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Protecting Scenic Assets: Regulations Based on Study, Expert Reports, and Rationality

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Abstract: Many municipalities are seeking to protect scenic assets through a combination of land use tools and implied police powers. These tools include comprehensive planning, subdivision and site plan approval, and in New York, execution of the State Environmental Quality Review Act (SEQRA). An example of scenic protection is North Elba, New York, where the local planning board denied Wal-Mart's application to construct a store because the store would compromise the viewshed of a nearby mountain. This article reviews the SEQRA process in the Wal-Mart case and also reviews several other methods municipalities may use to protect environmental and aesthetic interests.

Denying Wal-Mart to Protect a Scenic Viewshed

"It is settled that conduct which is...offensive to the senses of hearing and smell may be a valid subject of regulation under the police power...and we perceive no basis for a different result merely because the sense of sight is involved." *People v. Stover*, 12 NY2d 462 (1963), appeal dismissed 375 US 42 (1963). Recently, the Third Department ratified this principle in sustaining a planning board's denial of an application to build a large Wal-Mart store located in a designated Scenic Preservation Overlay District. *Wal-Mart Stores Inc. v. Planning Board of the Town of North Elba*, NYS2d 774 (1998)

Wal-Mart had applied to the Planning Board for a conditional use permit under the Town's Land Use Code which requires applicants to show that the proposed project "will not result in a clearly adverse aesthetic impact." North Elba, a resort community noted for its rustic nature and striking scenery, had established an overlay district to protect the viewshed of Whiteface Mountain, a critical portion of the western gateway to the community. After reviewing computer simulations of the proposed development, including efforts to screen the store from the road, the Planning Board found that the project would cause a noticeable change in the visual character of the viewshed and denied the application.

Wal-Mart claimed that the Planning Board's decision was not supported by substantial evidence and was an arbitrary and capricious reaction to citizen and

merchant opposition. The Appellate Division noted that, since public hearings held by planning boards are informational and not adjudicatory in nature, the standard of judicial review is one of rationality, not substantial evidence. The court sustained the Planning Board's denial of the Wal-Mart proposal because its review of the record did not persuade it that there was no rational basis for the board's decision.

Long List of Techniques to Protect Scenic Assets

The *Wal-Mart* case illustrates one of an increasing number of techniques that local governments are using to protect their scenic assets. Among these are environmental review mitigation measures, comprehensive planning and zoning provisions, conditions on site plan, subdivision and variance approvals, and ordinances regulating the removal of trees, quality of commercial signs and the design consistency of new construction.

Protecting Aesthetics Under SEQRA

In the *Wal-Mart* case, the petitioner's application was subject to environmental review under the State Environmental Quality Review Act (SEQRA). Wal-Mart argued that scenic impacts are not within the scope of an agency's review under SEQRA. The court decided the case on other grounds, those related to the conditions imposed on the award of a conditional use permit under the provisions of the town's Land Use Code. SEQRA, however, does provide an additional means for local agencies to protect scenic assets such as the viewshed at issue in the *Wal-Mart* case. Under the regulations of the Commissioner of the State Department of Environmental Conservation, 6 NYCRR Part 617.1(l), all local agency reviews of project applications must consider whether the project will have a negative impact on resources of "historic or aesthetic significance" and, if so, conditions may be imposed on a project's approval to mitigate that impact.

The Court of Appeals held that "aesthetic considerations are a proper area of concern in SEQRA balancing analysis...." *WEOK Broadcasting Corp. v. Planning Board of the Town of Lloyd*, 79 NY2d 373 (1992). The court noted, however, that aesthetic impact considerations, unsupported by substantial evidence, may not serve as a basis for denying an application. This suggests that had the *Wal-Mart* case been based on SEQRA considerations, instead of the conditional use permit language of the local ordinance, the board's determination would have been subjected to a substantial evidence rule. In the *WEOK* case, aesthetic reasons for denial were inadequate because they were not based on substantial evidence; the court found the planning board's determination that the project "might" have a negative visual impact "hopelessly conclusory," backed only by inconclusive expert reports.

Other Methods of Protecting Scenic Qualities

Comprehensive Planning: If a community wishes to adopt local laws that regulate aesthetics, it may create a legal basis for those regulations in its comprehensive plan. Local comprehensive plans may identify and provide for the preservation of historic and cultural resources, natural resources and sensitive environmental areas. Village Law § 7-722(4)(d), Town Law § 272-a(3)(d) and General City Law § 28-a(4)(d). Since all land use regulations are required to conform to the comprehensive plan, such provisions help sustain aesthetic regulations when they are challenged. Village Law § 7-704, Town Law § 263 and General City Law § 20(25).

Zoning: It is legitimate for zoning provisions to achieve aesthetic objectives. Long ago, judicial approval of two acre zoning was based on court's understanding of the public interest in the "present character, appearance and environment of this rural high-class residential community." *Elbert v. North Hills*, 28 NYS2d 172 (1941), rehearing denied, 29 NYS2d 152. Zoning codes may contain specific "nuisance prevention" provisions such as specifications for signs in commercial areas as well as requirements that eliminate nonconforming uses, such as billboards or junkyards. A separate source of authority to regulate aesthetics is found in Section 10(1)(ii)(a)(11) of the Municipal Home Rule Law which states that a municipality may adopt land use laws for the "protection and enhancement of its physical and visual environment."

