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## In Accordance with a Comprehensive Plan, the Need for Planning Consistency in New York State

Peter Q. Eschweiler

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# PACE ENVIRONMENTAL LAW REVIEW

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## In Accordance With A Comprehensive Plan, The Need for Planning Consistency in New York State\*

Peter Q. Eschweiler\*\*

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\* Except for minor editorial changes, this address appears as originally presented on February 19, 1992 at "Development Rights and Water Body Protection — Legal Solutions," a conference sponsored by the Real Estate Law Society of Pace University School of Law.

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### I. Introduction

The purpose of this colloquium is to examine, under the rubric of "water body protection," the rising tension between development rights and local planning, and the efforts to preserve water bodies and other natural resources. In giving visual form to his premise, Professor Nolon has suggested that the traditional arrangement of planning and land use regulatory authority is planar and horizontal, and that a number of the efforts to impose control over land use in the name of environmental protection are planar and vertical. With the intersection of two planes, the lines are drawn.

This article presents a land use planner's view of the horizontal plane of the authorities, the powers, and the techniques for land use planning.<sup>1</sup> It will comment on the need to

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1. This article originally was prepared and delivered as a speech and appears as originally presented, except for minor editorial changes. It expresses over three decades of experiences and observations of the author and is not intended as an exhaustive legal document. For more specific citations and examples *see generally* PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* (1977); ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* (1986); DANIEL R. MANDELKER, *LAND USE LAW* (1988); AMERICAN BAR ASSOCIATION, *ADVISORY COMMISSION ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW* (Richard P. Fishman, ed., 1978); *THE PRACTICE OF LOCAL GOVERNMENT PLANNING* (Frank S. So et al. eds., 1979); DANIEL R. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* (2d ed. 1981); DANIEL R. MANDELKER, *ENVIRONMENTAL AND LAND*

add "3-D" — the third dimension — to this plane. It will list some of the changes that are occurring and their causes, drawing on examples from my experience in the Westchester County Department of Planning. Finally, the article will discuss some of the efforts that are being made to coordinate these changes with a greater sense of common policy alignment, at least in New York State.

It is my premise, first, that there needs to be a mechanism in place to assure that any government that regulates matters affecting the use of land must have a plan for the most appropriate use of that land. Second, there must be a greater consistency between this plan and the plans of the other agencies at the same or other levels of government. Third, the plan must articulate that the implementation of the plan is necessary, that there is a predictable outcome, and that it is consistent with desired goals.

#### A. Examples of Conflicts and Usurpation

Professor Nolon, in his presentation at this colloquium, posed the following as examples of extraterritorial actions which are being taken or have been proposed in the name of water quality protection:

*Item.* The State of New York would impose moratoria on development in areas tributary to Westchester's Long Island Sound sewage treatment plants, pending the improvement of those plants to arrest the nitrogen buildup in the Sound.<sup>2</sup> Pathogenic pollution is not at question; it is

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#### CONTROLS LEGISLATION (1976).

For discussions on zoning and land use in the context of New York State, see WILLIAM X. WEED & OSCAR L. WARREN, *WARREN'S WEED NEW YORK LAW OF REAL PROPERTY* (4th ed. 1993). Specifically, see vols. 3 (Land Use Regulations: Takings and Monetary Damages); 3A (Municipal Corporations); 4 (Public Housing); 5 (State Land Use Control); 5A (Urban Renewal); 6 (Zoning: Bulk and Design Regulations and Flexible Techniques; Zoning: Construction; Zoning: Nature and Authority).

For further information regarding Westchester planning and for Westchester County planning documents, contact the Westchester County Department of Planning, 432 Michaelian Office Building, White Plains, New York 10601, Tel. (914) 285-4400.

2. For additional information, contact The Long Island Sound Study Office, Stamford Government Center, 888 Washington Blvd., Stamford, Ct. 06904-2152.

the fertilization by treated sewage that is the complaint.  
*Item.* The City of New York proposal for extensive changes and stricter rules affecting development in the areas tributary to its water supply reservoirs in seven up-state counties, including the dictation of the permitted densities of development, in the interests of cost avoidance of water filtration plants.<sup>3</sup>

*Item.* Along the Hudson River, the Village of Tivoli considers establishing watershed rules and regulations that would give the Village power to protect its drinking water in the Stony Creek watershed over an area of nearly twenty square miles outside its own one square mile area.<sup>4</sup> The result would be limitations on development in Red Hook in Dutchess County, and in Clermont and German-town in neighboring Columbia County.

*Item.* A three-year moratorium on development results from delays by the New York State Department of Environmental Conservation in determining the boundaries of the restricted areas along the Peconic River in Suffolk County that were to be established by the inclusion of that river in the State's Wild, Scenic and Recreational Rivers system. Finally, development within a one-half mile of that river is severely limited as to density and type, which the plaintiff Town of Riverhead alleges is an illegal delegation of the State's police power to the regulatory agency.<sup>5</sup>

Are these all bad? Is there some public benefit that justifies overriding local home rule? Sovereignty always has been a negotiable item, as the following discussion will show.

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3. See Revised Discussion Draft Regulations for the Protection from Contamination, Degradation and Pollution of the New York City Water Supply and its Sources, Text circulated by Al Appleton, New York City Department of Environmental Protection (June 12, 1992) [hereinafter Appleton].

4. *Tivoli Wants to Police its Water*, GAZETTE ADVERTISER, Nov. 23, 1988, at 1.

5. *Town of Riverhead v. DEC*, N.Y. L.J., Nov. 6, 1990, at 26.

## B. The Importance of Water to Westchester County

When I was a youngster, growing up in Milwaukee in a home about 500 yards from Lake Michigan, I never gave much thought to water. We drank the lake water after municipal filtration, and there certainly was plenty of it. We swam in it, we watched the boats sail on it and the car ferries steam across it, and never gave much heed. Even in planning school, we were never drilled on the essentiality of water to human and urban existence. The planners were exposed to the subject through the kindness of the engineering school, where we took "Mains and Drains." Since we were planners and from diverse, non-technical backgrounds, it was a special course tailored to our levels of understanding, or what one might call "Water Supply and Sewage Disposal for Poets."

My experience in Westchester County was my awakening. As one of the three County commissioners who served on the Westchester County Water Agency, I was quickly immersed in the facts of life — obtaining potable water is not merely a matter of extending an intake into the boundary waters, as it was in Milwaukee. Westchester County is almost totally dependent on the City of New York for its water supply.<sup>6</sup> Approximately 90% of Westchester's residents are served by community water supplies, a central distributor with multiple customers. In addition, 90% of the water in those community systems is provided from New York City watershed reservoirs.<sup>7</sup> Since the amount of water available to New York City from its present collection network is finite, it is my current duty as Chairman of the County's Drought Emergency Task Force to develop long- and short-range plans for reducing the per capita consumption of potable water, to keep our thirst within the bounds of the City's ability to supply.

Because of that dependency, the attitudes of the West-

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6. See N.Y. CITY DEP'T ENVTL. PROTECTION *Hudson River Water Supply Study* (1990). Additional information about Westchester County water needs and uses may be obtained from the Westchester County Department of Planning.

7. More than 700,000 Westchester County residents have a vital stake in the quality, quantity, distribution and cost of New York City water, whether they know it or not.

chester County administration are more closely aligned with the water quality preservation measures proposed by New York City,<sup>8</sup> both within and outside of Westchester's boundaries, than may seem politically correct to both their constituents, and the building community. The alternatives — massive public works for water filtration and distribution — are fiscally intimidating, to say the least.

## II. Traditional Land Use Planning<sup>9</sup>

### A. The Role of Planners

Planners today are perceived in various ways. To some, a planner is merely a boy scout with a power complex, or a landscape architect with a whole community as his client. To others, a planner must be an economist, devoted to the promotion of land uses that will be fiscally beneficial to the community's tax base and property tax burden. An ever-broadening area today is that of the social planner, who often forswears physical planning aspects and concentrates on determining the needs and oppressions of various subgroups of our society and acting as their advocate before those who hold political power. Others may be lawyers who specialize in applying legal techniques to the planner's art or who litigate over the nits and nuances of planning procedures and reviews. Planning, simply expressed, is the organization of policy, and it includes all of the necessary preparatory work in order to advise the politically responsible authorities to take rational and consistent action on all major aspects of development.

One of the early leaders of the planning profession was Frederick Law Olmsted, Jr., son of the famous landscape architect, who became distinguished in his own right as a city planner. At the National Conference on City Planning in 1911, he gave my favorite description of a city plan:

We must cultivate in our minds and in the mind of the people the conception of a city plan as a device . . . for

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8. See Appleton, *supra* note 3.

9. See generally *supra* note 1.



preparing, and keeping constantly up to date, the unified forecast and definition of all important changes, additions, and extensions of the physical equipment and arrangement of the city which a sound judgment holds likely to become desirable and practicable in the course of time, so as to avoid so far as possible both ignorantly wasteful action and ignorantly wasteful inaction in the control of the city's physical growth. It is a means by which those who become at any time responsible for decisions affecting the city's plan may be prevented from acting in ignorance of what their predecessors and their colleagues in other departments of city life have believed to be reasonable contingencies.<sup>10</sup>

## B. The Comprehensive Plan

The main point of Olmsted's description is the prime importance of a comprehensive plan<sup>11</sup> in any program involving the appropriate use of land. In the sense that the term "comprehensive plan" is used in this article, it should be taken to mean both geographical comprehensiveness and jurisdictional comprehensiveness — all embracing. To the extent that the comprehensive plan affects the interests of other governments, it must be large enough in scope to reflect the interests of all parties.

How does an urban planner approach the preparation of a comprehensive land use plan? Based on my experience, the general sequence is as follows: (1) state the objectives and the measurement of the status quo, (2) compare the two to determine gaps, shortages or needs, (3) apply a variety of standards to express current and future needs in measurable terms, (4) project needs and objectives throughout the time span of the planning period, (5) determine the most appropriate means of

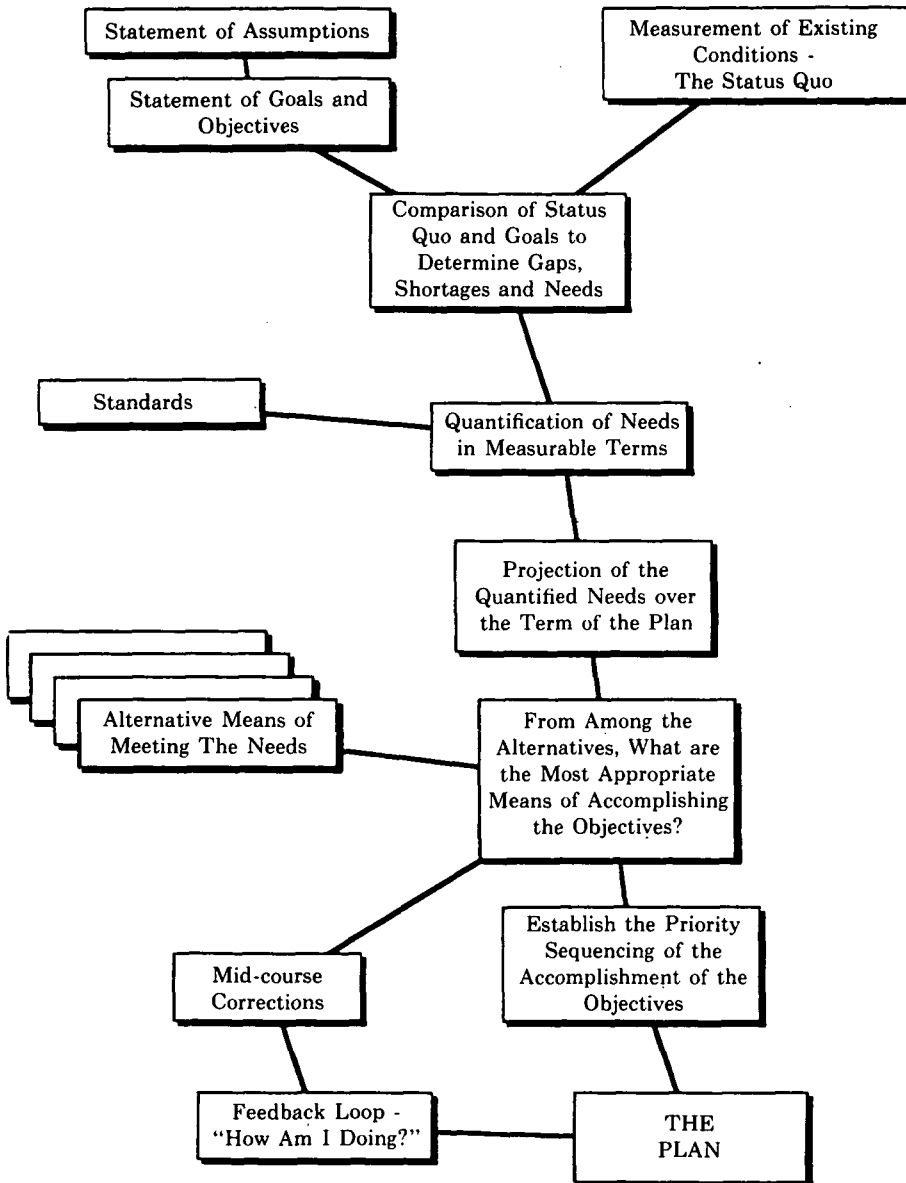
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10. *Proceedings of the Third Conference on City Planning, Philadelphia*, Pennsylvania, May 15-17, 1911 (Boston: 1911), pp. 12-23 [hereinafter Philadelphia].

11. For discussions on comprehensive plans, see, e.g., *Udell v. Haas*, 235 N.E.2d 897, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968); *Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 302 N.Y. 115 (1951); *Kravetz v. Plenge*, 84 A.D.2d 422, 446 N.Y.S.2d 807 (1982); *Blumberg v. City of Yonkers*, 41 A.D.2d 300, 341 N.Y.S.2d 977 (NEED DEPT 1973).

accomplishing the objectives, (6) schedule their accomplishment throughout the planning period on a priority basis, and (7) impose a feedback loop to measure the accomplishments, detect and remedy the glitches, and add mid-course corrections where appropriate. Under this approach, the role of the planner is similar to that of the travel agent: a client wants to take a vacation, and the agent's job is to find out where he thinks he wants to go, where he ought to go, where he can afford to go, and then to show him how to get there, on schedule. The agent also stands by in case the client gets lost and needs redirection. The following chart visualizes the planner's process.

### The Planner's Process



### C. Guiding Development

Too often a government's reaction to a problem is the knee-jerk response: "We must pass a law" or "We must establish controls." This is particularly true of New York State, which too often sees its role in dealing with the environmental issues as solely that of the regulator. But laws and controls are only a small part of the answer. The process may be put into perspective by posing an acronym as a mnemonic for this article: ARID.<sup>12</sup> The word consists of the initial letters of the four different types of activities that the inventive planning profession has used to shape urban development: Advisory actions, Regulatory actions, Inducing actions, and Direct actions. Their sequence generally indicates the order in which they have been used to obtain greater public leverage in constructing urban patterns. The acronym defines the spread of approaches that planners and their clients have used over the years in the municipal guidance of land use. Use this acronym to consider the problems and examples that will be described, and to judge whether perhaps other ARID solutions would do, or would have done, a better job.

The advisory role of municipal planning — the letter "A" — was typical of the civic arts and aesthetic commissions of the early 20th century. Their role was strictly advisory; they had no real powers, and, in many cases, they were not even an officially recognized branch of local government. By the development of exemplary plans of the beaux arts school, generally patterned after the examples of the 1893 Chicago World's Fair, these groups sought to influence future development — principally of civic plazas and public buildings — with emphasis on very formal types of urban design. Today, advice and the closely related techniques of persuasion and inspiration still play important roles in guiding development. In the absence of strong regional planning authority at the metropolitan level, this is the chief technique on which planners rely.

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12. Based on "ACID," as coined by John W. Reps, Pomeroy Memorial Lecture, "Requiem for Zoning," in *Planning 1964, Selected Papers from the ASPO National Planning Conference*, Boston, Mass., Apr. 5-9, 1964 (Chicago 1964) at 56-57.

When municipal officials realized that advice alone was insufficient to produce the type of urban environment desired by the public, the inventive planners of the United States developed several new concepts of regulating — our letter “R” — private developments as a means of achieving civic goals. Out of this concept grew the widely recognized and practiced methods of land use control through zoning,<sup>13</sup> the official map, the development plan, subdivision regulations, and the like. The development of this approach was particularly spurred by the Housing Act of 1954<sup>14</sup> and its successors,<sup>15</sup> which provided federal and state aid to municipalities between 1954 and 1977 in the development of local plans and implementation techniques through the Municipal Planning Assistance Program.<sup>16</sup> Under this program or on their own, virtually all Westchester municipalities in this period either adopted or strengthened their assortment of land use control powers.

