" to the zoning board of appeals.¹⁷² Unnecessary hardship requires a showing that all of the following have been met:

1. Under the applicable zoning regulations, the applicant is deprived of all economic use or benefit from the property.¹⁷³

165. Town Law § 267 was repealed and replaced by adding a new § 267. See Act of Aug. 2, 1991, ch. 692, sec. 1, 1991 N.Y. Laws 1364, 1364-65 (codified at N.Y. TOWN LAW § 267 (McKinney Supp. 1993)). Additionally, chapter 692 added new Town Law sections 267-a, 267-b and 267-c. See Act of Aug. 2, 1991, ch. 692, sec. 2-4, 1991 N.Y. Laws 1364, 1365-68 (codified at N.Y. TOWN LAW §§ 267-a, 267-b and 267-c (McKinney Supp. 1993)). Village Law § 7-712 was repealed and replaced by adding a new § 7-712. See Act of Aug. 2, 1991, ch. 692, sec. 5, 1991 N.Y. Laws 1364, 1368-69 (codified at N.Y. VILLAGE LAW § 7-712 (McKinney Supp. 1993)). Chapter 692 also added new Village Law sections 7-712-a, 7-712-b and 7-712-c. See Act of Aug. 2, 1991, ch. 692, sec. 6-8, 1991 N.Y. Laws 1364, 1368-72 (codified at N.Y. VILLAGE LAW §§ 7-712-a, 7-712-b, 7-712-c (McKinney Supp. 1993)).

166. Actually, the word "variance" never appeared in the statutes. The language used was "vary or modify." See *supra* note 103.

167. See WORKING PAPER, *supra* note 28, at 1.

168. N.Y. TOWN LAW § 267-b(2).

169. N.Y. VILLAGE LAW § 7-712-b(2).

170. James A. Coon & Sheldon W. Damsky, *Revisions to State Zoning Laws Enacted*, 5 MUN. LAW. 1, 1 (1991).

171. See *supra* notes 105-27 and accompanying text.

172. N.Y. TOWN LAW § 267-b(2)(b); N.Y. VILLAGE LAW § 7-712-b(2)(b).

173. N.Y. TOWN LAW § 267-b(2)(b)(1); N.Y. VILLAGE LAW § 7-712-b(2)(b)(1).

2. The hardship is unique, and does not apply to a substantial portion of the district or neighborhood.¹⁷⁴
3. The variance will not alter the essential character of the neighborhood.¹⁷⁵
4. The hardship is not self-created.¹⁷⁶

The rules for issuing use variances are more clearly established by the courts than the rules for the issuance of area variances.¹⁷⁷ This is an understatement of epic proportions. A new statutory process for the granting of area variances has been established by new Town Law section 267-b(3)¹⁷⁸ and new Village Law section 7-712-(b)(3).¹⁷⁹ While there is no "test" as such for the granting of area variances, the new laws require that the board of appeals balance the benefit the applicant would receive from the variance, against the detriment to the health, safety and welfare of the community or neighborhood that would occur if the variance were granted.¹⁸⁰ In addition to jettisoning the "practical difficulties" test,¹⁸¹ the new statutory provisions governing area variances take a bold step backwards to *Wachberger v. Michalis*¹⁸² and its relatively easy guides for consideration by boards of appeals.¹⁸³ There are five factors for the board to *consider* in balancing these interests:

1. Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the grant of the variance;¹⁸⁴
2. Whether the benefit sought by the applicant can be achieved by some feasible method other than a variance;¹⁸⁵

174. N.Y. TOWN LAW § 267-b(2)(b)(2); N.Y. VILLAGE LAW § 7-712-b(2)(b)(2).

175. N.Y. TOWN LAW § 267-b(2)(b)(3); N.Y. VILLAGE LAW § 7-712-b(2)(b)(3).

176. N.Y. TOWN LAW § 267-b(2)(b)(4); N.Y. VILLAGE LAW § 7-712-b(2)(b)(4).

177. Coon & Damsky, *supra* note 170, at 1.

178. N.Y. TOWN LAW § 267-b(3).

179. N.Y. VILLAGE LAW § 7-712-b(3).

180. N.Y. TOWN LAW § 267-b(3)(b); N.Y. VILLAGE LAW § 7-712-b(3)(b).

181. See *supra* text accompanying notes 111-12.

182. 19 Misc. 2d 909, 191 N.Y.S.2d 621 (Sup. Ct. 1959), *aff'd*, 18 A.D.2d 921, 238 N.Y.S.2d 309 (2d Dep't 1963).

183. See *supra* note 114 and accompanying text.

184. N.Y. TOWN LAW § 267-b(3)(b)(1); N.Y. VILLAGE LAW § 7-712-b(3)(b)(1). See also Coon & Damsky, *supra* note 170, at 1.

185. N.Y. TOWN LAW § 267-b(3)(b)(2); N.Y. VILLAGE LAW § 7-712-b(3)(b)(2). See also Coon & Damsky, *supra* note 170, at 1.

