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Smart Growth: Community Planning Requires Protecting Open Space

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Abstract: Smart growth involves two main principles, creating incentives to increase compact development in some areas, and in turn, preserving open space in other areas. The New York legislature has imparted municipal governments with general authority to regulate land and preserve open space. In turn, several tools have developed which are at the disposal of municipal governments including, overlay zoning, floating zones, cluster development and state laws such as the New York State Environmental Quality Review Act (SEQRA). The use of these tools, along with proper training for state and local officials on the subject of smart growth, will render open space preservation less problematic.

Introduction

In several previous columns, I explored the topic of smart growth, examining some of the more practical techniques that local governments can use to implement the concept. At a minimum, smart growth requires local governments to take two related actions. The first is the designation of discrete geographical areas into which private market growth pressures are directed. The second is the designation of other areas for recreation, conservation, and environmental protection. In this column, I address the techniques that local governments may use to regulate areas designated for conservation and environmental protection, areas identified by local leaders and citizens generally as “open space.”

Why Protect Open Space?

Open space serves a variety of purposes including the conservation of farm land, wetlands, viewsheds, flood plains, coastal areas, habitats, and other natural resources. Open space maintains natural processes of conservation, provides recreational opportunities, promotes aesthetically pleasing landscapes, and maintains community character and the quality of life.

Authority to Protect Open Space

The preservation of open lands is one of the few land use objectives that is found in the State Constitution. It is the policy of New York State to “conserve and protect [the] natural resources and scenic beauty [of the state] and encourage the development and improvement of . . . agricultural lands for the production of food and other agricultural products.” (Article 14, § 4) The State Legislature has enacted several statutes that delegate to local governments the authority to protect local natural resources and agricultural lands. Under Town Law § 263, Village Law § 7-704, and General City Law § 20(25) zoning regulations may be adopted to encourage “the most appropriate use of the land.” The Municipal Home Rule Authority Law § 10(1)(ii)(a)(11) authorizes each local government to adopt land use laws “for the protection and enhancement of its physical and visual environment.”

Preserving Open Space through Regulation

Local governments in New York have extensive authority to limit the development of privately owned land through land use regulations. Using this authority, localities have protected open space through overlay zoning, floating zones, clustering development, environmental review, incentive zoning, transferring development rights, tree preservation, and wetland protection.

Overlay Zoning

Overlay zoning is a flexible zoning technique that allows a municipality to either encourage or discourage development in certain areas. An overlay zone is defined as “a mapped overlay district superimposed on one or more established zoning districts.” An overlay zone supplements the underlying zoning standards with additional requirements that can be designed to protect the natural features in an important environmental area. A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements.

The purpose of an overlay zone is to conserve natural resources or realize development objectives without unduly disturbing the expectations created by the existing zoning ordinance. In areas that contain particularly valuable natural resources, zoning might not suffice and more specific provisions may be needed to preserve the natural environment. Unique natural or aesthetic resource areas, such as a pine barren, wetland resource area, watershed, or tidal basin, can be identified and protected.

To illustrate, an overlay district can be created to protect designated ridgelines in a community. In these areas, landowners would be required to site all structures to avoid occupying or obstructing public views of land within the mapped overlay districts. This generally requires locating buildings away from ridgelines and ridgetops at lower elevations and closer to existing roads. These standards for the placement of buildings are, of course, more stringent and specific than those required by the underlying zoning law.

Floating Zones

The floating zone is a zoning district, created by the local legislature, that is not designated on the municipal zoning map until a land owner or developer applies for rezoning under that district or until some additional condition is met.

A floating zone law can contain a number of provisions intended to mitigate the impact of development on the surrounding area. Normally, for a parcel to be eligible for rezoning under a floating zone, it must be of a sufficient size to insure that the development can be fitted properly into its surroundings. An owner who requests that the zone be applied to a particular parcel must demonstrate that a variety of impacts will be properly handled, such as the project's effect on natural resources, visual and noise impact, preservation of open space, and the effect on nearby property values.

The Town of Washington created an environmental floating zone that automatically alights on a parcel proposed for development when that parcel contains two or more of five designated natural features that the town wishes to protect from the impacts of development.

Cluster Development

Cluster development is a zoning device used to conserve open space. The New York statutes define cluster development as:

a subdivision ... in which the applicable zoning ordinance or local law is modified to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands.

Normally, land is subdivided and developed in conformance with the dimensional requirements of the local zoning ordinance. Zoning usually requires that the entire parcel be divided into lots that conform to minimum lot sizes and that buildings on subdivided lots conform to rigorous set-back, height, and other dimensional requirements. Using its cluster authority, a locality can allow or require allowable development to be placed on a portion of the parcel and the rest to remain undeveloped open space. Clustering can be limited to parcels with particular natural resource characteristics such as wetlands, valuable viewsheds, agricultural soils, or steep slopes.