However, controls are basically negative instruments, written in commandment form: “Thou shalt not . . . .” They can be used to prevent, but not to compel. Even though the regulatory form of guidance has probably been used in the production of more dollars’ worth of investment than any of the other devices, it still has not achieved the type of development that many felt was needed.<sup>17</sup>

The planning profession again came to the rescue, and developed a wide variety of federal, state, and local programs for the inducement — the letter “I” — of appropriate development. The basic message was: “We can’t make you do it if you don’t want to, but if you do it our way, we’ll make it worth your while.” Inducements took many forms, but were generally financial subsidies. These were either direct or indi-

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13. See, e.g., *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926) (establishing the constitutionality of zoning).

14. Housing Act of 1954, ch. 649, 68 Stat. 590.

15. See generally 5 PATRICK J. ROHAN, *ZONING AND LAND USE CONTROL* (Matthew Bender ed., Oct. 1992) § 29.02[7] [hereinafter ROHAN].

16. See ROHAN, *supra* note 15, § 29.02(6) n. 48.

17. For example, our slums are still with us, the urban poor were becoming more and more concentrated, the replacement of obsolete housing and buildings was virtually nil in many areas, and the pace of private development was governed more by the areas of greatest return than by the areas of greatest need or public good.

rect; for example, through the abatement or elimination of taxes, one of the major burdens of the rent roll. At least fifty-seven varieties of alphabet soup agencies, including FHA (Federal Housing Administration), VA (Veterans Administration), Urban Renewal, and the FNMA (Federal National Mortgage Association), became commonplace as the public again tried to induce private development to accommodate the public good.

The final stage of planning power development, or at least the current one, sees the role of government change from advisor, regulator, and inducer to that of the direct developer — the letter “D.” Where the other techniques have not worked fully, government takes unto itself the powers of the developer, and acts as the entrepreneur: obtaining and packaging the land (as in urban renewal), preparing the plans, and, if necessary, acting as prime contractor. In 1968, New York State went so far as to create a new state agency, the Urban Development Corporation (UDC),<sup>18</sup> which combined in one agency powers never before so assembled.<sup>19</sup>

#### D. Planning and the Private Enterprise System

We must not lose sight of the fact that government depends upon the private enterprise system to be the major agent for delivering civic objectives through private investment and through the entrepreneurial role of the developer. Virtually all of our urban development facilities, other than those uses that are patently public,<sup>20</sup> must be provided through the private enterprise process. We are dealing not only with an extensive system of private ownership of land, but also with traditions in government — federal, state, county, and municipal — that a man’s home is indeed his cas-

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18. N.Y. UNCONSOL. LAW § 6254 (McKinney 1992).

19. *Id.* §§ 6252, 6255, 6272. The Agency was created to rehabilitate and construct industry, manufacturing, education, recreation, and low income housing in substandard and unsanitary areas. *Id.* § 6252. To that end, the corporation was exempted from local taxes and was given the power to rehabilitate, construct, or improve any project by making loans. *Id.* § 6255.

20. Public facilities include courts, firehouses, schools, and governmental office buildings.

tle, and that the government has little right to interfere with his use and enjoyment therein.

Citizens rely on private developers to provide them with most of their housing, utilities, transportation systems, communications, recreation, and other facilities, all at some degree of profit to the developers for their entrepreneurial efforts. Since they are motivated by profit, developers often seek to maximize that profit and, in the eyes of many, developers left to their own devices will maximize their gain at the expense of the community.

Basic land use regulations, based upon a negative approach, can limit but not compel. The foundation of municipal control over land use and the land development process rests in the basic police power of municipal government, the right of a government to control the public and private acts of its citizens (and its developers) in the interest of the public health, safety, morals, and general welfare.<sup>21</sup>

#### E. Planning and the Police Power

The municipal use of the police power is further constrained by both state and federal constitutions, and particularly by the due process and equal protection clauses.<sup>22</sup> If a citizen intends to challenge the constitutionality of a zoning action, the legal test will consider one or more of these three elements: (1) whether the ordinance is so restrictive as to constitute a taking,<sup>23</sup> (2) whether application of the ordinance denied the individual due process,<sup>24</sup> or (3) whether the individ-

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21. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (a state has unquestioned power to protect the health and safety of its citizens); *Mugler v. Kansas*, 123 U.S. 623 (1887). *But see*, *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (a balancing test is required to determine whether a statute is clearly excessive in relation to the putative local benefits).

22. *See* U.S. CONST. amend. XIV., and N.Y. CONST. art. I, § 6 (due process) and § 11 (equal protection).

23. *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *rev'd and remand*, 112 S. Ct. 2886 (1992) (holding that a taking occurs when all economically viable use of the property had been taken and when there was no clearly defined common law tradition for the purpose behind the restricting statute).

24. *See Village of Belle Terre v. Boraas*, 461 U.S. 1, 94 S. Ct. 1536, 39 L.Ed. 797 (1974) (holding that a zoning regulation is invalid on equal protection and due pro-

ual was denied his right of equal protection of the laws.<sup>25</sup>

One of my more conservative associates defined police power rather broadly as "the right under law to use my equity for your purposes." The municipal government uses this authority to control the actions of private developers in the urban marketplace to shape entrepreneurial efforts in order to permit development only in accordance with land use patterns and designs which the community holds to be acceptable. These land use controls are then used to implement the community's policy — a synonym for the community's land use plan.

#### F. Plan Implementation Devices

Let us assume that, after determining objectives, measuring needs, and laying out the plan, you determine that the police power approach is the correct one. What tools are at your disposal? There are a variety of classic implementing devices based on the police power. First and most obvious is the zoning ordinance, but others which should be considered are subdivision regulations, the official map, site plan review, the urban renewal process, and capital programming and budgeting. With the exception of the last two, most of these are negative devices — "Thou shalt not" — and all that can be said is that they do not make things happen, but simply allow certain things to happen.<sup>26</sup>

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cess grounds of U.S. Const. amend. XIV if both the intent and the effect of the regulation is to discriminate against racial, ethnic or economically disadvantaged groups).

For the New York State standards, see *French Investing Co. v. City of New York*, 39 N.Y.2d 587, 596, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976) (holding that an ordinance is unreasonable and constitutes a deprivation of property with out due Process of Art. 1 § 6 of the New York State Constitution if it fails this two-part test: (1) was it enacted to further a legitimate governmental purpose, and (2) there is a "reasonable relation between the end sought to be achieved by the regulation and the means to achieve that end."); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975) (holding that zoning regulations will appear to have either an exclusionary purpose or effect and be invalid under the N.Y. Const art. I § 6 (due process) and art. I § 11 (equal protection) if they fail this two part test: (1) a properly balanced and well-ordered plan, and (2) reflect consideration for the needs of botg the region and the municipality).

25. See cases cited *supra* note 24.

26. A good test of this is the statement that was taught to me at an early stage



## 1. The Zoning Ordinance

The zoning ordinance is the legal instrument used by a community to divide the land of the municipality into geographically defined districts and to control the use, bulk, and intensity of land use in those districts.<sup>27</sup> It is not the plan itself, which has to do with the overall design of the community, but is rather a plan-implementing device controlling the physical arrangement and size of individual buildings and other structures placed on land. Typically, the community is divided into two or more districts, which vary on the basis of the type of use permitted, the arrangement of the buildings on the property (in terms of lot size, frontage, yards, setbacks, distances between buildings and the like) and the height and other dimensions of the building in relation to the size of the lot on which it is located. Two of the tests of a legal zoning ordinance are that it must serve legitimate purposes<sup>28</sup> and that it must permit some reasonable and economic use of land by the property owner;<sup>29</sup> to be denied all economic use would deprive an owner of the use and enjoyment of his property without due compensation. You frequently hear in connection with zoning the cliché "highest and best use,"<sup>30</sup> but this is a concept based primarily on economic rate of return, and has little place in the implementation of a comprehensive development program in any municipality.

Early zoning provisions had little regard for conservation of land and natural resources. The standards were people-oriented, drawn to assure the adequate circulation of light and air into buildings, to lessen congestion in the streets, to secure

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by my first planning boss: "Remember, Peter, that if zoning could make things happen, we could all zone for oil wells and retire!"

27. See, e.g., *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (providing the definition of use zoning).

28. *French Investing Co v. City of N.Y.*, 39 N.Y.2d 587, 596 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

29. *Id.*

30. *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 292, 470 N.Y.S.2d 350, 458 N.E.2d 809 (1983) (holding that the test for constitutionality of a zoning ordinance is not the deprivation of highest and best use, but whether the zoning classification deprives the owner of a reasonable return).

safety from fire and flood, and to provide for an appropriate density of population. Little thought was given to the use of zoning as a device for preserving exceptional areas of natural beauty or ecological importance. Nor was it viewed as a shaping device for urban form,<sup>31</sup> the visual and subjective contrast between uses and between geographic areas. More modern zoning standards, generally those written in the last twenty years, are being used to permit such popular open-space-preserving developments as cluster subdivisions or planned unit developments. They may also provide incentives of one sort or another for developments that promote other civic objectives, such as affordable housing, historic preservation, public art, or other amenities.

## 2. The Drawbacks of Zoning

One of the unfortunate drawbacks of zoning is that it uses a series of minimum standards, and therefore allows a minimum community to be created. Because of the equal protection requirement of most state enabling statutes and the United States Constitution, zoning standards must be equally applicable to all properties in the same zoning district. This means that the minimum standards become lowest common denominators.

Few are the communities that have not found the need to make exceptions to the general rules of broad-brush zoning through a variance procedure.<sup>32</sup> Because exceptions must be made, zoning ordinances provide for variance procedures. A zoning board of appeals is created to act in a quasi-judicial role, and is authorized to grant a zoning variance to those who would suffer from the strict application of the ordinance's requirements. The zoning board determines if the application of the strict letter of the ordinance would cause the property owner unusual hardship or practical difficulty. If property

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31. The development of the urban form approach to land planning in Westchester is discussed *infra* notes 43, 183-199 and accompanying text.

32. See, e.g., *Otto et al. v. Steinhilber*, 24 N.E.2d 851, 282 N.Y. 71 (1939) (use variance); *Fulling v. Palumbo*, 233 N.E.2d 272, 286 N.Y.S.2d 249, 21 N.Y.2d 30 (1967) (area variance).

owners can show that they suffer from one or both of these characteristics, or are otherwise legally deprived of the enjoyment of their land, the board can exempt their property from the letter of the law and permit them a use or a dimensional exemption, which would not otherwise be allowed.

Unfortunately, many boards of appeal see themselves in the role of the International Red Cross, making it their prime purpose to grant relief to anyone coming before them, regardless of whether the hardship is legitimate or illusory. This weakens the validity of the plan which the ordinance was intended to implement. A zoning board must remember that it is a board of relief, not a board of privilege. It has a responsibility to see that landowners are restored to the same level of enjoyment of the use of their property as is accorded their neighbors who do not suffer the hardship. Landowners seeking a variance should not be allowed to use their land or build in a manner that grants them a privilege denied to others. Above all, the hardship must be one that runs with the land, and not a personal inconvenience to the current land owner.

### 3. Subdivision Approval

Municipal planning boards also control and implement the design aspects of their land use plans through subdivision review.<sup>33</sup> The property owner who proposes to divide the land into separate lots for individual buildings is required to apply to and obtain approval of the local planning board before selling or developing the land. Approval is based on the layout of the subdivision, as shown on a subdivision plat, and on the design of physical improvements, shown in detail on the accompanying construction plans. A usual condition of approval is the installation of improvements shown on the construction plans (e.g. roads, sewers, water supply, etc.), before any purchasers can move in. The planning board's procedure is usually stated in a series of subdivision regulations, adopted by the board, which describe the design criteria for the improve-

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33. See generally James A. Kushner, *Subdivision Law and Growth Management* (1991).

ments to be installed.

Whereas the zoning ordinance describes the minimum size of a lot for each use, and probably gives basic minimum dimensions (such as 100 ft. width or 200 ft. depth), subdivision regulations describe the design details of the neighborhood.<sup>34</sup> In many jurisdictions, the planning board is entitled to require the developer to set aside a certain proportion of the land in his subdivision for park or recreation purposes. Enabling statutes vary as to whether developers can be required to turn over that land to the municipality, which the developers frequently do because they usually do not want to retain any continuing interest in the land after all lots are sold.

In New York, judicial dictum was adopted as an enabling statute to permit the planning board to waive the actual reservation of land for recreational purposes and to require the developer to make a contribution of money to the municipality in lieu of such reservation.<sup>35</sup> These funds are to be used by the municipality for the acquisition of recreation land outside the subdivision but available to its residents. Land reservation standards usually vary by density of the zoning district in which the subdivision is located, and are usually related to some standard of acres-per-family of recreation land desired by the community, such as three acres per 100 families.

The fee required in lieu of such recreation land usually bears some relationship to the market value of the equivalent acreage in that particular subdivision.<sup>36</sup> Such park land reservation clauses present an opportunity to preserve at least some of the ecologically important land in new subdivisions. The money in lieu of land procedure can be used to acquire

34. The details may include how lot lines must be perpendicular to street lines, how intercepting streets must meet at right angles, the maximum and minimum grades of new streets for safe vehicular use and for adequate drainage, the location of utility lines within the subdivision, and the placement of such amenities as street trees, street lights, road signs, sidewalks, and the like.

35. N.Y. VILLAGE LAW § 7-730(4) (McKinney 1986 & Supp. 1993); N.Y. GEN. CITY LAW § 33 (McKinney 1986 & Supp. 1993); N.Y. TOWN LAW § 277(4) (McKinney 1986 & Supp. 1993).

36. In Westchester County, at least one community requires a recreation fee of \$7,000 per acre in the new subdivision, and \$1,750 per lot.

conservation land elsewhere in the community, provided it meets the tests of the enabling statute and is available to the residents of the subdivision that provided the funds.

#### 4. Site Plan Review

Subdivision regulations apply, by definition, only in those cases where the land is being divided into separate lots. Exempted from subdivision regulations would be major apartment or non-residential projects, where the land is either to be rented or preserved as a unit in an undistributed manner. In these cases, planning boards can utilize another police power technique — site plan review. This is a procedure similar to subdivision approval and is usually a mandatory step before a building permit can be issued for the permitted use. The developer is required to show the same sort of information as is required in a subdivision procedure. Compliance with the approved site plan is commonly made a mandatory condition of building permit issuance.

#### 5. The Official Map

The official map is a device that is not well understood in most jurisdictions and is usually used sparingly. It is a means by which a municipality may take formal action to reserve the rights-of-way for municipal improvements, even though no construction or acquisition is anticipated for some time.<sup>37</sup>

The scope and use of the official map seems to be gradually increasing. In some jurisdictions, the official map not only shows new streets, but also indicates the rights-of-way for other municipal facilities, drainage lines or, in some cases, future recreational areas. With regard to the opening of new streets, the enabling statutes usually provide that no building permit may be issued for a building located in the bed of a mapped street. This will prevent blocking of an ultimate

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37. See, e.g., N.Y. GEN. MUN. LAW §§ 239-h to 239-k (McKinney 1986 & Supp. 1993); N.Y. TOWN LAW §§ 270, 273, 279, 280, 280-a (McKinney 1987 & Supp. 1993); N.Y. GEN. CITY LAW §§ 26, 29, 35, 35a, 36 (McKinney 1989 & Supp. 1993); N.Y. VILLAGE LAW §§ 7-724, 7-734, 7-736 (McKinney 1973 & Supp. 1993).

street extension by the inadvertent placement of a building on unsubdivided land.

As part of the checks and balances, statutes usually provide that an aggrieved property owner may seek relief from a board of appeals if the application of the official map principle would deprive him of the reasonable use and enjoyment of his land. The statutes often contain hortatory language that the relief granted by the board should be the minimum necessary to reserve and permit the future extension of the street. In New York State, the state enabling statute<sup>38</sup> permits the official map to be used to show future recreation areas,<sup>39</sup> but, curiously, the building permit exclusion clause is not extended to protect these uses.<sup>40</sup> As a result, this recreation feature is infrequently used. Most planning boards regard as adequate the indication of future parks and open space areas on the municipal development plan alone.

## 6. Urban Renewal

Urban renewal is the popular name for the device by which government can intervene in the market place for urban land in the interest of implementing a municipal development plan. Usually the plan calls for the promotion of new development to replace unattractive, uneconomic, blighted areas.<sup>41</sup> It is often used in those cases where there is only a small difference between the cost of land, even with its blighted development, and the value of the land once cleared of blight. In such cases, private enterprise cannot afford to acquire and redevelop it at private expense. In other cases, the land cannot be privately acquired for redevelopment because the landowner is not willing to sell — the hold-out property owner.