3. Whether the requested variance is substantial;¹⁸⁶
4. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district;¹⁸⁷
5. Whether the alleged difficulty was self-created, however, this will not necessarily preclude the granting of the area variance.¹⁸⁸

The new statutes also include the following changes:

- an express authorization for boards of appeals to impose conditions to minimize the impact of use or area variances;¹⁸⁹
- clarification of the power to interpret the zoning regulations;¹⁹⁰
- a specific cross-reference to the referral requirements of General Municipal Law, section 239-m;¹⁹¹
- a specific cross-reference to the requirements of SEQRA;¹⁹²
- provision is made for three-member or five-member boards of appeals;¹⁹³
- the time within which appeals must be taken to the board of appeals is prescribed in the statute (60 days) instead of leaving it to the rules of the board of appeals;¹⁹⁴
- zoning boards of appeals hearings in both towns and villages must be preceded by at least five days notice published in a newspaper of general circulation in the municipality (instead

186. N.Y. TOWN LAW § 267-b(3)(b)(3); N.Y. VILLAGE LAW § 7-712-b(3)(b)(3). See also Coon & Damsky, *supra* note 170, at 1.

187. N.Y. TOWN LAW § 267-b(3)(b)(4); N.Y. VILLAGE LAW § 7-712-b(3)(b)(4). See also Coon & Damsky, *supra* note 170, at 1.

188. N.Y. TOWN LAW § 267-b(3)(b)(5); N.Y. VILLAGE LAW § 7-712-b(3)(b)(5). See also Coon & Damsky, *supra* note 170, at 1.

189. N.Y. TOWN LAW § 267-b(4); N.Y. VILLAGE LAW § 7-712-b(4).

190. N.Y. TOWN LAW § 267-b(1); N.Y. VILLAGE LAW § 7-712-b(1).

191. N.Y. TOWN LAW § 267-a(10); N.Y. VILLAGE LAW § 7-712-a(10). These sections require the board of appeals to send notice at least five days before a hearing to the parties, to the regional state park commission having jurisdiction over any park within five hundred feet of the property affected by the appeal, and to the county, metropolitan or regional planning agency. The notice shall be accompanied by a full statement of the matter under consideration. N.Y. TOWN LAW § 267-a(10); N.Y. VILLAGE LAW § 7-712-a(10).

192. N.Y. TOWN LAW § 267-a(11); N.Y. VILLAGE LAW § 7-712-a(11). These sections require the board to comply with the provisions of the state environmental quality review act.

193. N.Y. TOWN LAW § 267(2); N.Y. VILLAGE LAW § 7-712(2).

194. N.Y. TOWN LAW § 267-a(5); N.Y. VILLAGE LAW § 7-712-a(5).

of the official newspaper).¹⁹⁵

It must be noted that while the above discussion concerns zoning boards of appeals in towns and villages, a bill currently before the State Legislature would enact the same provisions into the General City Law.¹⁹⁶ Also, Chapter 248 of the Laws of 1992 made a number of technical changes to the zoning board of appeals legislation.¹⁹⁷

C. 1992

While the Recodification Project achieved a good deal of success in 1991, the impetus of the Project, its recognition by the legislature, and the overwhelming support from local governments all helped to make the following year particularly gratifying. The 1992 legislative session was especially productive with respect to changes to the zoning and planning statutes. No fewer than eight measures were passed by the legislature — all of which resulted from the ongoing efforts of the Commission to recodify the enabling statutes.¹⁹⁸ A brief summary of each of these enactments follows.

1. *Incentive Zoning for Cities*

As previously noted,¹⁹⁹ this measure²⁰⁰ adds a new section 81-b to the General City Law, to give cities identical authority concerning incentive zoning, as was given to towns and villages.²⁰¹ The bill became effective immediately.²⁰²

195. N.Y. TOWN LAW § 267-a(7); N.Y. VILLAGE LAW § 7-712-a(7). See generally Coon and Damsky, *supra* note 170, at 1-2 for a discussion of the new statutory provisions in Town Law sections 267-a and 267-b and Village Law sections 7-712-a and 7-712-b.

196. A. 4865, 215th General Assembly, Regular Sess. (1993).

197. See Act of June 30, 1992, ch. 248, sec. 1-14, 1992 N.Y. Laws 927, 927-30 (codified as amended at N.Y. TOWN LAW §§ 267(1), (2), (9), 267-a(2), (3), (4), (5), (7), 267-b(1), (2)(a), (3)(a), (4), 267-c(1), (4)), sec. 15-29, 1992 N.Y. Laws 927, 930-33 (codified as amended at N.Y. VILLAGE LAW §§ 7-712(1), (2), (4), (9), 7-712-a(2), (3), (4), (5), (7), 7-712-b(1), (2)(a), (3)(a), (4), 7-712-c(1), (4)).

198. See *infra* notes 199-265 and accompanying text.

199. See *supra* note 163 and accompanying text.

200. Act of June 30, 1992, ch. 247, sec. 1, 1992 N.Y. Laws 925, 925-27 (codified at N.Y. GEN. CITY LAW § 81-b).

201. *Id.*; see N.Y. TOWN LAW § 261-b (McKinney Supp. 1993); N.Y. VILLAGE LAW § 7-703 (McKinney Supp. 1993).