Special use permits: The *Wal-Mart* case rested on the authority of a local government to condition its approval of an application for a special permit on meeting objectives and standards contained in the zoning ordinance. Village Law § 7-725-b, Town Law § 274-b and General City Law § 27-b allow local governments to issue special use permits subject to requirements that assure the proposed use "will not adversely affect the neighborhood."

Site Plan and Subdivision Approvals: Site plan and subdivision regulations adopted by the local legislature may require that aesthetic impacts be revealed in maps, plats and drawings submitted for review. They also may authorize the reviewing body to condition any approval on design and layout changes that are reasonably related to the prevention of aesthetic damage or to the preservation of aesthetic resources nearby. This authority regarding applications for site plan approvals is found in Village Law § 7-725-a(2)(a), Town Law § 274-a(2)(a) and General City Law § 27-a(2)(a); these statutes allow localities to include in their site plan regulations requirements that all site plans show "screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the [local legislative body.]" The authority regarding subdivision approvals is found in Village Law §§ 7-728 & 7-730, Town Law §§ 276-278 and General City Law §§ 32-34 & 37. These provisions allow local governments to provide for the future development of the

municipality by authorizing their planning boards to review and approve subdivision plats that show the lot layout, dimensions and topography of the subdivision. Planning boards may also be authorized to permit or require subdivision development to be clustered on a portion of the land in order “to preserve the natural and scenic qualities of open lands.”

Conditions on the Award of Zoning Variances: State statutes allow local zoning boards of appeals to grant use variances where the applicant can prove that the variance “will not alter the essential character of the neighborhood,” and area variances with due consideration given to whether the variance will cause an undesirable change in the character of the neighborhood or a detriment to nearby properties. Village Law § 7-712-b, Town Law § 267-b and General City Law § 81-b.

Overlay Districts: Unique aesthetic resource areas or sites may be identified and protected through the adoption of overlay districts. The *Wal-Mart* case involved the creation of a Scenic Preservation Overlay District to protect the gateway viewshed of a resort community. Overlay districts generally do not disturb the underlying zoning requirements; they add requirements to protect and enhance identified areas in need of additional protection. The Town of North Elba, for example, imposed aesthetic standards on the issuance of a conditional use permit in the established Scenic Preservation Overlay District.

Sign control ordinances: Provisions can be added to the zoning code to control the location, size and aesthetics of signs and billboards. While the First Amendment protects the content of signs, which may not be regulated except to achieve a compelling state interest, this constraint does not affect the authority of local governments to regulate the “time, place and manner” by which signs and billboards communicate their messages. A village sign ordinance, prohibiting commercial signs exceeding four square feet, was sustained by the Court of Appeals in *People v. Goodman*, 31 NY2d 262 (1972). In *Suffolk Outdoor Advertising Co. Inc. v Hulse* 43 NY2d 483 (1977), the Court of Appeals upheld a local ordinance prohibiting the erection of non-accessory billboards and providing for the removal of all non-conforming billboards in the community. The decision was based on the fundamental principle that “... aesthetics constitutes a valid basis for the exercise of the police power.”

Design review ordinances: The General Municipal Law, § 96-a, authorizes local governments to regulate districts, sites and buildings having any “aesthetic interest or value” which “may include appropriate and reasonable control of the use or appearance of neighboring property within public view.” Village Law § 7-702 and Town Law § 262 grant villages and towns the power to “regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land.” It is under these statutes that local governments have adopted design review ordinances and created architectural review boards to review compliance of new development with locally adopted design standards.

The Court of Appeals, in *Old Farm Road, Inc. v. Town of New Castle*, 26 NY2d 462 (1970), sustained the creation of a local architectural review board and its authority to issue or deny permits based on design considerations to those who seek to erect signs and buildings in the community.

Tree Ordinances: General Municipal Law, § 96-b, authorizes local governments to adopt tree preservation laws based on aesthetic as well as other grounds. A tree preservation ordinance allows a community to restrict the removal of trees on private property in order to preserve their environmental and aesthetic importance. Tree ordinances typically limit their applicability to trees of a certain diameter and height. They establish a permit system under which tree removal is allowed, but only upon a showing of necessity and compliance with certain conditions such as the replacement of some or all of the trees to be removed. A municipal tree preservation ordinance was found to be a proper exercise of the town's authority to protect its health and general welfare. *Seaboard Contracting & Material, Inc. v. Smithtown*, 147 AD2d 4, 541 NYS2d 216 (2nd Dept, 1989).

Conclusion

In *Berman v. Parker* 348 US 26 (1954), the Supreme Court held that the public welfare that is to be advanced by land use regulations is broad and inclusive. "The values it represents," wrote Mr. Justice Douglas, "are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." The New York legislature has responded by authorizing local governments to protect their scenic assets through numerous provisions of the Village, Town and General City Law, Municipal Home Rule Law, General Municipal Law and State Environmental Conservation Law. This ample authority has been judiciously framed by the case law which cautions localities to base their scenic regulations on careful planning, definitive studies, inventories or expert reports and other clear evidence of rationality.