Any government with the power of eminent domain must use that power only for a public purpose. Generally speaking,

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38. N.Y. GEN. MUN. LAW §§ 236-38 (1986).

39. N.Y. GEN. MUN. LAW 239-h (1986 & Supp. 1993).

40. N.Y. GEN. MUN. LAW 239-j (1986 & Supp. 1993).

41. See, e.g., N.Y. GEN. MUN. LAW § 500-24 (1986 & Supp. 1993); HOUSING AND URBAN DEV., 24 C.F.R. 500-699 (1992).

public purpose means public use. It would be an illegal use of the eminent domain power for a municipal government to acquire private land from the hold-out owner and then resell it to a frustrated private buyer, thus using governmental power to deprive the seller of his property.

In the urban renewal process, a state enabling statute is necessary to make an acquisition (either by purchase or condemnation) and resale of property a legitimate use of municipal authority. Once given this power, the municipality can acquire the blighted land, clear it, install necessary public improvements, and then resell it for private development. New development is usually limited to uses of a type and design found acceptable to the municipal government. The municipality may wish to keep the land and use it for some municipal purpose, but this was within its basic eminent domain authority from the start. Similarly, public development of the land would probably mean that the land did not go back onto the tax rolls.

The financial inducement to private, tax-paying development is that land becomes available that may not otherwise have been obtainable. The municipality may wish, as an inducement, to sell the cleared, improved land at a price lower than its municipal investment. This becomes legal under the urban renewal procedure.<sup>42</sup> As an incentive, the federal government has a program of underwriting a major share of the cost differential or write-down cost. In return for this financial involvement, the federal government requires that its procedures and particular brand of red tape be used. Despite popular misconception, the urban renewal process is basically a state and local power, not a federal power.

## 7. The Capital Program

The most powerful implementation device is the ability to do it yourself: to undertake and fund the project at hand. In Westchester County, this was the basis for the County

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42. See generally 24 C.F.R. §§ 500-699 (1992).

Planning Board's *Urban Form* land use policy document;<sup>43</sup> the expenditure by the County of its capital budget for projects of municipal infrastructure would exert major leverage on local and private land use decisions.<sup>44</sup> This was a subtle way of giving backbone to the Planning Board's advisory recommendations in *Urban Form*.

Westchester County has a very sophisticated capital program,<sup>45</sup> which includes over 300 projects and spends up to \$250 million per year. With that kind of expenditure, it is essential that the program is done in a well-planned manner; this is a major reason why the County Planning Board plays such a large part in formulating the County's capital program.

The terms "capital program" and "capital budget" should not be used interchangeably. The capital program is a multi-year expression of the desirable capital projects in a logical sequence and priority order, so there need be no reason to dig up this year's new road to lay next year's new sewer.<sup>46</sup> In Westchester County, the capital program is prepared by a nine-member Capital Projects Committee.<sup>47</sup>

The Westchester capital budget is the list and funding requirements to be undertaken in the next budget year.<sup>48</sup> It is

43. WESTCHESTER COUNTY PLANNING BOARD, *Assumptions, Goals and Urban Form* (1975) (on file at the Westchester County Department of Planning, approved by the County Planning Board, Nov. 14, 1974; printed Summer, 1974; public hearing, Dec. 3, 1974; adopted with revisions, January 7, 1975) [hereinafter *URBAN FORM*].

44. WESTCHESTER, N.Y., CHARTER § 167.11(3) (1961). For example, water supply, sewage disposal, highways, public facilities, and open space.

45. See WESTCHESTER COUNTY, *Capital Budget and Five Year Program* (1992) (providing complete descriptions of the capital program and capital plan); Westchester County Department of Planning, *Planning Report: Status of Municipal Planning in Western County — 1987*, (June, 1988) p. 22 (describing the capital program and budget) [hereinafter Westchester County Planning Report].

46. WESTCHESTER, N.Y., CHARTER § 167.51 (1975). In Westchester, the capital program spans five years, with a catch-all "Undetermined" category, providing a sixth year or longer time frame.

47. WESTCHESTER, N.Y., CHARTER § 167.51 (1975). The Committee is composed of the County Executive, Chairman of the Board of Legislators, Chairman of the Budget and Appropriations Committee of the Board, Budget Director, Commissioner of Planning, Commissioner of Public Works, Administrator of General Services, Commissioner of Environmental Facilities, and the Commissioner of Parks, Recreation and Conservation. *Id.*

48. See WESTCHESTER, N.Y., CHARTER § 167.61(3)-(4) (1961).



prepared by the County Executive upon consideration of the full five-year program, and optimally will be those projects recommended by the Committee for the first year.<sup>49</sup> The County Executive proposes the budget to the Board of Legislators, which has editorial license to change the budget to fit its idea of spending priority.<sup>50</sup> Both legislative leaders and the County Executive in Westchester are authorized to be active participants in the preparation of the program by the Capital Projects Committee. However, neither is given unilateral authority to modify that program once it has been adopted by the Committee. The Legislators and the County Executive can modify only the capital budget that is prepared by the Capital Projects Committee.

Funding for the capital program is also indicated by the Capital Projects Committee,<sup>51</sup> and the financing plan must be adopted by the Board of Legislators when it adopts the capital budget.<sup>52</sup> The options for financing are cash, bonding, and "foreign aid."<sup>53</sup> Cash for the capital budget is provided in a "Cash-to-Capital" account in the operating budget, and most recently has been about five percent or less of the gross project costs. Specific bonding legislation must be passed by the County Board during the budget year in addition to the indication of intent in the act adopting the capital budget.

In Westchester, the County Planning Board plays a direct, statutory role in the review of each project proposed for inclusion in the capital program.<sup>54</sup> Each project must be reviewed for its physical planning aspects and conformance to the Planning Board's development policy recommendations.<sup>55</sup> In recent years, the Department of Planning has taken over much of the administrative function of preparing the capital

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49. See WESTCHESTER, N.Y., CHARTER § 167.61(1) (1961).

50. See WESTCHESTER, N.Y., CHARTER § 167.101 (1952).

51. WESTCHESTER, N.Y., CHARTER § 167.51 (1975).

52. Financing is most often from the state or federal governments, but sometimes comes from local governments or private sector parties.

53. For example, funding from a non-county source, usually the state or federal governments, but sometimes from local governments or private sector parties.

54. WESTCHESTER, N.Y., CHARTER § 167.31 (1960).

55. There is no such term as "County master plan" in the Westchester County Charter. See WESTCHESTER, N.Y., CHARTER §§ 101-200 (1992).

program from the Budget Department. Planning staff serves as the secretariat to the Capital Projects Committee, and follows each project from its inception to its completion.<sup>56</sup>

Over the years, the involvement of the Department of Planning has resulted in changes in the philosophy of the County's capital spending programs. These have included the following:

- (1) The principle that municipalities should be able to request and initiate County capital projects that will support and implement their local development policies;
- (2) the establishment of a housing implementation fund, to provide infrastructure improvement monies to assist local governments to achieve their housing goals, particularly goals for affordable housing;
- (3) the provision of Environmental and Feasibility Study Funds in the capital budget, to allow the planners and requesting department the capability to test the concept of a new project for its impacts, prior to the funding of the project itself (which would trigger a preapproval State Environmental Quality Review Act (SEQRA) review);<sup>57</sup>
- (4) special project funds for landscaping improvements to new buildings. Too often in the past the sub-account for the landscaping of a new building was sacrificed during the construction process to make up for cost overruns in other areas;
- (5) special emphasis on the design and appearance of public buildings, in accordance with the policy recommendations of the County Planning Board; and
- (6) the computerization of the capital budgeting process, so that information on the details and status of the individual projects could be learned at any time by any County employee with access to the County's computer network (virtually all of the 5,000 "knowledge workers"

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56. See WESTCHESTER COUNTY CODE § 191.51 (1960).

57. N.Y. COMP. CODES R. & REGS. tit. 6, § 617, State Environmental Quality Review under N.Y. ENVTL. CONSERV. LAW § 8-0109 (requiring preparation of an Environmental Impact Statement for any action that will significantly impact on the environment).

in the County work force).

### G. One-Dimensional and Out-of-Date Enabling Statutes

The authority to plan, and the authority to utilize these implementation tools, flows to municipal governments through enabling statutes adopted by the State legislature. In the 1920's, when these earlier statutes were framed, there were considerable differences in the powers of cities, towns, and villages. Cities were established only through special charters granted by the legislature. Because cities were likely to be relatively concentrated urban areas to begin with, they had broader powers than the less densely developed villages, and certainly more than the rural towns. Over time, the functional differences among them with respect to the services each was called upon to provide began to disappear. Today, there are very few functional differences among their powers. For example, villages may operate fire departments, but towns may not. However, these enabling statutes are still out of date in many regards, particularly in their failure to require use of the third dimension (intergovernmental relationships) in the development of the planning and implementation programs they permit. Similarly, State agencies are not required to take any of these local programs into consideration, or to have comparable plans of their own.

There are four separate sections of New York State law that grant planning authority to municipal governments: General City Law,<sup>58</sup> Town Law,<sup>59</sup> Village Law,<sup>60</sup> and General Municipal Law.<sup>61</sup> The General Municipal Law has provisions overlapping those of the City and Village Laws, with special provisions for metropolitan, regional and county planning boards.<sup>62</sup> Other sections also relate to municipal powers with respect to capital programs;<sup>63</sup> protection of historical places,

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58. N.Y. GEN. CITY LAW § 27 (McKinney 1986 & Supp. 1993).

59. N.Y. TOWN LAW § 261 (McKinney 1987 & Supp. 1993).

60. N.Y. VILLAGE LAW § 7-718 (McKinney 1973 & Supp. 1993).

61. N.Y. GEN. MUN. LAW § 7-239-b (McKinney 1986 & Supp. 1993).

62. N.Y. GEN. MUN. LAW § 239-b (McKinney 1986 & Supp. 1993).

63. N.Y. GEN. MUN. LAW § 99-g (McKinney 1986 & Supp. 1993).

buildings and works of art,<sup>64</sup> and the acquisition of open spaces and areas.<sup>65</sup> In addition, there are special provisions relating to realty subdivisions in the Public Health Law<sup>66</sup> and the Real Property Law.<sup>67</sup>

With such a variety of sources, it is inevitable that differences in the planning and land use control powers will creep in. Although there is substantial parallelism among them, the gaps are broadening as one class and then another seeks to clarify or improve on the basic statutes.

In addition to the difference by class of municipality, there are uncertainties and ambiguities of wording in the statutes themselves, and in the interpretations that the courts have made. One of the basic discrepancies which Professor Nolon expands upon in his support materials for the colloquium is the basis for zoning: to be a valid exercise of the police power, the zoning adopted by the municipal legislative body must be in accordance with a comprehensive plan. The municipal planning board is given the authority to prepare and change a comprehensive master plan for the development of the entire area of the community. There is no clear statutory link that a planning board's master plan is intended to be the legislative body's "comprehensive plan," and, from the planner's standpoint, it should probably *not* be the same.

Planners, after all, are looking to the future. The zoning ordinance — the balance sheet of current municipal land use policy — is a status quo document: today's policies enshrined in law. How can the planners develop the Olmstedian construct of an up-to-date "*forecast* and definition of all important changes, additions, and extensions . . . likely to become desirable in the course of time,"<sup>68</sup> if their plan and the zoning ordinance must be constantly consistent and congruent?

The following table compares the master plan contents of the New York State enabling statutes for cities,<sup>69</sup> towns,<sup>70</sup> and

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64. N.Y. GEN. MUN. LAW §§ 96-a, 119-aa (McKinney 1986 & Supp. 1993).

65. N.Y. GEN. MUN. LAW § 247 (McKinney 1986 & Supp. 1993).

66. N.Y. PUB. HEALTH LAW § 1116 (McKinney 1985 & Supp. 1993).

67. N.Y. REAL PROP. LAW §§ 335-339-c (McKinney 1989 & Supp. 1993).

68. See Philadelphia, *supra* note 10.

69. N.Y. GEN. CITY LAW § 28-a (McKinney 1986 & Supp. 1993).

villages.<sup>71</sup>

MASTER PLAN CONTENTS, NEW YORK STATE ENABLING STATUTES		
Cities	Towns	Villages
Existing and proposed streets, bridges and tunnels, and the approaches thereto	Desirable streets, bridges and tunnels and the approaches thereto	Desirable streets, bridges and tunnels and the approaches thereto
Viaducts	Viaducts	Viaducts
Parks	Parks	Parks
Public Reservations	Public Reservations	Public Reservations
Roadways in Parks	Roadways in Parks	Roadways in Parks
Sites for public buildings and structures	Sites for public buildings and structures	Sites for public buildings and structures
Zoning Districts	Zoning Districts	Zoning Districts
Pierhead and bulkhead lines	Pierhead and bulkhead lines	Pierhead and bulkhead lines
Waterways	Waterways	Waterways
Routes of public utilities	Routes of public facilities	Routes of public facilities
Such other features, existing and proposed as will provide for the improvement of the city and its future growth, protection and development	Such other features existing and proposed as will provide for the improvement of the town and its future growth, protection and development	Such other features existing and proposed as will provide for the improvement of the village and its future growth, protection and development
[Such other features as] will afford adequate facilities for the	[Such other features as] will afford adequate facilities for the	[Such other features as] will afford adequate facilities for the
- public housing	- public housing	- public housing
- transportation	- transportation	- transportation
- distribution	- distribution	- distribution
- comfort	- comfort	- comfort
- convenience	- convenience	- convenience
- public health	- public health	- public health
- safety and	- safety and	- safety and
- general welfare	- general welfare	- general welfare
of its population	of its population	of its population

70. N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1993).

71. N.Y. VILLAGE LAW § 7-722 (McKinney 1973 & Supp. 1993).

In the absence of a legislative definition of what is meant by the zoning ordinance's "comprehensive plan," the judiciary has come up with some amazing logical contortions:

(1) A zoning ordinance can be legal even in the absence of a written plan;<sup>72</sup>

(2) the statute is satisfied if, implicit in the zoning ordinance itself, there is evidence of rational planning;<sup>73</sup>

(3) once a plan is adopted, it does not have to be kept current. The courts will not require "slavish servitude to any particular comprehensive plan," but will look rather for "comprehensiveness of planning;"<sup>74</sup> and

(4) in the absence of a plan or the presence of an out-of-date one, the courts will examine all relevant evidence of comprehensive planning found in previous land use decisions of the locality, including the zoning ordinance itself.<sup>75</sup>

The following table compares the zoning purposes in view of the New York State enabling statutes for zoning for cities,<sup>76</sup> towns,<sup>77</sup> and villages.<sup>78</sup>

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72. *Place v. Hack*, 34 Misc. 2d 777, 230 N.Y.S.2d 583, 587 (Sup. Ct. July 6, 1962); *see also Walus v. Millington*, 49 Misc. 2d 104, 266 N.Y.S.2d 833 (Sup. Ct. Feb. 4, 1966) *aff'd*, *Walus v. I. Gordon Realty Corp.*, 297 N.Y.S.2d 894 (1969).

73. *Walus*, 266 N.Y.S.2d at 839.

74. *Matter of Town of Bedford v. Village of Mt. Kisco*, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 136, 306 N.E.2d 155, 159 (1973).

75. *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 121, 96 N.E.2d 731, 733-34 (1951); *see also Udell v. Haas*, 21 N.Y.2d 463, 471-2, 288 N.Y.S.2d 888, 895-96, 235 N.E.2d 897, 902 (1968).