202. Act of June 30, 1992, ch. 247, sec. 5, 1992 N.Y. Laws 925, 927.

2. Zoning Boards of Appeals — Technical Changes

As also previously noted,²⁰³ this legislation,²⁰⁴ which became effective on July 1, 1992, made a number of technical changes to the Town and Village Law zoning board of appeals legislation of the previous year.²⁰⁵ Among the changes is one which would authorize town boards and village boards of trustees to require training for zoning board of appeals members, and to provide for their removal for failure to complete the local training requirements.²⁰⁶ Among the other changes are the following:

- decisions of the board are to be filed in the town or village clerk's office within 5 business days, instead of "immediately".²⁰⁷
- it is now clear that conditions imposed by a board of appeals when granting variances may relate to the proposed use of the property, or to the duration of the variance or both.²⁰⁸
- for village boards of appeals members, the terms of office are geared to the village official year, instead of the calendar year.²⁰⁹

3. Cluster Development Projects in Two or More Districts

This measure²¹⁰ amends General City Law section 37,²¹¹ Town Law section 281,²¹² and Village Law section 7-738,²¹³ with

203. See *supra* note 197 and accompanying text.

204. Act of June 30, 1992, ch. 248, 1992 N.Y. Laws 927.

205. See *infra* notes 206-09 and accompanying text.

206. Act of June 30, 1992, ch. 248, sec. 2-3, 1992 N.Y. Laws 927, 928 (codified as amended at N.Y. TOWN LAW § 267(2), (9)), sec. 16, 18, 1992 N.Y. Laws 927, 930, 931 (codified as amended at N.Y. VILLAGE LAW § 7-712(2), (9)).

207. *Id.* sec. 4, 1992 N.Y. Laws 927, 928 (codified as amended at N.Y. TOWN LAW § 267-a(2)), sec. 19, 1992 N.Y. Laws 927, 931 (codified as amended at N.Y. VILLAGE LAW § 7-712-a(2)).

208. *Id.* sec. 12, 1992 N.Y. Laws 927, 929 (codified as amended at N.Y. TOWN LAW § 267-b(4)), sec. 27, 1992 N.Y. Laws 927, 932 (codified as amended at N.Y. VILLAGE LAW § 7-712-b(4)).

209. *Id.* sec. 17, 1992 N.Y. Laws 927, 930-31 (codified as amended at N.Y. VILLAGE LAW § 7-712(4)).

210. Act of June 30, 1992, ch. 230, 1992 N.Y. Laws 905.

211. *Id.* sec. 1, 1992 N.Y. Laws 905, 906 (codified as amended at N.Y. GEN. CITY LAW § 37 (McKinney Supp. 1993)).

212. *Id.* sec. 2, 1992 N.Y. Laws 905, 906-07 (codified as amended at N.Y. TOWN LAW § 281 (McKinney Supp. 1993)).

213. *Id.* sec. 3, 1992 N.Y. Laws 905, 907-08 (codified as amended at N.Y. VILLAGE

respect to planning board approval of cluster development projects that lie in more than one zoning district.²¹⁴ In such circumstances, the new laws allow planning boards to cluster all the development allowable onto any portion of the tract.²¹⁵ The effective date was July 1, 1992.²¹⁶

4. *Site Plan Approval*

This is a new measure of major significance, which became effective July 1, 1993.²¹⁷ It repealed Town Law section 274-a²¹⁸ and Village Law section 7-725,²¹⁹ with respect to planning board approval of site plans and special use permits. It replaced those sections with new Town Law section 274-a²²⁰ and new Village Law section 7-725-a,²²¹ which provide for site plan approval, and new Town Law section 274-b,²²² and new Village Law section 7-725-b,²²³ which provide for special use permits. The new sections provide for review procedures for site plans and special use permits that would be used by whatever board is designated as the review agency (planning board, zoning board of appeals or another board).²²⁴

An important new provision allows towns and villages to require developers to provide land for park or recreational purposes, or cash in lieu of the land, as a condition of approval of residential site plans.²²⁵ The new site plan sections provide more

LAW 7-738 (McKinney Supp. 1993)).

214. *Id.* sec. 1-3, 1992 N.Y. Laws 905, 905-08.

215. *Id.*

216. *Id.* sec. 4, 1992 N.Y. Laws 905, 908.

217. Act of July 31, 1992, ch. 694, 1992 N.Y. Laws 1807.

218. *Id.* sec. 1, 1992 N.Y. Laws 1807, 1807.

219. *Id.* sec. 3, 1992 N.Y. Laws 1807, 1811.

220. *Id.* sec. 1, 1992 N.Y. Laws 1807, 1807-09 (codified at N.Y. TOWN LAW § 274-a (McKinney Supp. 1993)).

221. *Id.* sec. 3, 1992 N.Y. Laws 1807, 1811-13 (codified at N.Y. VILLAGE LAW § 7-725-a (McKinney Supp. 1993)).

222. *Id.* sec. 2, 1992 N.Y. Laws 1807, 1809-11 (codified at N.Y. TOWN LAW § 274-b (McKinney Supp. 1993)).

223. *Id.* sec. 4, 1992 N.Y. Laws 1807, 1813-14 (codified at N.Y. VILLAGE LAW § 7-725-b (McKinney Supp. 1993)).

224. *See supra* notes 223-26 and accompanying text.