The Bedford town board authorized its planning board to use clustering to preserve "a unique or significant natural feature of the site, including but not limited to a vegetative feature, wildlife habitat, surface water supply, underground aquifer, endangered species, rock formation, and steep slopes" and to protect "a unique or significant feature of the man-made environment of the site, including but not limited to a building, structure, or artifact of architectural, historical, or archeological value." The Town of Stanford requires residential structures to be clustered to protect agricultural

soils for farming.

State Environmental Quality Review Act

The State Environmental Quality Review Act (SEQRA) plays a vital role in protecting New York State's open space. The essence of SEQRA is the requirement that the impact of all development projects on the environment be considered at the planning stage and that local agencies act effectively to avoid any possible adverse environmental impacts.

SEQRA regulations contain standards that can be used to protect open space. For example, the types of environmental effects that are to be considered and mitigated include potential adverse impacts on land, water, air, plants and animals, agricultural resources, aesthetic resources, historic and archeological resources, growth and character of community or neighborhood, and open space and recreation. SEQRA gives local boards independent authority to impose conditions on project approvals to mitigate negative impacts on open spaces and their associated environmental features.

Incentive Zoning

Under state statutes, local legislatures may allow developers to build at greater densities than allowed under zoning in exchange for public benefits such as the preservation of open space. The Town of LaGrange, for example, awards a 40% density bonus when a developer promises to preserve 80% of a site for farming purposes.

The statutes also allow communities to receive cash payments in exchange for the zoning incentives awarded a developer. This allows localities to use the cash to achieve the public benefit directly. Using this authority, it is possible for the community to purchase development rights, or conservation easements, on valuable open space land using the cash contributed by a developer who is granted zoning incentives to build in an appropriate location that can absorb the development impacts. See Town Law § 261-b, Village Law § 7-703, and General City Law § 81-d.

Transfer of Development Rights

New York statutes define transfer of development rights as "the process by which development rights are transferred from one lot, parcel, or area of land in a sending district to another lot, parcel, or area of land in one or more receiving districts." (See Town Law § 261-a, Village Law § 7-701, and General City Law § 20-f.) A comprehensive plan in the Long Island Pine Barrens allocates development credits to land in the fragile pine barrens aquifer, based on their development yield under local zoning, and greatly restricts development in these "sending districts." The plan establishes receiving districts into which these development credits may be transferred. Developers who own land in these receiving districts may purchase credits from land

owners in sending districts. Each purchased credit allows the developer to build one housing unit over that permitted by the receiving district's zoning.

Tree Preservation

Another means of controlling scenic quality and community appearance is the adoption of a tree preservation law. Such a law allows a community to restrict the removal of trees on private property in order to preserve their environmental and aesthetic importance to the community. The purpose clause of one extensive local law explains that the provisions were adopted to reduce tree destruction which gives rise to barren and unsightly conditions, impairs the stability of real property values, and adversely affects the character of the community. Tree ordinances typically limit their applicability to trees of a certain diameter and height. They establish a permit system, allowing tree removal but only upon a showing of necessity and compliance with certain conditions, such as replacement of all or a portion of the trees to be removed.

Freshwater Wetland Protection

Under the provisions of the State Freshwater Wetlands Act, local governments are authorized to adopt a local wetlands law governing all freshwater wetlands within their jurisdiction. Once a local government has filed a wetlands map with the Department of Environmental Conservation (DEC), the municipality may then enact a wetlands law. Most local wetlands laws are adopted pursuant to the Municipal Home Rule Law which authorizes local governments to adopt laws to protect the "physical environment." Under these local laws, broader definitions of wetlands may be adopted, larger buffer areas regulated, and a more extensive range of activities covered than is possible under DEC's regulations which govern wetlands 12.4 acres in size or larger.

The New York Freshwater Wetlands Act lists the critical public benefits that wetlands provide. These include flood and storm water control, aquifer protection, groundwater recharge, maintaining stream flow, pollution elimination, erosion control, and the provision of recreational opportunity, open space and habitat for wildlife, including threatened, rare, and endangered species. The purpose of adopting a wetlands law is to preserve these benefits for the public. Generally, landowners who propose to conduct regulated activities must apply to the designated administrative agency for a permit. Where certain standards and conditions can be met, a permit may be granted allowing the regulated activity to proceed. Conditions may be placed on the permit to avoid, minimize or mitigate the loss or degradation of wetlands which, in turn, promote open space conservation.

The State's Role

Even with this impressive list of tools and techniques that localities may use to protect open space, critical challenges remain for this portion of the smart growth agenda to be implemented. Most local officials are not aware of this authority or the progress some communities have made in this area. Local enforcement of open space

conservation laws is problematic. If open space laws are poorly drafted or ineptly enforced, they will be challenged in court. Part of the smart growth agenda at the state level is to insure that training is provided to officials, financial assistance is available to supplement enforcement capacity, and that the local initiatives that result are defensible.