76. N.Y. GEN. CITY LAW § 20(24) (McKinney 1986 & Supp. 1993).

77. N.Y. TOWN LAW § 263 (McKinney 1987 & Supp. 1993).

78. N.Y. VILLAGE LAW § 7-704 (1973 & Supp. 1993).

ZONING "PURPOSES IN VIEW", NEW YORK STATE ENABLING STATUTES		
CITIES	TOWNS	VILLAGES
Such regulations shall be designed to:	Shall be in accordance with a comprehensive plan and designed to:	Such regulations shall be made in accordance with a comprehensive plan and designed to:
	Lessen congestion in the streets	Lessen congestion in the streets
Secure safety from <ul style="list-style-type: none"> <li>- fire</li> <li>- flood</li> <li>- other dangers</li> </ul>	Secure safety from <ul style="list-style-type: none"> <li>- fire</li> <li>- flood</li> <li>- panic</li> <li>- other dangers</li> </ul>	Secure safety from <ul style="list-style-type: none"> <li>- fire</li> <li>- panic</li> <li>- floods</li> <li>- other dangers</li> </ul>
Promote the public health and welfare, including, so far as conditions may permit:	Promote health and general welfare	Promote health and the general welfare
Provision for adequate light [and] air	Provide adequate light and air	Provide adequate light and air
Provision for convenience of access		
	Prevent the overcrowding of land	Prevent the overcrowding of land
	Avoid undue concentration of population	Avoid undue concentration of population
Accommodation of solar energy systems and access to sunlight necessary therefor	Accommodate solar energy systems and access to sunlight therefor	Accommodate solar energy systems and access to sunlight therefor
	Facilitate adequate provision of <ul style="list-style-type: none"> <li>- transportation</li> <li>- water</li> <li>- sewerage</li> <li>- schools</li> <li>- parks</li> <li>- other public requirements</li> </ul>	Facilitate adequate provision of <ul style="list-style-type: none"> <li>- transportation</li> <li>- water</li> <li>- sewerage</li> <li>- schools</li> <li>- parks</li> <li>- other public requirements</li> </ul>
Give reasonable regard to the character of buildings erected in each district	Give reasonable consideration to the character of the district and its suitability for particular uses	Give reasonable consideration to the character of the district and its suitability for particular uses
[Give reasonable regard to] the value of land	A view to conserving the value of buildings	A view to conserving the value of buildings
[Give reasonable regard to] the use to which [the land] may be put, to the end that such regulations may promote <ul style="list-style-type: none"> <li>- public health</li> <li>- safety</li> <li>- welfare</li> <li>- the most desirable use for which the land of each district may be adapted</li> </ul> and may tend to conserve the value of buildings and enhance the value of land throughout the city	Encouraging the most appropriate use of land throughout such municipality	Encouraging the most appropriate use of land throughout such municipality
<p><i>For the regulation of trades and industries:</i></p> <p>The zoning regulations may regulate and restrict the location of trades and industries, and the location of buildings designed for specific uses. This shall be done by dividing the city into districts, and the regulations shall prescribe for each district-</p> <ul style="list-style-type: none"> <li>- the trades and industries that shall be excluded or subjected to special regulation</li> <li>- the uses for which buildings may not be erected or altered</li> </ul> <p>Such regulations shall be designed to promote</p> <ul style="list-style-type: none"> <li>- the public health</li> <li>- safety</li> <li>- general welfare</li> </ul> <p>and shall be made with reasonable consideration to-</p> <ul style="list-style-type: none"> <li>- the character of the district</li> <li>- its peculiar suitability for such uses</li> <li>- the conservation of property values</li> <li>- the direction of building development</li> </ul> <p><i>in accordance with a well considered plan</i></p>		

The zoning and master planning enabling language contains no requirement that the drafters look beyond the borders of their community, either to the effects of their actions on their neighbors or to see how their actions may fit in an areawide or regional setting. Such requirements were later imposed as part of the State Environmental Quality Review Act (SEQRA),<sup>79</sup> but in SEQRA the emphasis is more on the environmental aspects, as usually interpreted locally. This is another aspect of the planar view of land use controls: not only is the product two-dimensional, but the plane can be composed of individual municipal pieces or tiles with no regard for how they fit together.

### III. The Westchester County Experience

#### A. Adding the Third Dimension

As a result of the planar myopia permitted by the enabling statutes: (1) later legislation has added some limited forms of review, (2) court decisions have required analyses of areawide relationships, and (3) several funding programs have made the recipient study the multi-municipal impacts or requirements of the program being funded.

##### 1. Mandatory Review at the County Level

In 1960, the New York State Legislature passed the Van Lare Act,<sup>80</sup> which declared that it was in the public interest for certain classes of proposed municipal zoning and planning actions to be reviewed by the county planning agency "as an aid in coordinating such zoning actions and planning among municipalities by bringing pertinent inter-community and county-wide considerations to the attention"<sup>81</sup> of the municipal planners and zoners. Section 239-l established the purposes in view and listed the criteria by which a county planning agency was to judge the zoning and planning actions, as

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79. N.Y. COMP. CODES R. & REGS., tit. 6, § 617 (1978).

80. Currently codified as N.Y. GEN. MUN. LAW § 239-l-m (McKinney 1988 & Supp. 1993).

81. N.Y. GEN. MUN. LAW § 239-l (McKinney 1986 & Supp. 1993).



summarized in the following table.<sup>82</sup>

<p style="text-align: center;">GML § 239-1 Areas of County Planning Agency Consideration</p>
<ul style="list-style-type: none"> <li>• Compatibility of various land uses with one another</li> <li>• Traffic generating characteristics of various land uses in relation to the effect of such traffic on other land uses and to the adequacy of existing and proposed thoroughfare facilities</li> <li>• Impact of the proposed land uses on existing or proposed county or state institutional or other uses</li> <li>• Protection of community character as regards               <ul style="list-style-type: none"> <li>- predominant land uses</li> <li>- population density</li> <li>- relation between residential and non-residential areas</li> </ul> </li> <li>• Community appearance</li> <li>• Drainage</li> <li>• Community facilities</li> <li>• Official development policies, municipal and county, as may be expressed through:               <ul style="list-style-type: none"> <li>- comprehensive plans</li> <li>- capital programs</li> <li>- regulatory measures</li> </ul> </li> <li>• Such other matters as may relate to:               <ul style="list-style-type: none"> <li>- the public convenience</li> <li>- governmental efficiency</li> <li>- to the achieving and maintaining of a satisfactory community environment</li> </ul> </li> </ul>

Section 239-m required mandatory referral of certain types of zoning adoptions or amendments along with special permits and variances if the affected property lay within (1) 500 feet of a municipal boundary or (2) 500 feet of the right-of-way or property line of a state or county highway, parkway, thruway or expressway, or of a county-owned stream or county drainage channel line, or of a land parcel with a build-

82. *Id.*

ing or institution on it.<sup>83</sup> Section 239-n, which was added subsequently (1968), established similar mandatory referral requirements for subdivision plats within the same 500 foot distance buffers.<sup>84</sup>

Such referral must be made to the county, metropolitan, or regional planning agency prior to the municipal agency taking final action on the proposal, staying local action for a review period of up to thirty days.<sup>85</sup> The county, metropolitan, or regional planning agency is given thirty days to respond.<sup>86</sup> If it fails to do so, the municipal agency may take final action.<sup>87</sup> In its referral reply, the county agency must present its recommendations, with a full statement of its reasons.<sup>88</sup> If the county planning agency recommends disapproval or modification of the proposed municipal action, the municipal agency can only override that recommendation with a majority vote plus one with all its members present.<sup>89</sup>

In Westchester County, the prospect of the Van Lare Act was viewed by the municipalities as an unwelcome intrusion by the county planners into the area of municipal home rule. The Westchester Board of Supervisors sought special legislation that would limit the negative aspects of the effects of a county comment on local action. The result was § 451 of the Westchester County Administrative Code,<sup>90</sup> which went into effect only three months after the effective date of the Van Lare Act. Section 451<sup>91</sup> eliminated the dreaded "majority plus one" voting requirement of the General Municipal Law (GML) necessary to override the County's recommendation, but gave the Westchester County Planning Board broader scope over referable actions. That action, however, limited the geographic scope by requiring that the proximity requirement

83. *Id.* § 239-m.

84. *Id.* § 239-n.

85. *Id.* § 239 m-n.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* This "superior majority" would mean four votes on a five-person board, or five votes in a seven-member agency.

90. Currently codified as WESTCHESTER, N.Y., ADMIN. CODE § 277.61 (1961).

91. WESTCHESTER, N.Y., ADMIN. CODE § 277.61 (1961).

be "abutting" the state or county facility<sup>92</sup> rather than be "within 500 feet" as required by the GML. Subdivisions were included in the Westchester law, as was site plan review.<sup>93</sup> Although the Westchester planning board was given only ten days notice,<sup>94</sup> as contrasted to thirty required by the GML,<sup>95</sup> the notice had to precede any public hearing held on the application.<sup>96</sup> The County Planning Board was authorized to appear at hearings and be heard, and to file a memorandum supporting its position.<sup>97</sup> Although Westchester County lost the majority plus one requirement, the statute specifically gave the County the right to seek judicial review of a municipal override of its negative recommendations.<sup>98</sup>

Later court decisions in Westchester County further confused the issue of whether the General Municipal Law (GML) provisions or those of the County Administrative Code apply. Because of its 500 foot provision, the GML meant that many more local actions would be examined.<sup>99</sup> Unfortunately many of the additional cases were innocuous, causing little or no county or intermunicipal impact. Still, each such referral had to be examined by staff to make even that basic determination.

Westchester County's situation has been further clouded by recent judicial interpretations, the latest of which is *City of White Plains v. O'Rourke*.<sup>100</sup> The court ruled that the County Planning Board must operate under *both* General Municipal Law and the County Administrative Code, except in those cases where there is a "conflict" between the two; then, the

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. WESTCHESTER, N.Y., ADMIN. CODE § 277.61(2).

97. *Id.*

98. *Id.*

99. Review workloads under that law in Nassau County were reported to me at one time to be 3,000 cases per year. In Westchester County, comparable figures, when operating solely under the Administrative Code, were in the 150-200 case range. Such a difference in workloads would have a profound effect on staffing and budgeting requirements for my county planning department.

100. *City of White Plains v. O'Rourke*, No. 8210/87 (N.Y. Sup. Ct. July 13, 1987).

Administrative Code applies.<sup>101</sup> The decision never defined what was meant by a "conflict."<sup>102</sup> Earlier, in *Dougherty v. City of Rye*,<sup>103</sup> the New York State Court of Appeals ruled that the County Planning Board had to receive notice of *any change in the use classification of any property in the municipality*<sup>104</sup> as required by the Westchester County Administrative Code,<sup>105</sup> whether the change was made by a zoning ordinance, a zoning amendment, a special permit, or a use permit.<sup>106</sup> In other words, for changes of use classification, the location of the property or type of permit is irrelevant.

As a result of the *O'Rourke* decision, the workload of the referrals section of the Department of Planning increased remarkably. In response, the County Planning Board defined a menu of municipal actions for which the Board found there would *rarely* be a county or municipal impact, and for which the Commissioner of Planning was empowered to make a determination to that effect, without advance notice to the County Planning Board.<sup>107</sup>

In its review of municipal referrals, the County Department of Planning performs a detailed analysis of the referral, evaluates its likely impact, and notifies other government agencies of the pending action. The Department of Planning's report cites the referrals and may transmit the responses or give warning that a review and response may be coming directly. An example of the latter would be a detailed review of a site plan by the staff of the Westchester County Soil and Water Conservation District, whose members are experts in

101. *Id.* at 5-6.

102. If one law says "ten days" and the other says "thirty days," there is an identifiable conflict. However, what if one law imposes a requirement such as "review of site plans" and the other is silent? Is this a conflict, or just a difference?

103. 63 N.Y.2d 989, 473 N.E.2d 249, 483 N.Y.S.2d 999 (1984) (affirming 478 N.Y.S. 2d 818, 478 N.Y.S. 2d 342.(2nd Dept. 1984)).

104. *Id.* at 990, 473 N.E.2d at 250, 483 N.Y.S.2d at 1000.

105. WESTCHESTER, N.Y., COUNTY CHARTER, § 277.61(2)??

106. *Dougherty v. City of Rye*, 478 N.Y.S.2d 342, 343, 103 A.D.2d 818 (2nd Dept. 1984).

107. As a matter of housekeeping, the Planning Board does consider all such actions as a group at its next regular meeting, and ratifies the decision of the Commissioner.

the areas of hydrology, and the analysis of potential for erosion and flooding from storm water runoff.

## 2. Areawide Relationships in the *Berenson* Decisions

In *Berenson v. Town of New Castle*,<sup>108</sup> the New York State Court of Appeals handed down a landmark decision on the police power authority of a municipality to zone. In its zoning ordinance, the Town of New Castle did not provide for the construction of multi-family housing anywhere in the town.<sup>109</sup> Berenson sought to have his property rezoned for that purpose, since it had or was proximate to public water and sewer facilities, schools, retail shopping, a commuter train station, and major transportation arteries.<sup>110</sup> The Court of Appeals first evaluated if the case presented a triable issue.<sup>111</sup> In ruling that there was, the Court of Appeals established as state law that, in adopting a zoning ordinance, a municipality must give due consideration to (1) the housing needs of the present residents of the municipality, (2) the housing needs of the future residents, and (3) the housing needs of the region.<sup>112</sup>

The trial court was left to determine the scope of the word "region."<sup>113</sup> The plaintiff's strategy was to show that no matter how one defined the word "region," there was a housing need that could be met by the construction of multi-family dwelling.<sup>114</sup> First, the plaintiff set forth a hierarchy of descriptions of the "region:" (1) the Town of New Castle, (2) New Castle and the towns and villages abutting it, (3) Westchester County as a whole, (4) the New York sector of the metropolitan region, and (5) the metropolitan region as a whole.<sup>115</sup> Testimony from a series of professional planners at

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108. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

109. *Id.* at 105, 341 N.E.2d at 238-39, 378 N.Y.S.2d at 676.

110. *Id.* at 106, 341 N.E.2d at 239, 378 N.Y.S.2d at 677.

111. *Id.* at 108, 341 N.E.2d at 240-41, 378 N.Y.S.2d at 679.

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

113. *Id.* at 111, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 681-82.

114. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 511, 415 N.Y.S.2d 669, 672 (NEED DEPT 1979).

115. *Id.* at 670-71.

each level of the hierarchy showed that such a housing need existed at each level, and that the need would be relieved by the construction of multi-family housing.<sup>116</sup> The trial court's decision in favor of Berenson<sup>117</sup> rocked Westchester municipal circles. In addition to the units that Berenson had proposed for his own property, Judge Trainor imposed a 3,500 housing unit production schedule that the Town of New Castle would have to meet.<sup>118</sup> That decision also went to the Court of Appeals.<sup>119</sup> The housing target was reduced, but the Town's zoning was changed to address a share of that need.<sup>120</sup>

#### B. 3-D Planning Views of Westchester: What Worked? What Didn't?

The Westchester County Department of Planning has been involved in several planning programs that required the assessment of the needs (as reflected by municipal planning policies and decisions) of the area as a whole, or that attempted to meet those needs. Some were successful, others were not.

##### 1. The Role of the Regional Planning Agencies

Two important regional planning agencies in the New York metropolitan area helped to give Westchester County planning operations a new dimension, and trained planners to see Westchester County in the same three-dimensional framework that we advocated for the municipal governments. The Regional Plan Association (RPA), a privately sponsored, non-governmental planning body, had always been extremely supportive of planning in Westchester County. The second body, with quasi-governmental status, was the Tri-State Regional

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116. *Id.* at 672.

117. *Id.*

118. *Id.* at 673.

119. *Berenson*, 38 N.Y.2d at 102; 378 N.Y.S.2d at 672.

120. *Id.* In *Berenson*, the issue of the *affordability* of the housing was not key, and it should not be described as "an affordable housing" case. One can draw the inference that multi-family housing, by virtue of economies of construction, might be less expensive to build and therefore less expensive to rent or sell than comparable single-family housing, but this was not the principal issue.

Planning Commission (Tri-State).<sup>121</sup> Only RPA survives today.

RPA prepared the First Regional Plan for the New York Metropolitan Area in the late 1920's. The plan was amazingly far-sighted. Focusing principally on Manhattan as the logical economic and employment center for the region, the regional plan described the physical needs of the twenty-two counties surrounding New York City in terms of the infrastructure needed to support it. Major emphasis was given to the transportation infrastructure (roads, bridges, rail lines) and to open space. Particular attention was paid to the park and parkway concept that was attracting such attention in Westchester County, which had purchased approximately 18,000 acres of land for these purposes.

The Second Regional Plan of the late 1960's had a particular impact on Westchester County's planning program, for it came when the County was formulating its *Urban Form*<sup>122</sup> policies. Planners feared being dubbed with the opprobrium "Spread City," meaning that county plans failed to devise a sense of place and municipal separation.<sup>123</sup> We tried to counter that threat by using open space as a positive land use element in urban form, supported by the County's ambitious plan of doubling County-owned open space by the year 2000. The Second Regional Plan also looked beyond Manhattan, realizing that uni-central dominance would place a strain on the regional transportation system. It called for the ring counties to base their plans on the creation of a single suburban nuclear center in each county. Westchester's center was to be White Plains. RPA produced a special volume, detailing the Second Regional Plan for Westchester County. Its presentation to the people of Westchester allowed the county to share the spotlight with the first release of the *Urban Form* concept plan.

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121. In addition to the Westchester County Department of Planning, contact the Regional Plan Association, 1211 Avenue of the Americas, Ninth Floor, New York, N.Y. 10036, for information regarding regional planning and for regional documents.

122. URBAN FORM, *supra* note 43.

123. URBAN FORM, *supra* note 43, at 40.

RPA's insistence that there be only one major suburban center in Westchester conflicted with reality and with the plans of the Tri-State Regional Planning Commission. Formed by interstate compact among New York, New Jersey, and Connecticut, Tri-State had first seen life as the "Tri-State Transportation Committee," and then became a "Commission." "Regional Planning" was substituted about ten years later when the original funding from the U.S. Department of Transportation was supplemented by § 701 funds from HUD.<sup>124</sup> Tri-State commanded our respect because HUD funds allotted to County planning agencies had to be reviewed by it, and had to be found to meet a reasonable, non-duplicative need.