225. Act of July 31, 1992, ch. 694, sec. 1, 1992 N.Y. Laws 1807, 1807-09 (codified at N.Y. TOWN LAW § 274-a(6)(a), (c)), sec. 3, 1992 N.Y. Laws 1807, 1812 (codified at N.Y. VILLAGE LAW § 7-725-a(6)(a), (c)).

clearly than the existing law that the uses subject to site plan approval *and* the site plan approval criteria must be set forth in the municipality's zoning ordinance or local law.²²⁶ In addition, the new site plan and special use permit statutes include the following provisions:

- specific authorization for the approving board to impose reasonable conditions when approving site plans or special use permits.²²⁷
- specific authorization for the local governing body to provide, in its ordinance or local law, for waiver of its site plan or special use permit requirements under certain circumstances, thus providing a parallel to the subdivision approval process.²²⁸
- that public hearings on site plans remain optional; they are not required under the new statute but may be required by the municipal ordinance or local law.²²⁹
- that public hearings on special use permits are to be required.²³⁰
- cross references to SEQRA²³¹ and to the referral requirements of General Municipal Law section 239-m.²³²

5. *Subdivision Approval*

This important measure, which became effective July 1, 1993,²³³ repealed the town and village subdivision approval statutes and enacted brand-new provisions (Town Law sections 276²³⁴ and 277;²³⁵ Village Law sections 7-728²³⁶ and 7-730²³⁷). Or-

226. *Id.* sec. 1-2, 1992 N.Y. Laws 1807, 1808, 1810 (codified as amended at N.Y. TOWN LAW §§ 274-a(2)(a), 274-b(2)), sec. 4, 1992 N.Y. Laws 1807, 1813 (codified at N.Y. VILLAGE LAW § 7-725-b(2)).

227. N.Y. TOWN LAW §§ 274-a(4), 274-b(4); N.Y. VILLAGE LAW §§ 7-725-a(4), 7-725-b(4).

228. N.Y. TOWN LAW §§ 274-a(5), 274-b(5); N.Y. VILLAGE LAW §§ 7-725-a(5), 7-725-b(5).

229. N.Y. TOWN LAW § 274-a(7); N.Y. VILLAGE LAW § 7-725-a(7).

230. N.Y. TOWN LAW § 274-b(6); N.Y. VILLAGE LAW § 7-725-b(6).

231. N.Y. TOWN LAW §§ 274-a(9), 274-b(8); N.Y. VILLAGE LAW §§ 7-725-a(9), 7-725-b(8).

232. N.Y. TOWN LAW §§ 274-a(8), 274-b(7); N.Y. VILLAGE LAW §§ 7-725-a(8), 7-725-b(7).

233. Act of July 31, 1992, ch. 727, 1992 N.Y. Laws 1960.

234. *Id.* sec. 1, 1992 N.Y. Laws 1960, 1960-63 (codified at N.Y. TOWN LAW § 276 (McKinney Supp. 1993)).

235. *Id.* sec. 2, 1992 N.Y. Laws 1960, 1963-67 (codified at N.Y. TOWN LAW § 277

ganization of the statutes is now simpler and easier to follow. Also, Town Law and Village Law provisions are now identical.²³⁸ Time limits for planning board actions are changed, so that in both towns and villages, there must be a public hearing within sixty-two days after receipt of a complete preliminary plat,²³⁹ or final plat if no preliminary plat is required, with the decision within sixty-two days after the hearing.²⁴⁰ Default approval provisions remain.²⁴¹ Cross reference to SEQRA²⁴² and to the referral requirements of General Municipal Law section 239-n are included.²⁴³ The new statutes incorporate guidelines for planning boards to follow in determining whether to require park land or cash in lieu thereof²⁴⁴ (the guidelines are based, almost verbatim, on the Court of Appeals' 1990 decision in *Bayswater Realty v. Planning Bd.*).²⁴⁵ The measure also broadens the kinds of security that may be required from developers to insure proper installation of improvements.²⁴⁶

(McKinney Supp. 1993)).

236. *Id.* sec. 5, 1992 N.Y. Laws 1960, 1968-71 (codified at N.Y. VILLAGE LAW § 7-728 (McKinney Supp. 1993)).

237. *Id.* sec. 6, 1992 N.Y. Laws 1960, 1971-74 (codified at N.Y. VILLAGE LAW § 7-730 (McKinney Supp. 1993)).

238. *See supra* notes 234-37.

239. Act of July 31, 1992, ch. 727, sec. 1, 1992 N.Y. Laws 1960, 1961 (codified at N.Y. TOWN LAW § 276(5)(b), (c)), sec. 5, 1992 N.Y. Laws 1960, 1969 (codified at N.Y. VILLAGE LAW § 7-728(5)(b), (c)).

240. *Id.* sec. 1, 1992 N.Y. Laws 1960, 1961-62 (codified at N.Y. TOWN LAW § 276(6)(b)), sec. 5, 1992 N.Y. Laws 1960, 1969 (codified at N.Y. VILLAGE LAW § 7-728(6)(b)).

241. *Id.* sec. 1, 1992 N.Y. Laws 1960, 1962 (codified at N.Y. TOWN LAW § 276(6)(f)), sec. 5, 1992 N.Y. Laws 1960, 1970 (codified at N.Y. VILLAGE LAW § 7-728(6)(f)).