Tri-State's land use plans for the region were done on the same small-scale basis as the *Urban Form* studies, and used the square mile as the smallest land use planning unit. Because of its transportation and trip-generating bias, the Tri-State plan was more congruent with Westchester County's plan. It recognized the existence of important traffic-generating centers in Westchester County, some of them larger in population than RPA's favored White Plains.

Tri-State played another important role in metropolitan planning. In addition to giving the broad regional view, for many years it sponsored the monthly Technical Advisory Group (TAG) meetings at its Manhattan headquarters, which it used to present its studies and technical reports to the senior staff of the county planning agencies. It was not only an opportunity both to hear the latest plans and information, but also to meet with planners from around the region on a regular basis. This stimulated further exchanges of information on a bilateral basis and, by giving faces to names, made direct communication between these agencies even easier. Tri-State later operated on a two-way television network for multi-agency meetings, which was available to both Tri-State staff and the counties. The technological limitations of the system made dialogue difficult, and it was not as effective a communi-

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124. See 42 U.S.C. §§ 2981-2981b (1972) (repealed 1981).



cation tool as face-to-face meetings at TAG.

After the demise of Tri-State, when Connecticut withdrew its financial support, no alternative group has achieved anything like the success of that body in meeting the needs for regional exchange of technical information. There is today the New York Metropolitan Transportation Council, which took over Tri-State's transportation planning functions, but its meetings appeal more to the transportation "techies" than to the region's planners.

## 2. The County Undertakes a § 701 Study of Housing Needs

In its first application for federal and state aid under the § 701 Comprehensive Planning and Management Assistance Program,<sup>125</sup> the County sought the opportunity to make an areawide housing needs assessment. In 1965, Sy J. Schulman, my predecessor as County Commissioner of Planning, presented a definitive paper on the impending housing shortage entitled "Apartments: Getting the Right Number, Size, Design and Location."<sup>126</sup> In his paper, Mr. Schulman showed how apartments met the housing needs of an urban population at several stages in their age cycle. The paper also demonstrated that a municipality or county that failed to provide the full range of housing types jeopardized its long-term ability to meet the needs of its residents. In those pre-Berenson days, the burgeoning development pattern in Westchester County was almost entirely composed of single-family residential subdivisions. A municipality's greatest fear was that it would have to add expensive new schools to accommodate the children that the single-family residents produced. Apartments were the type of housing purposely left behind by those moving to "the good life" in single-family housing at the urban fringe. Besides creating higher population densities, apartments required community water and sewer systems, a scarce commodity in northern Westchester.

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125. Codified at 42 U.S.C. §§ 2981-2981b (1972) (repealed 1981).

126. 20th Annual Regional Plan Conference, New York City, Nov. 10, 1965 (on file at the Westchester County Department of Planning).

It was also clear from empirical data that the housing situation in Westchester County was increasingly unbalanced, with the housing market addressing only the needs of those who could afford new, market rate housing. In formulating our § 701 application, we used 1960 census data,<sup>127</sup> the last hard housing data available, to rank Westchester's 205 census tracts on the basis of four critical factors: (1) percentage of dwelling units substandard, (2) percentage of families earning less than \$5,000 per year (considered the "poverty level" in the late 1960's), (3) percentage of non-white families, and (4) percentage of overcrowded dwelling units (units with more than one person per room). This broad ranking was necessary to develop a housing-problem index that more closely approximated the true social picture in a given area, unwarped by such mitigating factors as seasonal dwellings, or upper income minority groups. Those tracts at the top of the list in each category were identified as the Critical Tracts. Almost predictably, these tracts lay in five of our six cities, and two of our older villages. It was also increasingly clear that municipal action alone had no reasonable chance of alleviating the problem. Whether it was through unwillingness or inability, the communities simply could not cure their own ills. There seemed to be little evidence that their neighboring communities would assist them in curing the problems. Some areas were truly impacted.

*Query: Could higher levels of government respond to the need?* Under the New York State Constitution, county government is specifically omitted from the list of municipal jurisdictions allowed to undertake certain activities in housing. Counties may not participate in urban renewal, and may not create public housing authorities. The politically correct statement for county officials became: "Counties are without authority to act in the area of housing." Consider the effect of this in a typical "home rule" county such as Westchester. Forty-three municipalities with varying degrees of housing ills apparently were unable to improve living conditions and could

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127. Census data is available at the Westchester County Department of Planning or through the United States Census Bureau.

not ask the County government to help because it claimed it had no authority to do so. The County government, traditionally dedicated under home rule to helping its municipalities help themselves, but only intervening when directly requested to do so, believed itself unable to initiate direct action.

Although Westchester County was unwilling or unable to take direct steps toward alleviating the problem, its administration of aid to welfare recipients for shelter allowances made it a significant player in the housing market. Although Westchester County did not provide the housing, it supplied the funds with which the recipients themselves could find and pay for housing. Unfortunately, many welfare recipients found that the only affordable housing within the dollar range of the shelter allowance was substandard, making Westchester County the largest subsidizer of slumlords in the county.

The Department of Planning contended that in order to galvanize public action it would be necessary to bypass traditional governmental channels, and create a new kind of government entity — a development corporation at the county level that would be able to operate anywhere within the county. The development corporation would take direct action to improve structures and neighborhoods, and would provide a broad range of social programs in support of the residents of restored neighborhoods. Legislative advisors told the Department of Planning that it might be possible to get special authority passed in Albany to establish such a development corporation in Westchester, but in order to do so, the County would first have to prepare a well drawn and documented study assessing the need for the corporation and the possibility that it would be able to achieve positive results.

Sy Schulman and County Executive Edwin G. Michaelian developed the concept of a study that would provide the required documentation.<sup>128</sup> To avoid using local tax monies for the study and risk antagonizing those who were content to rationalize that "counties could take no direct action in the area of housing," the Michaelian administration applied for a fed-

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128. See *infra* note 132.

eral § 701 Comprehensive Planning and Management Assistance Program grant<sup>129</sup> from HUD to fund the analysis, with the required local share of one-sixth of the cost to be in the form of staff time contributed from already budgeted funds of the Department of Planning. A scope of services was developed, a consultant was selected,<sup>130</sup> and preliminary approval was obtained from the State's § 701 administrators.

Concurrently, Governor Rockefeller obtained approval from the State legislature to establish the Urban Development Corporation (UDC),<sup>131</sup> which was authorized to undertake the same activities projected for the county-level corporation: UDC had independent funding, was not bound by local zoning laws or municipal approval requirements, and could operate anywhere in the state to eliminate "blight" anywhere else in the state! The need for a separate corporation for Westchester County, and the political heat that would accompany its creation, had disappeared. We reasoned that UDC, or a corporate spin-off from it, would deliver the needed programs in Westchester County.

With no longer a need for the County to justify and create a development corporation, we chose to redirect our study to analyze not only those areas where a development corporation's direct involvement was the logical answer, but also those areas where the county and municipal governments could use existing powers to improve housing conditions. In other words, what end-around approaches might be available to us if the front line appeared to be blocked? Specifically, what could our County line agencies, (such as Social Services, Health, Public Works, Hospitals), do to improve the lot of the Westchester citizens who lived in inadequate housing? What could the communities do on their own, and what areas of municipal-county cooperation were open to us?

Our study became not only a housing conditions study, but also a market analysis as well as a systems study of hous-

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129. 42 U.S.C. §§ 2981-2981b (1988).

130. Economic Consultants Organization, Syracuse, N.Y.

131. N.Y. URBAN DEV. CORP. LAW § 6254 (McKinney 1992).

ing administration.<sup>132</sup> The scope of the study was broadened to integrate it into our county development plan program, even though the latter was not part of our § 701 funding. We concentrated the study on those areas of the county which were most patently unable to help themselves to better housing. Typically, these sub-market groups included minorities, the elderly, recipients of social welfare benefits, and low income earners. The study measured the basic factors of supply and demand, and the imbalance between them, by quantifying four critical factors: quality, quantity, distribution and cost.<sup>133</sup>

To understand the dimensions of the housing demand, you must first know the market. The key to our investigation was a large-scale program of home interview surveys, a private census. The surveys were representative of all homes in the county and entailed considerably greater detail than the Westchester County surveys performed by the federal government. Because of our basic bias to the needs of the special sub-market groups, we purposely skewed our sample to give us the most accurate information in our critical tracts, and were willing to accept greater standard deviations in those data gathered in the all-white, upper income neighborhoods, which could reasonably be expected to take care of their own needs. The home interview covered family structure, basic demographic data, family history, migration patterns, health histories and use of health services, organizational participation in civil rights or other special interest groups, relationships with municipal and voluntary welfare and health agencies, housing characteristics and family housing needs. It also measured the residents' attitudes towards their neighborhood and its social problems.<sup>134</sup> These data, together with population and employment projections from other sources, helped to document and forecast the demand for housing.

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132. ECONOMIC CONSULTANTS ORGANIZATION, RESIDENTIAL ANALYSIS FOR WESTCHESTER COUNTY, NEW YORK (1971) (on file at the Westchester County Department of Planning).

133. *Id.*

134. *Id.*

On the supply side of the ledger, our investigations included a thorough analysis of the cost elements that control the price of housing in Westchester County.<sup>135</sup> We analyzed builders' costs in terms of land, labor, lumber and loans, and studied areas to determine other factors that may impede the supply of housing.<sup>136</sup>

One of the greatest hindrances to progress in Westchester County housing has been the tremendous fear of the insatiable housing demand to our south. Municipal officials are often reluctant to provide surplus amounts of housing in their communities because of the fear that it will be quickly filled by those leaving New York City, rather than by those who may be living in sub-standard housing in the county. This is perhaps why there is the continued public tolerance of private building programs that build only for the upper income markets. During those boom years in Westchester County, if you could build it, you could sell it. There seems to be no top to the residential market in cost per unit, no slackening of demand until unit prices reach about \$500,000. With that kind of a market, builders can continue to build for the wealthy, without concern for the needs of the replacement market.

### 3. The UDC bombs out in Westchester County

The Urban Development Corporation was not the panacea for which we had hoped, for it adopted policies and programs that brought it into direct confrontation with the municipal officials of Westchester County. The UDC seemed to have its own agenda for meeting Westchester's housing needs. Its Nine Towns Plan<sup>137</sup> for building new housing was based on a completely different set of needs coordinates than Westchester County had previously developed with the Economic

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135. *Id.*

136. *Id.* These areas included municipal zoning and land use problems, public housing programs, availability of basic public facilities and utilities, and the attitudes toward housing held by municipal officials, private citizens, civic organizations, civil rights groups, and the like.

137. URBAN DEVELOPMENT CORP., *FAIR SHARE: WESTCHESTER HOUSING NEEDS* (1973) (on file at the City of White Plains Public Library, 100 Martine Avenue, White Plains, N.Y. 10601).

Consultants Organization. The result was that the sites selected and the housing construction programs proposed by the UDC were almost never consistent with local plans. The UDC's solutions were almost completely dictated by the same vagaries of the marketplace that controlled private development: who has what property on the market at a price that will let us make our rent roll or our selling price?

The UDC projects in Westchester County, for the most part, were never constructed, but the act of their proposal was to sound a death knell for the concepts on which the UDC was founded. When Governor Rockefeller left New York to become the Vice President of the United States in 1974, there remained behind no one who had the clout to protect the UDC from the revenge of the state legislators and their constituents. The UDC was stripped of many of its unilateral powers, and has become a docile eunuch of economic development. It still can be called upon to undertake the development, financing, and implementation of locally conceived projects, but without any of the social conscience that we had foreseen as needed to help municipalities to meet their housing and urban renewal, and infrastructure needs.

#### 4. The § 701 Housing Needs Apportionment Study, and Its Quick Death

The parochial approach to development problems (on an individual municipal basis, for example) works against any comprehensive solution. The first community that says, officially, "there is a Westchester housing problem, and we're going to do our fair share to help resolve it," has two strikes against it from the start. First, its neighboring communities may say, "Go right ahead, friend, we'll hold your coat," and second, what may be fair in proportion to the existing need in that community may be quite unfair in terms of the regional need and the potential of that community to solve it. On a county-wide basis, it is logical that lower cost units must probably mean multi-family units, which mean higher area densities. High densities can be accommodated best in areas with high accessibility, public water and sewer facilities, em-

ployment and cultural opportunities. Many of our forty three Westchester municipalities provide these opportunities, but others do not, and may never be able to do so. Communities cannot be all things to all people; however, geographical accident and capricious municipal dividing lines cannot be used as reasons to avoid accepting housing responsibility.

It was with some trepidation, therefore, that in the mid-1970's, to stay eligible for the § 701 planning grant program, Westchester undertook a housing needs analysis program with the objective of providing a "fair share" allocation among Westchester's forty-three municipalities.<sup>138</sup> Based on housing needs as quantified by the 1970 census data and the Economic Consultants Organization studies, and buttressed by the Mount Laurel housing decisions<sup>139</sup> in New Jersey, the Westchester County Planning Board sought to develop a county housing plan that would assign municipal housing responsibility, in terms of new housing construction and housing rehabilitation, based on a rational assignment of municipal need.

The program got off to a disastrous start. The Planning Board knew that municipalities would not embrace housing target numbers that were dictated to them from the county level. Instead, the County started on a path to arrive at the target numbers diplomatically by consensus. Through the offices of the Westchester Municipal Planning Federation, Westchester convened a committee comprised of planners from each of the municipalities. The planners agreed to hear the description of the housing problem and to work with the County to develop the rational response. The County sched-

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138. These were the early years of the DelBello county administration, and we had working with us Mort Yulish, former head of the Yonkers Community Development agency, and John Nolon, his former agency counsel and then-executive director of the Housing Action Council.

139. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (holding that the Mt. Laurel zoning scheme violated the substantive due process and equal protection rights guaranteed by the state constitution and violated the state enabling statute by failing to serve the general welfare of the region as a whole); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) (holding that a town has an affirmative obligation to provide its fair share of low and middle income housing).



uled several meetings and intended to guide each meeting with a discussion paper that was to be distributed to the planners as they left the previous meeting. The first meeting went well, but, because of a staff slip-up, the second meeting was a catastrophe. Unfortunately, the discussion paper for the third meeting, which should have been distributed to the planners at the end of the second meeting, was distributed at its beginning. Unfortunately, the third discussion paper contained the County's pro forma allocation of units among the municipalities.<sup>140</sup> The resulting chaos fed upon itself, and the meeting was probably the worst one of my professional career.

Two factors brought an end to the housing needs analysis program. HUD ended the federal funding under the § 701 program by folding the § 701 program into HUD's Community Development Block Grant program,<sup>141</sup> thus ending the requirement that eligible counties have a housing allocation plan. Secondly, the decision in *Berenson v. Town of New Castle*<sup>142</sup> was to shake municipal zoners to the core: the concept of having to relate local zoning to a regional need, and the implication that there needed to be a county-wide housing plan to protect the validity of local ordinances.

##### 5. The § 208 Areawide Water Management Plan

The mid-1970's saw another important areawide plan take shape in Westchester County. Section 208 of the federal Clean Water Act provided federal money for areawide land use planning in order to permit the more rational planning of sewage treatment facilities.<sup>143</sup> The County received a \$1 million grant from the Environmental Protection Agency (EPA) to develop a land use strategy that formed the framework for more detailed comprehensive sewerage plans. Because so

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140. Based on known over-crowding, dilapidated housing, vacant land and employment data.

141. Housing and Community Development Act of 1974 § 17(d), 42 U.S.C. § 5301-5320 (1988). Department of Housing Development Act 42 U.S.C. § 3535(d) (1988).

142. 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975).

143. CWA § 208, 33 U.S.C. § 1288 (1988).

much of the pollution in Westchester County that might result from the further development of lands without sewerage would occur in northern Westchester County (where the New York City Croton system reservoirs were located), the plan took the form of a watershed protection strategy.

Under the EPA's statewide approach, Westchester, New York City, and eight other urban areas across the state would be permitted to undertake their own, discrete § 208 plans.<sup>144</sup> The State, through the New York State Department of Environmental Conservation (DEC), would have the responsibility of doing the § 208 planning in the balance of the state. The EPA's planning approach required recipients to do excessive amounts of project design and pre-planning, extensive progress reporting, charting of interim outputs, and allocation of at least 10% of the grant to citizen participation efforts. In Westchester County, the Commissioner of the Department of Environmental Facilities (DEF), who designed and operated all of the County's sewage treatment plants, declared the process to be a "planning study," and recommended that the Department of Planning be the contract agency for the § 208 study during its planning phase rather than DEF; upon adoption and implementation, lead responsibility would shift to the County Department of Health.

The product of the study was an extensive plan document,<sup>145</sup> fully four inches thick, and in all likelihood, a document that has been read in its entirety by only a few people. It traced the land use patterns of development in Westchester County, and with the cooperation of the local government planning agencies and their professional advisors, projected the land use into the future. The quantities of waste water to be generated from the additional development were similarly projected, and general plans made to accommodate the wastes in the most environmentally acceptable manner. The EPA expected planners to determine if there were alternative land

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144. *Id.*

145. WESTCHESTER COUNTY DEPARTMENT OF PLANNING, WATER QUALITY TASK FORCE, *Areawide Waste Treatment Management Plan* (March 1978) (on file with the Westchester County Department of Planning).

use patterns and conservation approaches, such as significant cuts in the rates of consumption of potable water, that would make it possible to *avoid* the construction of additional federally aided sewage treatment plants.<sup>146</sup>

From the view of the Department of Planning, the § 208 process supported the approach taken with the Westchester *Urban Form* county development policy. Its findings underscored our premise that the *availability of infrastructure was the ultimate determinant of land use density*, and that land use plans would have to change if there were to be a significant alteration in the scheduling, design, or availability of the infrastructure elements. (This became apparent during the moratorium on extending sewer service to the Yonkers Joint Treatment Plant in the late 1980's.)

In order to protect the water quality of the Titicus, Cross River, Muscoot, and Croton Reservoirs, the § 208 plan recommended that public sewers be provided in the areas tributary to these water bodies.<sup>147</sup> Since sewage treatment plants in the watershed would have to provide expensive tertiary treatment levels or higher, it was shown to be more cost effective to pipe the sewage out of the Croton basin, down the Saw Mill Valley, into the county's main sewage system, and ultimately to the Yonkers Joint Treatment Plant, almost thirty miles away from the northernmost portion of the service area! The Yonkers Joint Treatment Plant already treated sewage to secondary levels, and was at that time processing about sixty million gallons of sewage per day (mgd). With a permitted capacity flow of ninety-three mgd, the Yonkers Joint Treatment Plant had sufficient unused capacity (in 1977) to accommodate the twenty mgd or so of northern Westchester County flows. What surprised the County and ultimately resulted in the moratorium, and the abandonment of the Upper Saw Mill sewer plan, was the unscheduled and unaccountable increase

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146. However, Westchester County's needs for reservoir and ground water protection were great enough that the plan documented the many areas where additional sewage and treatment plants were needed.

147. These areas included all or portions of the towns of Somers, North Salem, Lewisboro, Bedford, Mount Kisco, Yorktown and New Castle.

in inflow to the Yonkers Joint Treatment Plant that was to occur between 1977 and 1987. Population in the Yonkers Joint service area did not increase in this time period, and water supply consumption records do not indicate a doubling of potable water consumption in its service area. The remaining explanation seems to be that the remaining capacity has been totally utilized by the infiltration of ground water into the sanitary sewer systems tributary to the Yonkers Joint Treatment Plant, and by the direct inflow into the system of storm water or other unplanned-for water sources.

When daily flows at the Yonkers Joint Treatment Plant had far exceeded the permitted level of ninety-three mgd, the DEC imposed a moratorium on the extension of sewer service in the area served, or to be served, by the plant until acceptable plans had been developed to alleviate the situation. To end the moratorium, the County agreed to undertake a survey of the physical condition of all sewers, county and municipal, in the county's sewer system. The cost of the survey, which must be funded largely without state aid, is budgeted at \$25 million. Any needed repair or replacement costs will be in addition.

The § 208 Plan was completed in 1978, and was accepted, if not adopted, by the Board of Legislators as representing the County's policies on the various elements that it contained. Westchester County entered into a cross-acceptance agreement with the Department of Environmental Conservation, each agreeing to abide by the plan's recommendations in the planning of further works of improvement for waste treatment in Westchester County. Continuing administrative responsibility was transferred from the Department of Planning to the Department of Health. The plan died. It had never been fully appreciated by the engineering staff of the County Department of Environmental Facilities (DEF), who regarded it simply as a "planner's study," lacking the specificity of the more detailed engineering analysis needed to design the actual facilities themselves. By transferring responsibility to the Department of Health, rather than to the DEF, all hopes of building that confidence in the validity of the plan and its recommendations evaporated. Even the DEC failed to honor the plan in

later approvals, or even to admit that the DEC's subsequent permit approvals of inconsistent sewerage proposals had allowed Westchester's § 208 plan to drift away from reality. The formality of plan cross-acceptance would seem to entail a similar formality for plan amendment, but the DEC has indicated that this is not necessary, and that the plan can be modified through the SEQRA process when more detailed plans are reviewed. The moral seems to be that four-inch thick plans will never get read, and, without being read, will never be implemented!

## 6. Westchester Adopts a Housing Policy

The *Berenson* decision<sup>148</sup> took the County's legislators by surprise because implicit in the decision is the concept that local plans and zoning ordinances must be consistent with a county level plan. The legislators were quick to proclaim that no such plan existed.

With a Democratic county executive and a Republican majority on the Board of Legislators, the roles of County policy maker and implementor had become more sharply defined. The Board of Legislators was well aware that it was responsible for making County policy. Board Chairman Andrew O'Rourke faced the problem head on: "Should Westchester County have a housing policy, and if so, what should that policy be?" This was the question that he posed to a fourteen member "Blue Ribbon Panel" that he appointed. The Panel was a remarkable group, with the full spectrum of housing interests represented, from rent-control advocates to conservative builders, and from a municipal attorney known for his conservative view of county-municipal relations to myself as County planning director.

The Blue Ribbon Panel undertook research, held hearings, and consulted with state and regional officials. It reviewed the *Berenson* decision and considered the implications of the *Mt. Laurel*<sup>149</sup> decisions. It asked the leaders and the

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148. See *supra* notes 108-120 and accompanying text.

149. See *supra* note 139.

citizens whether it should be the County's policy to stimulate growth of population, or simply to ride with market demand. It reviewed the ability of the local municipalities to deal with their own problems, and to alter their own plans to accommodate the future needs of the "region." Its final recommendations<sup>150</sup> were: "Yes, Westchester County should have a County housing policy, and that policy should be to help the municipalities implement their local housing plans with the full force and assistance of the County's operating and capital budgets." The County should not resist growth, nor should it seek to surge upward in population, as it had between 1950 and 1970.<sup>151</sup> County assistance should be applied to support a population growth of up to 0.5% per year, or 5 % in a decade, but no more than that.<sup>152</sup>

The Blue Ribbon Panel's quantification of the numerical dimensions of the problem was based on census analyses and projections done by the Chief of Research of the County Department of Planning. His work factored into the equation the continuing decline in the average number of persons per occupied housing unit in Westchester County, the rate at which housing reached the end of its useful life and was either demolished or converted, and expected migration rates. For the county to maintain the current population, and to grow at the 0.5% rate, it would require about 53,000 additional dwelling units over a ten year period.<sup>153</sup>

The Panel's report<sup>154</sup> was submitted to Chairman O'Rourke, and assigned by him to the Committee on Community Affairs, Health and Hospital Committee of the Legislature, under the chairmanship of Legislator John Hand. They too held hearings, and later submitted their report and recom-

150. Report Concerning a County Housing Policy submitted by the Special Advisory Committee on Housing Policy, Oct. 23, 1978 (contained in WESTCHESTER COUNTY IMPLEMENTATION PLAN, BACKGROUND INFORMATION FOR MUNICIPAL OFFICIALS (June, 1980) (on file with the Westchester County Department of Planning) (adopted by the Board of Legislators as *Report Concerning a Housing Policy* (Sept 10, 1979).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

mentation<sup>155</sup> to the Board of Legislators. It reaffirmed the Blue Ribbon Panel's recommendations, including the numerical targets, and added that the municipalities should be encouraged to submit their municipal housing plans to the County Planning Board for assemblage (not review or approval), so that the County could determine how many of the 53,000 targeted units the local governments would be able to accept on their own initiative.<sup>156</sup> It was like a giant housing smorgasbord, where the County officials put 53,000 units on the table, invited the municipalities to grab a plate and help themselves, and then left the room. The Committee on Community Affairs also said that if any municipality was unable to undertake the development of a housing plan on their own, the services of the County Department of Planning would be made available to them at no cost.<sup>157</sup> No one accepted *that* offer. The Committee on Community Affairs report also recommended that the municipalities give every consideration to the role that multi-family housing could play in their community.<sup>158</sup>

The Board of Legislators adopted the Committee on Community Affairs' report recommendations<sup>159</sup> in their entirety, and the Blue Ribbon Panel's report<sup>160</sup> and its housing targets became County of Westchester policy.<sup>161</sup> It was the only county-wide land use policy statement the Board ever adopted.

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155. WESTCHESTER COUNTY BOARD OF LEGISLATORS COMMITTEE ON COMMUNITY AFFAIRS, HEALTH AND HOSPITALS, (contained in WESTCHESTER COUNTY IMPLEMENTATION PLAN, BACKGROUND INFORMATION FOR MUNICIPAL OFFICIALS (June, 1980) (on file with Westchester County Department of Planning) (adopted by the Board of Legislators as *Report Concerning a Housing Policy* (Sept. 10, 1979)).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Supra* note 155.

160. *Supra* note 150.

161. WESTCHESTER COUNTY IMPLEMENTATION PLAN, BACKGROUND INFORMATION FOR MUNICIPAL OFFICIALS (June 1980) (on file with the Westchester County Department of Planning).

## 7. Community Development Funds Come to Westchester

The action by HUD to combine the variety of community related funding programs into one Community Development Block Grant (CDBG), combining such diverse programs as urban renewal, beautification, recreation and open space, historic preservation, and planning assistance, was intended to bring an end to municipal competition for funds that was all too often based on what monies were still available rather than what the municipality actually needed.<sup>162</sup> Furthermore, several classes of urban areas would be given entitlement status — if you are eligible and apply with a reasonable program, you *will* be funded. Funds would go to categories such as Large Cities, Small Cities, and to a new category, Urban Counties.<sup>163</sup> The funds, once received, could be used for any of the wide variety of programs previously funded through categorical grants, but at the municipality's discretion.

Counties could qualify as Urban Counties if they possessed the full range of land use control powers, including urban renewal. Since counties in New York State are almost unique in the United States in *not* having land use jurisdiction in unincorporated areas, Westchester was required to enter into consent agreements with the constituent municipalities who wished to be part of our consortium. These consent agreements required the municipality to exercise any of its land use powers, such as urban renewal programs, within its jurisdiction at the *County's direction*, a relinquishing of a portion of its municipal sovereignty. Our cities who were eligible for the Large Cities entitlement could not be part of our Urban County, and the smaller communities were still at liberty to apply for Small Cities discretionary funding instead.

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162. See generally Community Development Block Grants, 24 C.F.R. § 570 (1992); for further description of the Westchester County Program, see Westchester County Department of Planning, Status of Municipal Planning in Westchester County — 1987 (June 1988) p.51-55. For example: "We're out of beautification funds, but if you have an historic preservation program, we can fund that!"

163. An Urban County is defined as having concentrations of urban communities with a total population of at least 200,000 and lying immediately adjacent to a metropolitan city (in our case, New York City).



Could we come up with the requisite 200,000 population to be classified as an Urban County? Were enough municipalities willing to part with a portion of their home rule authority? In the first year of program eligibility, the answer was "No".

Several municipalities elected in that first year of 1976 to try for Small Cities discretionary funds. To aid these municipalities, the County ran training programs to help them develop complete, well-documented applications.<sup>164</sup> Unfortunately, of all the Westchester County applicants, only one (Port Chester) was funded from the Small Cities pot, and our Urban County entitlement of approximately \$500,000 was unclaimed. For the second year, 1977, Westchester County was able to round up more than the threshold 200,000 population, and has been qualified and funded for the Urban County program every year since.<sup>165</sup>

Allocations within the Urban County programs are made annually on the basis of project proposals submitted by the consortium municipalities. The municipal project proposals are to be based on a three-year funding cycle. The broad range of project opportunities envisioned in the first years of the program have been narrowed by HUD directive. HUD now requires that 85% of the program funds go only toward projects that aid low and moderate income persons, or to truly urgent municipal needs (e.g., flood damage repair). Once a target area of low and moderate income constituents is identified in the participating municipality, almost any type of program that aids those persons or helps to stabilize their neighborhood is considered an eligible project. Home improvement loans to eligible elderly and income-qualified persons can be made anywhere in the municipality, and not just within the defined target area. It is possible that a project which aids the residents of one target area can be implemented in a neighboring community, even though the second community is not a consortium member.<sup>166</sup> All projects are evaluated by Urban

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164. The programs operated under Professor Nolon and Mr. Yulish.

165. Annual allocations are now in the four million dollar range.

166. One example of this was the assistance given to a health clinic in a non-consortium city, upon proof that a significant portion of the residents of the target

County staff on the basis of the consortium-wide needs and program goals, with the advice and counsel of a citizen advisory group, and of an Urban County Council representing each participating municipality.

A number of the communities are not eligible because of their Entitlement Cities status in the Community Development Block Grant program.<sup>167</sup> However, not all eligible Westchester communities participate in the Urban County program. Thirty-one communities participated in the 1992 funding year, which starts July 27th. Eight other communities have elected not to participate in that round.<sup>168</sup> Some of these communities participated in the past programs and may simply have failed to act by the cutoff date to be included in the current year. Others have left the program or never joined, because they didn't receive funding for pet programs or they were reluctant to sign the consent agreement thus giving up a portion of their home rule powers.

#### 8. CHAS: The Comprehensive Housing Affordability Strategy

The latest federal requirement for coordinated planning to improve housing is the CHAS, the Comprehensive Housing Affordability Strategy.<sup>169</sup> Westchester County has completed and submitted its county-wide CHAS in fulfillment of a requirement for continued eligibility in the Community Development Block Grant entitlement program and as an Urban County.

Although not all Westchester municipalities participate in

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area in an adjoining consortium village used that clinic for their health services.

167. These communities include Yonkers, Mount Vernon, New Rochelle and White Plains.

168. These communities include New Castle, Buchanan, Ardsley, Mount Pleasant, Pound Ridge, Scarsdale, North Tarrytown and Harrison.

169. State and Local Housing Affordability Strategies 24 C.F.R. § 91 (1991). See generally National Affordable Housing Act, 42 U.S.C. §§ 12,701-12,898 (1990); Housing and Community Development Act of 1974 (codified as amended 42 U.S.C. §§ 5301-5320 (1988)); 18 Hous. & Dev. Rep. (BNA) 827 (Feb. 4, 1991), quoted in Peter W. Salsich, Jr. *CHAS - Planners Makework or New Opportunity?*, URBAN, STATE AND LOCAL GOVT. LAW (ABA Section of Urban, State and Local Government Law), Summer 1991, at 6 [hereinafter Salsich].

the Urban County program, such as those whose Large City status precludes them from participation, this latest HUD requirement was prepared on the basis of the affordable housing needs of *all* of Westchester County, including the non-entitled jurisdictions, the Entitlement Cities, and the Urban County consortium. The Large Cities also have prepared their own CHAS strategies, which are incorporated by reference and presumably coordinate with the county-wide CHAS.

The CHAS consists of five principal components:<sup>170</sup> (1) *The Needs Assessment* — the need for affordable and supportive housing in Westchester County; (2) *The Market Analysis and Inventory* — a description of those elements which influence the Westchester County housing market, and of the nature and extent of county-assisted and public housing stock; (3) *The Strategies Section* — the coordination of the assessment of housing needs, markets and existing and public housing stock in the county, and a description of the County's priorities for investing in housing over the next five years; (4) *The Resources Section* — those resources likely to become available during the coming year and which can be used to implement Westchester County's housing strategies; and (5) *The Implementation Section* — the shaping of the five year strategy and the available resources into plans and goals for the number of families to be assisted in the first year.

The resulting findings were not surprising: Westchester County has acute needs for decent and affordable housing, and the governmental resources available to meet those needs are very limited. The one year and five year plans are expressed in "HUD-speak": numbers of units to be created in specified categories.<sup>171</sup> Operational proposals are reasonably site-specific, but are in terms of known projects. Reference is made to a pending housing allocation plan being developed as part of a recasting by the Board of Legislators of the West-

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170. See Salsich, *supra* note 169, at 6.

171. The categories include: emergency units, new rental and for-purchase affordable units, rehabilitation of existing units for low-income families, the creation of home ownership opportunities through financial assistance and counseling programs, and financial assistance to combat the problems of substandard housing.

chester County Housing Policy.

### C. Functional Transitions of Governmental Power

Another way in which municipalities have given up or lost some of their sovereignty has been the functional transition of governmental responsibilities from local governments to the County. In Westchester, these transitions have occurred in health and social services, transit, sewage treatment operations, water supply and solid waste disposal and environmental recycling. Municipalities have transferred these parts of their operational sovereignty because of higher costs, lack of funding capability or authority, complexity of operation, or for the benefits of greater efficiency through broad area administration.