242. *Id.* sec. 1, 1992 N.Y. Laws 1960, 1963 (codified at N.Y. TOWN LAW § 276(13)), sec. 5, 1992 N.Y. Laws 1960, 1971 (codified at N.Y. VILLAGE LAW § 7-728(13)).

243. *Id.* sec. 1, 1992 N.Y. Laws 1960, 1963 (codified at N.Y. TOWN LAW § 276(10)), sec. 5, 1992 N.Y. Laws 1960, 1971 (codified at N.Y. VILLAGE LAW § 7-728(10)).

244. *Id.* sec. 2, 1992 N.Y. Laws 1960, 1964 (codified at N.Y. TOWN LAW § 277(4)), sec. 6, 1992 N.Y. Laws 1960, 1972 (codified at N.Y. VILLAGE LAW § 7-730(4)).

245. 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990).

246. Act of July 31, 1992, ch. 727, sec. 2, 1992 N.Y. Laws 1960, 1965 (codified at N.Y. TOWN LAW § 277(9)), sec. 6, 1992 N.Y. Laws 1960, 1973 (codified at N.Y. VILLAGE LAW § 7-730(9)).

6. *Creation of Planning Boards*

This measure, which became effective July 1, 1993,²⁴⁷ consolidated in one section in the Town Law and one in the Village law, all provisions concerning the creation of planning boards, appointment of members and the general advisory powers of such boards.²⁴⁸ The measure provides for the creation of new planning boards by local law, rather than by resolution.²⁴⁹ It also provides that the subject matter of planning board regulations, such as subdivision regulations, must be adopted by local law.²⁵⁰ The measure would also allow town boards and village boards of trustees to require training for planning board members, and to provide for their removal for failure to complete the local training requirements.²⁵¹

7. *Agricultural Districts and Land Use Regulation*

This measure, which became effective July 1, 1993,²⁵² added new Town Law section 283-a²⁵³ and new Village Law section 7-741²⁵⁴ which require applicants for certain land use approvals to provide "agricultural data statements," for use by reviewing agencies.²⁵⁵ It applies to applications for special permits, use variances, site plan approval and subdivision approval for property within an agricultural district containing a farm operation or on property with boundaries within 500 feet of a farm operation in an agricultural district.²⁵⁶ The agricultural data state-

247. Act of July 31, 1992, ch. 663, 1992 N.Y. Laws 1749.

248. Act of July 31, 1992, ch. 663, sec. 1, 1992 N.Y. Laws 1749, 1749-51 (codified at N.Y. TOWN LAW § 271 (McKinney Supp. 1993)), sec. 2, 1992 N.Y. Laws 1749, 1751-52 (codified at N.Y. VILLAGE LAW § 7-718 (McKinney Supp. 1993)).

249. *Id.* sec. 1, 1992 N.Y. Laws 1749, 1749 (codified at N.Y. TOWN LAW § 271(1)), sec. 2, 1992 N.Y. Laws 1749, 1751 (codified at N.Y. VILLAGE LAW § 7-718(1)).

250. *Id.* sec. 1, 1992 N.Y. Laws 1749, 1750 (codified at N.Y. TOWN LAW § 271(13)), sec. 2, 1992 N.Y. Laws 1749, 1752 (codified at N.Y. VILLAGE LAW § 7-718(10)).

251. *Id.* sec. 1, 1992 N.Y. Laws 1749, 1749, 1750 (codified at N.Y. TOWN LAW § 271(1), (9)), sec. 2, 1992 N.Y. Laws 1749, 1751 (codified at N.Y. VILLAGE LAW § 7-718(1), (6)).

252. Act of July 24, 1992, ch. 534, 1992 N.Y. Laws 1523.

253. *Id.* sec. 5, 1992 N.Y. Laws 1523, 1525 (codified at N.Y. TOWN LAW § 283-a (McKinney Supp. 1993)).

254. *Id.* sec. 6, 1992 N.Y. Laws 1523, 1525-26 (codified at N.Y. VILLAGE LAW § 7-741 (McKinney Supp. 1993)).

255. *See supra* notes 253-54.

256. Act of July 24, 1992, ch. 534, sec. 5, 1992 N.Y. Laws 1523, 1525 (codified at N.Y.

ment would contain information identifying farm operations so that reviewing boards would be aware of their proximity.²⁶⁷ The measure also amended General Municipal Law sections 239-m and 239-n to require referrals under those sections of special use permits, use variances, site plans and subdivision plats within 500 feet from the boundary of farm operations within agricultural districts.²⁶⁸

8. *Intermunicipal Cooperation in Planning and Land Use Regulation*

This measure, which became effective July 31, 1992,²⁶⁹ added new Town Law section 284,²⁶⁰ Village Law section 7-741,²⁶¹ and General City Law section 20-g,²⁶² to encourage municipalities to use their powers to undertake cooperative efforts for planning and local land use regulations.²⁶³ It complements the broad authority municipalities have under General Municipal Law article 5-G to enter into agreements for joint activities.²⁶⁴ The measure specifies examples of intermunicipal cooperation that are possible, including joint planning boards or zoning boards of appeals, and the joint preparation of comprehensive plans.²⁶⁵

With the enactment of the eight new statutes mentioned above, some old and familiar sections have been renumbered.