#### 1. Health and Social Services<sup>172</sup>

In the late 1960's, two cities (New Rochelle and Yonkers) still administered their own public health functions while the County Department of Health supplied these services throughout the other forty-one municipalities, funded by a special district that excluded the two cities from its tax. Social services were similarly performed by the County on a less than county-wide basis. By 1970, both services were fully transferred to the County domain, principally for cost avoidance by the two municipal governments.

#### 2. Transit<sup>173</sup>

The issue that brought bus transit into County operation in 1970 was the opportunity for the County to accept federal and state aid to acquire new rolling stock for the private bus companies. At that time, there were more than a dozen sepa-

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172. Additional information and documentation may be obtained from the Westchester County Departments of Health and of Social Services, 112 E. Post Rd., White Plains, N.Y. 10601.

173. Additional information and documentation may be obtained from the Westchester County Department of Transportation, 112 E. Post Rd., White Plains, N.Y. 10601.

rate bus companies in the county, with routings that occasionally paralleled and competed with each other. Furthermore, the franchising of these routes, i.e. defining the streets over which they could run (and in some cases defining where the stops would be), was in the hands of the municipalities. There was no guarantee that the street that one municipality might wish the buses to exit by would be the same street that the adjoining town would prefer the buses to enter. There was little interline transfer capability or coordinated scheduling, and fares were individually set.

The County made it clear to the bus company owners that if there were to be County sponsorship of the grants for new equipment, there would have to be greater cooperation among the companies, and centralized franchising authority. The release of their franchise rights was posed to the municipal leadership, and once a ground swell of support had been detected, special legislation was adopted under which the County was given the franchising authority.<sup>174</sup> There was no direct cost advantage to the municipalities, and indeed probably some revenue loss from franchise fees foregone, but the promised increases in efficiency were deemed worth it.

### 3. Sewage Treatment and Disposal Operations<sup>175</sup>

The transfer to the County of sewage treatment responsibility was the result principally of changes in federal and state treatment requirements. Many municipalities, particularly those along the shores of our boundary waters, had operated primary sewage plants in the past. With the required upgrade to secondary treatment levels, many municipalities saw the opportunity to avoid the direct costs by allowing the County to develop a network of trunk sewers that would intercept the municipal system and deliver the wastes to one of a group of centrally located, properly designed secondary facilities. The state and federal governments funded a county comprehensive

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174. WESTCHESTER, N.Y., CHARTER § 188.01-.31 (1974).

175. Additional information and documentation may be obtained from the Westchester Department of Environmental Facilities, 19 Bradhurst Ave., Hawthorne, N.Y. 10532.

sewering plan in the late 1960's. By the 1980's, only one major municipal plant (Yorktown) remained in operation, and had been upgraded to secondary treatment standards. The County now operates seven sewage treatment plants at secondary treatment levels.<sup>176</sup>

#### 4. Water Supply<sup>177</sup>

The County has never had a direct role in the supply of water. Although there are more than eighty community water supplies in the County, most of them obtain their water from New York City sources (either from the Delaware, Catskill or Croton aqueducts, or from the regulated lakes and reservoirs in Westchester County). Some of the community systems are owned by local governments; many are private water companies, either investor owned or cooperatives serving the particular development in which they are located. Many community systems supplement their draws from the New York City water system with local sources, such as wells or local waterbodies (e.g., Byram Lake for Mount Kisco). Under the terms of the applicable water rights agreements, New York City must supply water to community systems in Westchester at the same volume per capita as used by New York City residents. As long as there is a drop of water in the New York City system, Westchester is entitled to a percentage of it. New York City prefers to deal directly with community purveyors, rather than the County, for fear that the County will attempt to increase its withdrawal volumes on the argument that we are entitled to factor into the withdrawal equation the entire population of Westchester, and not just the populations of the community systems served.

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176. Three of the sewage treatment plants are located on the Hudson River (Peekskill, Ossining, and the Yonkers Joint Treatment Plant), and four on Long Island Sound (Port Chester, Blind Brook (in Rye city), Mamaroneck, and New Rochelle). The completion of the reconstruction of the Mamaroneck plant will mean that all seven are operating at secondary treatment levels.

177. Additional information and documentation may be obtained from the Westchester County Water Agency, a division of the Westchester Department of Environmental Facilities, Michaelian Office Building, 148 Martine Avenue, White Plains, N.Y. 10601.

Despite that concern, there have been several city-county water supply arrangements for the benefit of Westchester municipalities. To facilitate each, the County established special service areas by forming four county water districts, so that the benefitted populations could be charged directly and discretely.

*County Water District #1.* The County acquired New York City's 48-inch pipeline which runs from the water supply dam at Kensico Plaza down the valley of the Bronx River. Water District #1 obtains water from the New York City system at the dam, chlorinates and fluoridates the water, and then wholesales it to White Plains, Scarsdale, Mount Vernon and Yonkers.

*County Water District #2.* The County established Water District #2 solely to provide the long-term financing capability that was available to the County but not to the town districts, specifically the Towns of Yorktown and Somers. The local districts needed to build a water filtration plant, but did not have borrowing authority to finance it. The County established the district encompassing the local districts, and built the plant with bond sale funds. The local districts buy water from the New York City water system, sell it to the County District for treatment, and then buy it back. In this way the fiction that the City is not dealing directly with the County is maintained, but the purposes of intergovernmental cooperation in a technically complex operation are achieved.

*County Water District #3.* For its own County purposes, this district obtains water from New York City's Catskill aqueduct in Mount Pleasant, and supplies the county reservation at Grasslands and the Westchester Community College. No municipal customers are served directly, but there are interconnection agreements with local districts in the event of an emergency.

*County Water District #4.* Water District #4 has been created, but never activated. The Rye-Port Chester area is served by the Greenwich American Water Company, which obtains its supplies from a small reservoir network with watersheds in Greenwich and Stamford, Connecticut

and the Westchester Towns of Pound Ridge and North Castle. These systems have very limited storage capacity, about a thirty day supply. District #4 was established to provide an interconnection to the Rye-Port Chester service area from New York City sources in Westchester County. Physical construction of the interconnection has not yet taken place; there are issues of filtration requirements and preservation of water quality.

As a further source of assistance to the municipalities, Westchester County has long provided the services of its Water Agency. This body is supported by the County's Departments of Planning, Environmental Facilities, and Health, whose three commissioners form the Water Agency policy board. A staff of two professional engineers is available on request, to provide free technical assistance to the community water systems and municipalities, and the Agency undertakes, on its own initiative, planning studies on water supply issues affecting the county. The Agency is recognized by the City of New York and New York State regulatory agencies as the "gatekeeper" to County involvement in water supply issues. The Agency also actively supports the Westchester Water Works Conference, the membership group that represents the major community water supply systems of the county.

##### 5. Solid Waste Disposal and Environmental Recycling<sup>178</sup>

For many years, when its legislative body (the Board of Supervisors) was composed of the chief executives of the town governments and representatives of the six city governments, the County operated a landfill at Croton Point Park, a peninsula on the Hudson River. The landfill was a wetland area of the park which offered disposal opportunities, in the general name of "land reclamation." It was not a very attractive aspect of the park, but it did offer the opportunity to obtain additional usable park area. The operation was seen not so much as a *responsibility* of the County but rather as a *service*

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178. Additional information and documentation may be obtained from the Westchester Department of Environmental Facilities, 19 Bradhurst Ave., Hawthorne, N.Y. 10532.



that the towns were doing for the Westchester County Department of Parks, Recreation and Conservation: increasing its usable land area through the donation of municipally collected solid waste. Once the amount of fill had resulted in sufficient usable area, the County Commissioner of Parks, Recreation and Conservation on several occasions asked for permission to close the landfill, but the Board of Supervisors regularly denied that request.<sup>179</sup> The landfill was a course of least resistance to the villages and towns that were using it.

By 1967, the issue of the future capacity of the Croton Landfill as well as the opportunity for a system of disposal options more convenient to the centers of population in the southern area of the county had stimulated the Westchester County Department of Public Works to investigate and propose a major solid waste incinerator plant at Croton. The Board of Supervisors held a public hearing on the issue of the County's role in solid waste disposal. Some municipalities were operating their own incinerators or landfills, and were happy to continue to do so. Others saw problems of incinerator maintenance, clean air obligations, and staff expenses as reasons for relinquishing this area of operations. As a result of the hearings, the Board of Supervisors accepted the responsibility for solid waste disposal and directed the County Executive to prepare a plan for a solid waste disposal system, including a possible incinerator at Croton.

The County was to develop a series of solid waste disposal plans over the next fourteen years, each trying to take advantage of the current, tested technology available and the state aid that might be available. When incinerator upgrade funds were available from a state environmental bond issue, the name of the game was "incinerator upgrade." When the environmental fervor and the energy crises of the 1970's demanded an alternative, the watchword was "energy recovery." When the Penn Central faced bankruptcy and needed additional revenues, a rail-haul program to an out-of-county

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179. Occasionally, the records show, the County Commissioner of Parks, Recreation and Conservation asked that the landfill be kept *open*, but it is not difficult to see a certain amount of bureaucratic arm-twisting in the background of his request.

quarry was proposed in the interests of building freight revenues for the railroad and the watchword changed to "mined land reclamation" in an upstate county. When high tech, black box technologies promised fantastic rates of volume reduction ("You put it *all* in here, and you get *nothing* out back there"), the County plan offered the opportunity for technological experimentation on a limited basis, to see if it would really work. When "public-private partnerships" opened the opportunity to "use the other guy's money," Westchester developed a joint venture alternative, with state of the art incineration and energy recovery in the form of electricity generation. The latter technique was the one to be used at the County's Charles Point Waste disposal facility in Peekskill.

The financial experts advising the County and its partners complicated the planning by refusing to endorse as viable a plan and facility that was larger than needed for the waste volume and revenue flows that the County could guarantee. Intermunicipal agreements (IMA's) between the County and the municipal governments of Westchester were required. These were contracts that the municipality would deliver, or cause to be delivered, to the Charles Point Plant all of the municipal solid waste collected in their community at the somewhat fictional tipping fee rate of \$17 per ton. Because some communities were unwilling to sign such agreements by the time of the financing deadline, the plant was sized smaller than necessary to handle *all* of the municipal solid waste of the county.<sup>180</sup>

Because of the request from the Board of Supervisors that the County prepare a solid waste plan, Westchester had drafted and was constantly revising a very thoroughly documented solid waste plan. The preparation of some phases of this had been financed by the State of New York; other parts were totally County funded. The County plan, however, was

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180. Today, with the opportunity for recycling, and a plant that was operating near the upper limits of its rated capacity, the County is now providing incentives *not* to bring waste to Charles Point. The municipalities are rewarded at the rate of \$17 per ton for each ton of waste that they do *not* bring to Charles Point, if they can show that it was disposed of instead through recycling.

always in the lead of the policy plans of the state regulators, whose policies were more dictated by the requirements of the aid plans that they were administering at that moment. When the State was finally directed by the Legislature to prepare a State Solid Waste Management plan, we were well on the way to implementing our own. The State plan that emerged, however, was drawn in many areas on idealism rather than practicality, and viewed the State's role as solely to set standards and regulate their compliance, regardless of costs. The State abjured any responsibility for a direct role in the process, as the provider or operator of regional facilities for particularly hard-to-dispose-of wastes. Such was particularly true of the State Recycling Plan, which set untested goals for percentage of waste stream recycled, because the "high numbers seemed better than lower numbers," according to one state official with whom I spoke. If the State was going to make these high levels of recycling mandatory, then the State should see that they could work. It could become the market of last resort, for example. Westchester officials urged that the State benefit from Westchester's experience, modify its plan to take a more active role, and set goals that may be accomplished as early targets. This was to no avail.

As part of Westchester's plan, the County government encourages municipal recycling in many ways, and takes direct actions to make it possible to achieve their local recycling programs. We have negotiated master purchasing contracts with recycling companies, which assure the participating municipalities of a market for their separated materials. The County is building a Material Recovery Facility (MRF), which will process unseparated recyclables (such as glass, metal, plastics, and newspapers) that are delivered by the participating municipalities. The County also supplies specialized recycling machinery that can be loaned to local governments to help their local operations, such as equipment for aerating and turning leaf composting piles. Efforts to establish centralized leaf composting areas in county parks have been stalled by the State's policy of not permitting park land to be used for solid waste disposal purposes, even of such an innocuous

nature.<sup>181</sup>

#### D. County Land Use Policy in a Home Rule County

Shortly after I took over as Commissioner of Planning in 1968, the County Planning Board asked the staff to bring to them our concepts on a series of development policies that could provide a guidance system for County actions and municipal development. Under the Westchester County Charter, the Planning Board is empowered to frame such policies, hold hearings on them, and present them to the municipalities and the Board of Legislators for their consideration and adoption.<sup>182</sup> It was our strategy to use the Westchester Municipal Planning Federation, the county-wide body composed of all members of all local legislative bodies, planning boards, boards of appeal and others involved in the development process, as our sounding board. The staff worked out a series of policy statements that would present the amalgam of municipal planning recommendations from the county's forty-three local governments, in the rather classic format of residential, commercial, industrial, transportation, and the like.

One staff member, a landscape architect, was assigned the responsibility of working on the aspect of the Planning Board's charge that recommendations result in a county of *attractive appearance*. He named his section *Urban Form*,<sup>183</sup> and, as fate would have it, it was one of the first completed. While it started out as the tail, it was soon not only to wag the dog, but to become the dog. From its first presentation to the County Planning Board, we found that its concepts were easily grasped, all-encompassing, and gave that illusive third dimensional view. Ultimately, the success of *Urban Form* and the other planning actions that were shaping planning procedures in Westchester would make the other scheduled elements unnecessary, at least for the near term.

The *Urban Form* plan developed a new palette for dis-

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181. The County would be allowed to compost the leaves that fell *in* the park, but not any that fell *outside* its boundaries.

182. WESTCHESTER, N.Y., CHARTER § 191.51 (1992).

183. URBAN FORM, *supra* note 43 (1975).

playing land use on the planners' maps. It described urban development not in the traditional categories of residential, commercial or industrial, but in terms of its basic density. It was a generalized land use planning technique, focusing on area-wide development patterns as defined by three criteria: (1) the intensity or density of development, (2) its relationship to surrounding development, and (3) its visual impact on the individual.<sup>184</sup>

In the days preceding environmental impact statements, we had circumscribed the elements that would later be the focus of this technique: What impact do different levels of development have on Westchester County's systems? What resources must they have to exist? And how can we shape that development to give the individual a sense of place, and combat the suburban bugaboo of Spread City?<sup>185</sup>

The Planning Board urged that we drop the other elements and concentrate instead on the *Urban Form* approach. The engineers on the County Planning Board saw in the technique a valuable approach to infrastructure planning.<sup>186</sup> Since density would be determined by infrastructure, and infrastructure would be supplied by County capital investments, the *Urban Form* approach could be used to define the same ranges of variation as the engineers were using in their infrastructure designs. We knew from our land use work for our traffic engineers that trip generation was a function of density rather than precise form of land use<sup>187</sup> and for county-wide trip planning, the general point of origin would suffice, rather than the specific lot and block.<sup>188</sup> We would use these generalities to determine the large scale characteristics of different densities of development, and leave the detailed work to the local government planners.

With this dichotomous approach, we developed a bias for

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184. *Id.* at 25-28.

185. *Id.* at 40.

186. There is frequently built into engineering work a safety factor or margin of error to accommodate unforeseen parameters or changes in conditions.

187. For example, a residential unit would generate the same number of trips per day whether it was a dwelling unit in a single family house or in a garden apartment.

188. URBAN FORM, *supra* note 43, at 28-29.

using *Urban Form* as a framework for physical development decisions by all levels of government and the private sector. By our generality, we were providing a range of local options, and by our upper and lower limits, we were providing book-ends within which local planners were free to make their own decisions. This non-confrontational approach was a major factor in the successful reception of *Urban Form* throughout the county. The following table delineates the County and municipal roles and responsibilities of comprehensive planning under the *Urban Form* approach.<sup>189</sup>

Comprehensive Planning — Roles and Responsibilities	
County	Municipality
"Macro" scale for area-wide planning	"Micro" scale for local planning
Focuses on widespread geographic areas and is intermunicipal in nature	Focuses on smaller geographic areas located within one municipality
Not as concerned with specific land uses as with urban form: the shape, character and density of overall development patterns	Concerned with specific land uses and densities on individual lots and in individual structures
Advisory role to municipalities on zoning and land use actions, emphasizing intermunicipal and areawide impacts	Strong regulatory authority — sole jurisdiction to approve/disapprove land use actions within its boundaries
Implementation of planning objectives through the provision of county-wide services: major roads; the bus system; sewer and water facilities; parkland acquisition	Implementation of planning objectives through the exercise of state delegated powers: zoning, subdivision, official map and planning controls

The original *Urban Form* approach established five different types of urban form to describe the range of development patterns in Westchester:

*Concentrated Urban Centers.* The downtown areas, characterized by vertical development, pedestrian orientation, compactness, and the variety and intensity of activity. They have or offer the potential for public transit and cen-

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189. WESTCHESTER COUNTY PLANNING BOARD, *URBAN FORM REFINEMENT: A STATUS REPORT TO THE WESTCHESTER 2000 CONFERENCE 2* (1985) (on file at the Westchester County Department of Planning) [hereinafter *URBAN FORM REFINEMENT*].

tral water and sewer service. On entering such a center by car, you may park the car once and walk to a variety of activities. Although such centers may vary in size throughout the county, they all exhibit these similar characteristics at whatever their local density may be, in contrast to their surroundings.<sup>190</sup>

*High Density Urban Areas.* These areas differ from Concentrated Centers in the degree of activity. They have a greater reliance on the automobile, which is often used to travel from one errand to another within them. This form is more specialized in function, and is generally spread out horizontally over a large area of the municipality. They are often corridors, as along the Boston Post Road, or Central Avenue, or Tarrytown Road. They are served by public water and public sewer.<sup>191</sup>

*Medium Density Suburban Areas.* Here there is more of a blending of the man-made physical development with the natural environment. Essentially they are residential in appearance, although any land use can occur in any urban form type. There is almost exclusive reliance on the automobile, except at the upper range of this form, where densities are sufficient to support the bus system. Central water supply and sewers are generally available. Residential uses predominate, and there is a wide range of residential densities, but probably not fewer than one family per acre.<sup>192</sup>

*Low Density Rural Areas.* These areas are epitomized by the relative infrequency of man-made structures. They contain a mix of land uses, e.g., hamlets, large estates, and farms, and they are on the fringe of development. There is an almost total reliance on individual water supply and septic disposal systems.<sup>193</sup>

*Open Spaces.* This category includes parks, watershed lands, and other open areas, as well as other non-recrea-

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190. URBAN FORM, *supra* note 43, at 28-29.

191. *Id.* at 29-31.

192. *Id.* at 31-33.

193. *Id.* at 33-34.

tional uses that have the visual attributes of parks or undeveloped lands, such as cemeteries, campus type developments, airports, private preserves, and certain rights-of-way which are predominantly undeveloped. Open space areas are essentially natural in character and provide relief and contrast to their more urbanized surroundings. Permanent open space can provide a useful device for urban form definition — here is where development stops and the country begins.<sup>194</sup>

You can easily visualize what we mean by “Urban Form,” and at the grain of detail that we were planning. Imagine that you are viewing the myriad lights of the county from an airplane on an early evening in winter. The brightest lights are in the centers of the cities, and similar but smaller bright clusters show the locations of other centers of activity in the villages and hamlets. Connecting the major centers are ribbons of lights along the major shopping avenues, and you can pick out the streams of headlights along the darker bands of the parkways. Filling in the less bright areas between the major corridors are the evenly spaced streetlights of the residential communities. North of the Cross Westchester Expressway, the lights are farther apart and much less intense, and the large dark areas are much more dominant — the rural communities and the open space elements. You know that each of these areas beneath you has a visual and community character of its own, but there are no artificial boundaries, and the individual details of the land use pattern are less distinguishable, and less significant.<sup>195</sup>

In developing our Urban Form maps, we worked closely with our municipal counterparts, sharing with them our draft documents and manuscript maps. We held a series of meetings in the different sectors of the county. At these meetings, we gave special briefings to the chief elected officials and their planning board chairmen, followed by formal presentations to the general public and other members of the official municipal families. We would roll out our draft maps on large tables,

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194. *Id.* at 35-38.

195. See generally *URBAN FORM REFINEMENT*, *supra* note 189.



hand the local officials a red pencil and an eraser, and say: "Okay, where do you recommend that we change our urban form boundaries to accommodate your plans, based on your knowledge of your local terrain?"

One reaction emerged, however, that did surprise us: "You are not being specific enough, in terms we can understand." *Urban Form* was great as a qualitative concept, and the local government officials were very pleased that we were giving them a range within which to plan. The problem was their inability to translate easily from the qualitative concepts of *Urban Form* into the quantitative concepts that the local planners were used to dealing with, in terms of families per acre, floor area ratios, parking requirements, and the like. In response we took time out to develop the *Urban Form Technical Supplement*,<sup>196</sup> the Rosetta Stone that translated the landscape architects broad strokes into the more tightly defined lexicography of the municipal zoning official.

The *Technical Supplement* was based entirely on empirical data. *Urban Form* told us what kind of development we were looking for, so we scoured the county to find actual examples of uses that epitomized development in these density ranges. These were photographed and carefully cataloged, and their physical characteristics of density and environmental requirements plotted and graphed. From this we were able to develop not only a general density measure that we called our *Land Use Intensity Index* (LUI) but also detailed ratios of open space to floor area, parking, and gross and net residential densities. The LUI range from zero to ten was a sort of "Richter Scale" of urban activity.<sup>197</sup>

Our system worked. In 1975, at the required public hearing on the *Urban Form* policy document, we received only kudos and encouragement from the relatively few persons who spoke. The public had already been consulted, and their com-

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196. WESTCHESTER COUNTY PLANNING BOARD, URBAN FORM STANDARDS TECHNICAL SUPPLEMENT (1972).

197. The higher the number, the more intense the development, the more vehicle trips, solid waste, school children, and storm water runoff it generated. URBAN FORM, *supra* note 43, at 73; URBAN FORM REFINEMENT, *supra* note 189, at 7; see also Federal Housing Administration, *Land-Use Intensity*, Land Planning Bulletin (1966).

ments heard and accepted.

*Urban Form* is now undergoing a complete review by the County Planning Board. Formally adopted by the Board in 1975, it was submitted to the Board of Legislators in that year, but was only received and filed (and not ratified).<sup>198</sup> County Executive DelBello unilaterally declared it to be the land use policy of his administration, with or without Board of Legislators' ratification, and it has guided capital program preparation and municipal referral review for more than sixteen years.

The new *Urban Form* document, which will not stray very far from the model of its parent, is to be called *Patterns for Westchester: Its Land and Its People*.<sup>199</sup> The same broad program of participation in its review and formulation is being followed, again through the Westchester Municipal Planning Federation. One very significant change is being made, however, which is a harbinger of the new age in vertical integration; the entire process, from start to finish, is being mapped and recorded with the computer and data mapping capability of the County's Geographic Information System (GIS).

#### E. GIS: The Technology of Tomorrow's Planning

Planners throughout the world are celebrating this latest advance in technology because it presents them with so many useful tools for data gathering, storage, manipulation, and display. The computer-based geographic information system is a concept that is gaining widespread use throughout the metropolitan area and the State of New York. We are pleased that the County of Westchester is in the vanguard of county planning agencies in the United States in the development and use of this new tool.<sup>200</sup>

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198. One reason, we know now, was the thickness of the document; 100 pages of "policy" was too much for the legislators to consider.

199. Information regarding its publication may be obtained from the Westchester County Department of Planning.

200. Contact the GIS Division of the Westchester County Planning Department for additional information on the Westchester County GIS. See also Laura Long,

It is not unusual to store data in a computer, or to use the spreadsheet and graphic capabilities of even the most modest desktop computer in planning work. Planners are known for their fine mapping and display techniques, so it would not be unusual to expect that a high tech planning office would be able to use computers for electronic drafting in the same way that Computer Assisted Drafting and Design (CADD) is being used in architectural and engineering offices. What is unusual about a GIS is the linking of the two (the data and their graphic images) so that no matter at which end you begin, you will end at the other. Tabular data from one file can be used to generate a display map. The computer jockey at the display terminal, with a few clicks of his mouse, can generate hundreds of new data elements from the combined maps he can call up on his screen. From data to map, or map to data, the new system provides lightning fast linkages and the unique capability of generating new information not available before.

It works in this way. It is possible to break down the display images of the computer map into their component elements, or "objects." The object may be a point location, like a water well, or a line, such as a water main, or a shape, such as a land parcel, or a zoning district, or an entire municipality. Each such object has its discrete ID number. In the computer's data files, the records may describe the parcel's ownership, land use, size of the water main, the year it was laid, depth of the well, and the quality of its water. It is possible to give these records the same ID number. Through the GIS software, the operator can ask the map to identify in some special way (a different color, blinking light, appearance or disappearance) the geographic location of the particular data element.<sup>201</sup> The operator may also interrogate the map by highlighting or circumscribing the area of interest, and ask for a printed report of the characteristics of the area.<sup>202</sup>

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*From the Ground Up*, PLANNING PRACTICE, July, 1991, at 30 (discussing an approach to designing a GIS similar to that of Westchester).

201. For example, "Show me all properties in the Village of Pleasantville with accessory apartments."

202. For example, "Calculate for me the acres of each soil type that lie within the 100-foot buffer area around each wetland within the selected area, and give me a

More intriguing from an areawide or regional standpoint is the opportunity for this information to be shared, quickly and accurately, among interested users. To some extent this is possible from standardization among the various software publishers as to techniques, but it is more likely to be possible where the various users share the same brand of software. In our area the software of choice seems to be ARC/INFO, published by the Environmental Systems Research Institute. It is Westchester's system, and has been used by a variety of state and regional agencies.<sup>203</sup> Data records and maps can be shipped by tape or floppy disk, and will appear the same on each user's screen.

General information systems are useful in several different ways. One is retrospective — backward data capture. This is the ability to recall rapidly data already on file, such as from the filing system for land related data for buildings and parcels, and to display those data accurately at their geographic location. For example, it is possible to take any machine readable address data in the county's data base and display those data at their proper positions along a street map of the municipality.

A second application is forward data mapping — to create thematic maps or point location maps from separate sources of existing data, by first manipulating or combining the data in the file to create new information and then having the computer create the report or map that new information. For example, a planner may request "using your maps of vegetative coverage in the county, and my card files of the names and addresses of persons in the County who have had confirmed cases of Lyme disease, plot for me the location of all such persons who live in or within 1,000 feet of areas of prime habitat for the white-tailed deer."

The third area is interactive data mapping, such as "what if" gaming, where existing information can be combined with

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list of the affected property owners."

203. These agencies include the Hudson River Greenway, New York State Office of Parks and Recreation, New York State Equalization and Assessment, New York Department of Environmental Conservation, New York Power Authority, etc.

hypothetical premises to test out different options:

(1) Site Selection and Identification by Attributes: "Where are the *vacant parcels* of at least *x acres area* lying at least *y feet* from a *major arterial* which have at least *z school children* residing within a *half mile radius*?"

(2) Environmental Assessment: "How many residential units will be affected by aircraft noise at the *x decibel level* under the following three development alternatives?"

(3) Development and Land Suitability Modeling: The application of different GIS coverages of typical constraints on development to determine the development potential of selected parcels or areas of the county. "How will such factors as soils, steep slopes, depth to bedrock, flood plain status, ambient noise, proximity to infrastructure, etc., affect the development of this block in North Salem under the proposed master plan?"

I anticipate that the potential of the GIS capability of the County administration will revolutionize the way that the County staff is able to handle and evaluate data. In early 1992, we completed a department-by-department assessment of the current map and geographic data practices and desires of the County, and are fine tuning the implementation plan that will develop the GIS database to meet those needs. The County staff is operating the GIS on three different computer platforms: personal computer, workstation, and main frame. It will be possible to distribute the GIS information to every user in the County network (currently approximately 1,700 terminals and projected to double in the next four years). One objective is to make the use of the GIS procedures transparent to the computer user, who need not know *why* the computer is able to show the answer to his request in map format, but is not marveling at the fact that it can.

#### IV. State Level Growth Management Efforts

Regional coordination efforts<sup>204</sup> in the metropolitan area have been more a product of the private and quasi-govern-

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204. See *supra* note 121.

mental Regional Plan Association and the Tri-State Regional Planning Commission than they have of the State of New York, and it's a pity. When there was § 701 assistance administered by New York State, there was sufficient bureaucratic backup to provide the sense of regional coordination. Services offered by the Office for Local Government, the Office of Planning Coordination, and the Office for Planning Services were available to local and county governments throughout the state, and many valuable publications, development guides, and legal memoranda were available to help standardize and guide local planning efforts.

Beginning with the Carey gubernatorial administration, and carried on by Governor Cuomo, all such local assistance programs in the old style have been eliminated. New programs, such as Coastal Zone Management<sup>205</sup> in the Department of State and the independent Hudson River Valley Greenway Communities Council, have been established, and have brought or will bring planning assistance to qualified local governments — those with wet feet.

The county planners of New York State have become increasingly concerned about the abandonment of local planning support by the State, and especially by a lack of any apparent interest in the State government in the coordination of the State's own program efforts in the planning and implementation of transportation, economic development, environmental conservation, and open space programs. Because a number of states have recently redirected their approaches to the coordination of state, county and local planning, the county planners sponsored a symposium at Cornell University to learn more of what the other states were doing. The statement issued at the conclusion of that symposium follows.

#### *A Consensus Position on State Planning*

Concerned that there had been a deterioration in the degree of commitment by the leadership of the government of New York State from its support of comprehensive planning

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205. N.Y. EXEC. LAW § 912 (McKinney 1982 & Supp. 1993).

principles and processes, a group of professional planners, public administrators, academicians and concerned citizens met at Cornell University on June 15-16, 1990, to examine the situation and make recommendations. It was the consensus of the conference participants that there is a dire need to integrate and coordinate the efficient and effective planning at all levels of government in New York State, and that the Governor and the State Legislature must have direction on critical issues such as state goals, growth management, infrastructure provision and replacement, comprehensive land use planning, and the like. The group noted that although the state legislative and executive branches may have established stringent requirements in some of these areas, there has not been the continuing follow-through to assure the successful administration and equal enforcement of these elements throughout the state.

Specifically, the conference participants expressed serious concern that New York State lacks the following:

- Clearly defined goals and policies consistent with today's needs
- Coordination of planning activity among state agencies
- Coordination of planning activity among state, regional, county and municipal governments
- Consideration, in the development of enabling authority and technical procedures, of regional differences and geographic characteristics, demographic and social considerations, urban growth, municipal size, and municipal resources
- Sufficient support for the provision of basic planning authority, techniques and resources for local, county and regional agencies to accomplish their planning tasks
- Consideration of the relationship of the regulations, at the state and regional levels, that affect land use to an overall program uniting the functional plans of the individual state agencies.

Further, it was the consensus that in order to overcome these obstacles, the following steps need to be taken:

*Gubernatorial Leadership*

It was clear from the presentations of the keynote speakers at the conference that no state planning program in the nation has succeeded that did not have the strongest possible support from the State Governor. It is essential that state planning and coordination be developed at the highest level to meet the need for effective ideas, good information, and program coordination.

*State Goals and Planning Policies*

The first step in the state planning process must be the development of a concise statement of goals that are accepted by the Governor and the Legislature. From these, the state must have a mechanism for integrating the programs and policies of the state with the local, county and regional comprehensive plans.

*Implementation*

In New York State, planning must include both vertical and horizontal consistency: the requirement that state and regional agencies, counties and municipalities must adopt plans, regulations, and capital investment programs consistent with the State's overall goals and policies, and with the plans of others at their level. The implementation of these plans involves a two-way flow of support: there must be a State respect for the validity of local plans, and state assistance in the implementation of locally developed and regionally coordinated solutions and functional elements. County planning agencies should assume a special responsibility in the coordination process for the relating of the planning efforts of state and local governments.

*Regional Planning Relationships*

The conference participants noted the disparity in regional boundaries of the various districts established by the State: for the administration of the functional programs of such state agencies as Environmental Conservation and Transpor-



tation; for federally sponsored economic development programs; and for state sponsored regional planning activities. It was the consensus that the State of New York should reexamine these disparities, and seek to resolve them with the objective of greater consistency, wherever possible.

### *State Incentives*

New York State should create direct financial incentives for the development of regional, county and local comprehensive land use and infrastructure capital improvement programs and for the establishment of intermunicipal planning agreements and consolidations. The State should investigate with these various planning levels the development of new revenues that support these programs.<sup>206</sup>

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206. This position statement represents the consensus of the participants in the 1990 Spring Conference on The State of Planning in New York, sponsored by the New York State Association of County Planners, and the Cornell University Department of City and Regional Planning, in collaboration with: the Regional Plan Association; the Upstate and Metropolitan New York Chapters of the American Planning Association; the New York Planning Federation; and the Upstate New York Chapter of the American Society of Landscape Architects. The statement was adopted by the participants in Ithaca, New York on June 16, 1990.