TOWN LAW § 283-a(2)), sec. 6, 1992 N.Y. Laws 1523, 1526 (codified at N.Y. VILLAGE LAW § 7-741(2)).

257. *Id.* sec. 5, 1992 N.Y. Laws 1523, 1525 (codified at N.Y. TOWN LAW § 283-a(4)), sec. 6, 1992 N.Y. Laws 1523, 1526 (codified at N.Y. VILLAGE LAW § 7-741(4)).

258. *Id.* sec. 7-8, 1992 N.Y. Laws 1523, 1526-27 (codified as amended at N.Y. GEN. MUN. LAW §§ 239-m, 239-n).

259. Act of July 31, 1992, ch. 724, 1992 N.Y. Laws 1952.

260. *Id.* sec. 1, 1992 N.Y. Laws 1952, 1952-53 (codified at N.Y. TOWN LAW § 284 (McKinney Supp. 1993)).

261. *Id.* sec. 2, 1992 N.Y. Laws 1952, 1953-55 (codified at N.Y. VILLAGE LAW § 7-741 (McKinney Supp. 1993)).

262. *Id.* sec. 3, 1992 N.Y. Laws 1952, 1955-57 (codified at N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1993)).

263. *See supra* notes 260-62.

264. *See* N.Y. GEN. MUN. LAW § 119-m (McKinney 1986).

265. Act of July 31, 1992, ch. 724, sec. 1, 1992 N.Y. Laws 1952, 1953 (codified at N.Y. TOWN LAW § 284(4)), sec. 2, 1992 N.Y. Laws 1952, 1954 (codified at N.Y. VILLAGE LAW § 7-741(4)), sec. 3, 1992 N.Y. Laws 1952, 1956 (codified at N.Y. GEN. CITY LAW § 20-g(4)).

Thus, Town Law section 281, concerning cluster development, has been renumbered as Town Law Section 278, effective July 1, 1993.²⁶⁶ Town Law section 278, concerning recording of plats, has become section 279;²⁶⁷ Town Law section 279, covering permits for buildings in the bed of mapped streets, has become section 280;²⁶⁸ and Town Law section 280, concerning municipal improvements in streets, has become section 281.²⁶⁹ All of these changes became effective July 1, 1993.²⁷⁰ The separability clause, Town Law section 284, became section 285, effective July 31, 1992.²⁷¹ No renumberings affect the Village Law.

D. 1993

1. *Use Variance - Redefinition*

A number of Commission proposals were enacted into law during the 1993 session of the legislature and become effective on July 1, 1994,²⁷² including one²⁷³ which made a major change to the law enacted the previous year²⁷⁴ relating to use variances. Although the Commission staff and the Advisory Committee were satisfied with the "depr[iva]tion of all economic use" clause contained in the 1991 amendment,²⁷⁵ objections to the "harshness" of the amendment arose almost immediately after the new

266. Act of July 31, 1992, ch. 727, sec. 3, 1992 N.Y. Laws 1960, 1967 (codified as amended at N.Y. TOWN LAW § 278 (McKinney Supp. 1993)).

267. *Id.* sec. 3, 1992 N.Y. Laws 1960, 1967 (codified as amended at N.Y. TOWN LAW § 279 (McKinney Supp. 1993)).

268. *Id.* sec. 3, 1992 N.Y. Laws 1960, 1967 (codified as amended at N.Y. TOWN LAW § 280 (McKinney Supp. 1993)).

269. *Id.* sec. 3, 1992 N.Y. Laws 1960, 1967 (codified as amended at N.Y. TOWN LAW § 281 (McKinney Supp. 1993)).

270. *Id.* sec. 7, 1992 N.Y. Laws 1960, 1974.

271. Act of July 31, 1992, ch. 724, sec. 1, 1992 N.Y. Laws 1952, 1952 (codified at N.Y. TOWN LAW § 285 (McKinney Supp. 1993)), sec. 4, 1992 N.Y. Laws 1952, 1957.

272. Act of July 6, 1993, ch. 208, 1993 N.Y. Laws 593 (S. 2917-A, A. 4865-A); Act of July 6, 1993, ch. 209, 1993 N.Y. Laws 600 (S. 2918-B, A. 4867-B); Act of July 6, 1993, ch. 211, 1993 N.Y. Laws 604 (S. 3201-A, A. 5475-A); Act of July 6, 1993, ch. 242, 1993 N.Y. Laws 648 (S. 3203-B, A. 5476-B); Act of July 13, 1993, ch. 257, 1993 N.Y. Laws 701 (S. 3031-A, A. 5121-A); Act of July 28, 1993, ch. 544, 1993 N.Y. Laws 1313 (S. 3028-B, A. 5124-B).

273. Act of July 6, 1993, ch. 208, sec. 1, 1993 N.Y. Laws 593, 593-94 (to be codified at N.Y. GEN. CITY LAW § 81).

274. Act of Aug. 2, 1991, ch. 692, 1991 N.Y. Laws 1364. *See supra* notes 164-65.

275. *See* Act of Aug. 2, 1991, ch. 692, sec. 3, 1991 N.Y. Laws 1364, 1367 (codified at N.Y. TOWN LAW § 267-b(2)(b)).

provisions were signed into law.

Bowing to this reaction, the 1991 Town Law²⁷⁶ and Village Law²⁷⁷ were amended in 1993,²⁷⁸ as part of a bill which primarily amended the General City Law. The 1993 amendment to the General City Law²⁷⁹ essentially tracked the 1991 legislation concerning zoning boards of appeals.²⁸⁰ The amendment modified the "all economic use" language of the 1991 amendment to provide that an applicant can obtain a use variance if he "cannot realize a reasonable return, provided that the lack of return is substantial as demonstrated by competent financial evidence."²⁸¹

2. Zoning board of Appeals - Rehearing Provisions

Along with the use variance modifications, the 1993 amendments to the Town Law and Village Law sections also reinstated the rehearing provisions which had been deleted in 1991, and made a few technical changes.²⁸² It is important to note that for the first time the zoning board of appeals provisions of the Town Law, Village Law and General City Law (which are not applicable to New York City) are substantially identical.²⁸³

3. County Review of Local Actions

Section 239-m of the General Municipal Law was amended in 1993 to make the provisions affecting county review of local land use actions easier to read.²⁸⁴ Another interesting change in

276. N.Y. TOWN LAW § 267-b.

277. N.Y. VILLAGE LAW § 7-712-b(1).

278. Act of July 6, 1993, ch. 208, sec. 9, 1993 N.Y. Laws 593, 598 (to be codified at N.Y. TOWN LAW § 267-b), sec. 14, 1993 N.Y. Laws 593, 599-600 (to be codified at N.Y. VILLAGE LAW § 7-712-b).

279. *Id.* sec. 1-5, 1993 N.Y. Laws 593, 593-97 (to be codified at N.Y. GEN. CITY LAW §§ 81, 81-a, 81-b, 81-c, 81-e).

280. See *supra* notes 164-65 and accompanying text.

281. Act of July 6, 1993, ch. 208, sec. 9, 1993 N.Y. Laws 593, 598 (to be codified at N.Y. TOWN LAW § 267-b(2)(b)(1)), sec. 14, 1993 N.Y. Laws 593, 599 (to be codified at N.Y. VILLAGE LAW § 7-712-b(2)(b)(1)).

282. *Id.* sec. 8, 1993 N.Y. Laws 593, 598 (to be codified at N.Y. TOWN LAW § 267-a(12)), sec. 13, 1993 N.Y. Laws 593, 599 (to be codified at N.Y. VILLAGE LAW § 7-712-a(12)). Rehearing provisions were also reinstated in the General City Law. *Id.* sec. 2, 1993 N.Y. Laws 593, 595-96 (to be codified at N.Y. GEN. CITY LAW § 81-a(12)).

283. See Act of July 6, 1993, ch. 208, 1993 N.Y. Laws 593.

284. Act of July 28, 1993, ch. 544, sec. 1, 1993 N.Y. Laws 1313, 1313-15 (to be codified at N.Y. GEN. MUN. LAW § 239-m).

the 1993 amendment provides that if the county or regional agency report is not received by the local referring agency within the period agreed upon, but prior to final action by the referring agency, the report is subject to the present majority-plus-one voting requirements should the local referring agency wish to override the county or regional planning agency.²⁸⁵

4. *Subdivision - Deed Filing Requirements*

Section 333 of the Real Property Law was amended to provide that any deed conveying real property may be accepted for recording by a county clerk only if accompanied by a properly completed state board of equalization and assessment form, which calls for information regarding subdivision approval.²⁸⁶ As part of the same act, section 574 of the Real Property Tax Law was amended to require that certain technical information be furnished by county recording officers to county assessors, the county equalization agency and to the state board of equalization.²⁸⁷

5. *County-Local Cooperation in Planning*

Section 20-g of the General City Law,²⁸⁸ section 284 of the Town Law,²⁸⁹ and section 7-741 of the Village Law²⁹⁰ were amended to allow counties to participate in agreements relating to intermunicipal cooperation in comprehensive planning and the administration of land use regulations.²⁹¹

285. *Id.* sec. 1, 1993 N.Y. Laws 1313, 1315 (to be codified at N.Y. GEN. MUN. LAW § 239-m(4)(b), (5)).

286. Act of July 13, 1993, ch. 257, sec. 1, 1993 N.Y. Laws 701, 701-02 (to be codified at N.Y. REAL PROP. LAW § 333(1-e)).

287. *Id.* sec. 4, 1993 N.Y. Laws 701, 702-03 (to be codified at N.Y. REAL PROP. TAX LAW § 574(1)).

288. Act of July 6, 1993, ch. 242, sec. 1, 1993 N.Y. Laws 648, 648-49 (to be codified at N.Y. GEN. CITY LAW § 20-g(1), (2), (3), (4)).

289. *Id.* sec. 2, 1993 N.Y. Laws 648, 650-51 (to be codified at N.Y. TOWN LAW § 284(1), (2), (3), (4)).

290. *Id.* sec. 3, 1993 N.Y. Laws 648, 651-52 (to be codified at N.Y. VILLAGE LAW § 7-741(1), (2), (3), (4)).

291. *See supra* notes 288-90.

6. *City Planning Board Functions - Technical Changes*

The General City Law sections relating to planning boards, special permits, and site plan review were also amended in 1993.²⁹² The new law combines a number of existing provisions²⁹³ into one new section (section 27), which addresses the basic structure of city planning boards and their functions, powers and duties.²⁹⁴ The law also makes certain technical amendments to the comparable Town Law and Village Law sections²⁹⁵ which are necessary to achieve consistency with the new General City law provisions.

7. *Defining the Comprehensive Plan*

In all of our years dealing with land use matters, we have never found any serious opposition to the *concept* of comprehensive planning; nor do we know of any great amount of disagreement over the principle that many land use problems simply do not stop at the boundaries of each local government in the state. Until this year, however, Commission staff proposals dealing with a comprehensive plan *bill* have run into constant, and vocal, opposition. The proposals have been changed, almost on a monthly basis, for over three years. At the 1992 legislative session, many letters and phone calls were received, each carrying the same message: the comprehensive plan proposal²⁹⁶ is contrary to present statutory provisions and case law. Of course, the proposal *is* contrary to statute and case law. The statutes simply say that all zoning must be in accordance with a comprehensive plan;²⁹⁷ case law usually finds that a certain zoning action was not in accordance with a comprehensive plan, rather than defin-

292. Act of July 6, 1993, ch. 211, sec. 1-3, 1993 N.Y. Laws 604, 604-09 (to be codified at N.Y. GEN. CITY LAW §§ 27, 27-a, 27-b).

293. N.Y. GEN. CITY LAW §§ 27, 28, 30, 30-a (McKinney 1989 & Supp. 1993).

294. Act of July 6, 1993, ch. 211, sec. 1, 1993 N.Y. Laws 604, 604-06 (to be codified at N.Y. GEN. CITY LAW § 27).

295. *Id.* sec. 4, 1993 N.Y. Laws 604, 609-10 (codified as amended at N.Y. TOWN LAW § 271(1), (2), (6)), sec. 5-6, 1993 N.Y. Laws 604, 610 (codified as amended at N.Y. VILLAGE LAW § 7-718(1), (6)).

296. S. 2918-B, A. 4867-B, 215th Leg., Reg. Sess. (enacted by Act of July 6, 1993, ch. 209, 1993 N.Y. Laws 600).

297. See N.Y. TOWN LAW § 263 (McKinney 1987); N.Y. VILLAGE LAW § 7-704 (McKinney Supp. 1993).

ing what a comprehensive plan is, or should be, and measuring a certain action against this definition.²⁹⁸

While we cannot conceive that a municipality, or a municipal attorney, called upon in court to defend a land use action against a charge of non-accordance with a comprehensive plan would not rather rely on a written document, no matter how brief or how simple, rather than attempting to produce a nebulous record of meetings, conferences, consultant's reports and the like, our conception is hardly held in universal agreement. The basic problem does not appear to be widespread objection to comprehensive planning, but rather to a *written* plan, which seems to raise the specter of "state mandate" and even worse, "*unfunded* state mandate." Anyone involved in planning and zoning knows of the efforts presently being undertaken by groups, organizations, academic institutions and others to foster a regional approach to planning and true comprehensive planning. We have been given the opportunity to review literally dozens of documents and suggestions, many of which are both well thought out and workable, but still all of these efforts are thwarted by the opposition to a state statute defining a comprehensive plan, which is to be embodied in a written document.

Finally, this year, the legislature passed, and the Governor signed into law, a bill that provides a formal, legislative definition of the comprehensive plan to which zoning must conform.²⁹⁹ The new definition of a comprehensive plan is one paragraph long, is followed by an illustrative list of 15 topics that may be covered in the plan, and expresses the legislature's intent to place more emphasis on comprehensive planning.³⁰⁰ While the law contains no actual operative or procedural provisions, it represents, for the first time, something other than the rubric "all zoning must be in accordance with a comprehensive plan," and provides a foundation for future amendments that may result in

298. See, e.g., *Udell v. Hass*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); *Place v. Hack*, 34 Misc. 2d 777, 230 N.Y.S.2d 583 (Sup. Ct. 1962). See *supra* notes 54, 56 and accompanying text.

299. Act of July 6, 1993, ch. 209, sec. 1, 1993 N.Y. Laws 600, 600-01 (to be codified at N.Y. TOWN LAW § 272-a), sec. 2, 1993 N.Y. Laws 600, 601-02 (to be codified at N.Y. VILLAGE LAW § 7-722), sec. 3, 1993 N.Y. Laws 600, 602-03 (to be codified at N.Y. GEN. CITY LAW § 28-a).

300. See Act of July 6, 1993, ch. 209, 1993 N.Y. Laws 600.

comprehensive plan legislation that has been so desperately needed since the inception of the original zoning statutes.

V. CONCLUSION

Much remains to be done in improving the substantive requirements for land use planning, providing for formal training of local zoning and planning officials, and continuing to refine the organization, readability and consistency of the state's land use law. As this article demonstrates, however, Senator Charles D. Cook and the other members of the Commission, together with the efforts of Executive Director, Ronald C. Bauch, Commission Staff and the Statewide Advisory Committee on Land Use Statutes have made a major contribution to land use planning and zoning in New York State by launching and sustaining this multi-year legislative reform effort.