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Recommended Citation

John R. Nolon, Flexibility in the Law: Reengineering of Zoning to Prevent Fragmented Landscapes, N.Y. L.J., Feb. 18, 1998, at 5, <http://digitalcommons.pace.edu/lawfaculty/727/>.

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Flexibility in the Law: Reengineering of Zoning to Prevent Fragmented Landscapes

Written for Publication in the New York Law Journal
February 18, 1998

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Abstract: The continued existence vernal pools and other sensitive environmental areas greatly depends upon local and state land use decisions. Practices such as Euclidian Zoning, where land uses are separated into different districts, usually fail to account for the protection of these sensitive areas. However, local governments in New York, using implied municipal power created by state legislation, have a variety of land use tools to help alleviate the destruction of environmentally sensitive areas. These tools include: overlay zoning, incentive zoning, conservation easements, floating zones, and transferring development rights. By using these tools within a well-integrated strategy, New York communities can effectively preserve these areas better than the Euclidian Zoning schemes of the past.

Fragmented Landscapes

At a recent conference sponsored by Yale University, scientists and government officials from New England discussed the critical biological importance of vernal pools and the need for their protection. A vernal pool is a confined basin with no outlet stream where water stands for approximately two months, usually in the Spring. These small, intermittent wetlands shelter a variety of species that depend on the existence of vernal pools for their survival. The woodlands and watersheds surrounding these intermittent wetlands are critical to the proper functioning of vernal pools. Land use decisions that permit the laying of roads, cutting of trees and construction of buildings in these areas have significant adverse environmental impacts on the biological integrity of vernal pools.

Vernal pools and their critical buffers are fragments of the landscape that are threatened by the random development patterns allowed by local and state land use policies in New York and throughout New England. Vernal pools, along with other critical habitats, recharge areas, and watersheds provide a critical challenge to land use professionals to develop a competent means of creating land development patterns that protect landscapes and natural resources in a more integrated and effective manner.

Inadequacy of Legal Protection

Despite the intense focus of scientists on this tangible and important natural resource, many vernal pools simply do not exist in law. In New York, only wetlands 12.4 acres in size or larger are guaranteed protection. Vernal pools are usually not this large. Wetlands are defined primarily based on the presence and predominance of wetlands vegetation. Although provided with the authority to expand the state definition of wetlands, and to protect vernal pools in the process, only a small fraction of New York's 1,600 municipalities have done so. Developments in and around vernal pools, where they are not defined as wetlands, are not required to obtain any special permit that ensures the pools' protection. In reviewing any particular project, local agencies may use their environmental review powers to achieve some mitigation of identified negative environmental impacts, but the law guarantees only a "hard look" at the issue, not any particular result.

The Importance of Local Zoning

In New York, vernal pools and other natural resources depend primarily on local zoning for their protection. Land use professionals refer to the reigning zoning scheme as "Euclidean Zoning." This sounds like a geometric term, but is derived from the U.S. Supreme Court case that established the constitutionality of municipal zoning. (*Village of Euclid v. Ambler Realty Co.*, 272 US 365 (1926)). The geometric allusion is apt, however. Euclidean zoning encourages local governments to separate land uses into small geographical areas known as zoning districts. It locates single family housing here, neighborhood commercial development there, and some mixed uses in yet a different, segregated district of the community.

Why the natural landscape tends to be "fractured" is explained, largely, by Euclidean zoning. The layout of zoning districts very seldom has much to do with the topography or boundaries of natural resources. The lines one would draw, for example, to protect a vernal pool habitat or a watershed area would bear little relationship to the development blueprint of the municipal government found in its zoning district map. As important, local zoning often fails to create cost-effective development zones where developers are encouraged to build, where review processes are streamlined, and where infrastructure investments are concentrated.

Reengineering Local Zoning; Integrating Landscapes

A more coherent use of local land use authority is possible. Using the same statutory power that normally results in hard-edged, Euclidean zoning districts, the Town of Hyde Park recently adopted a much more fluid and integrated approach. It's newly adopted comprehensive plan and its novel zoning

ordinance, which is under review, redefine how zoning districts can be drawn. Instead of dividing the town into dozens of small, segregated districts, they establish just two underlying zoning districts. One of these is a waterfront district, lying east of the Hudson River, and the other a greenbelt district, located to the east of Route 9, the Town's major north-south transportation corridor. They further lay out several discrete districts drawn around existing developed areas. These include neighborhood, hamlet and town center districts. Within each of these districts, core areas are identified. In addition, the plan identifies certain scenic and historic districts of importance to the community.

The Hyde Park comprehensive plan departs further from the typical zoning formula by using indices of scale, density and intensity of development to define how much development can take place within these various districts. These indices focus on the gross square footage, number of dwelling units and employees generated and the number of daily vehicle trips produced by proposed developments. Greater scale, density and intensity of development are allowed in core areas and town center districts than in neighborhood and hamlet districts. The areas of the town that lie outside neighborhood, hamlet and town center districts are designated for very low density development where natural and scenic resources abound. Additional development constraints are imposed on designated scenic and historic districts.

Flexible Legal Authority

The flexibility of local land use law, as evidenced by Hyde Park's unique system, derives from both the delegated and implied powers of municipal corporations. To keep pace with the challenge of developing sustainable communities, the legislature has delegated a variety of new powers to local governments in recent years. Traditionally, the courts have taken a broad view of the implied powers of local legislatures to adopt reasonable means of providing for the future development and conservation of their communities.

New York law has greater potential to promote sustainable community development of the type evidenced in Hyde Park than is commonly known. If one respects certain technical requirements, it is possible to conserve natural resource areas and to transfer development potential to appropriate areas using a variety of techniques. These include, in addition to wetlands protection, the adoption of zoning overlay districts, the use of conservation easements, awarding zoning incentives to developers, the transfer of development rights to designated districts, the creation of agricultural districts, and the adoption of environmental constraint ordinances, among others.

Overlay Zoning

Overlay zoning allows local officials to designate the boundaries of natural resource or economic development districts. The local legislature is authorized

to designate such districts based on their environmental or economic integrity. It can then adopt different standards for the review of development projects and provide incentives for the achievement of established performance objectives for each district. Usually, the underlying zoning district lines and provisions are left in place, but authority to vary the application of zoning provisions is granted to local approval boards in the interest of accomplishing the objectives of the overlay district. Hyde Park's comprehensive plan does away with traditional zoning districts and uses several overlay districts as the basis for its innovative approach to municipal land use control. Overlay zoning is within the implied authority of local governments to enact planning, zoning and related laws. (*Rogers v. Tarrytown*, 302 NY 115 (1952)).

Incentive Zoning

Incentive zoning can be used to encourage development in appropriate areas away, for example, from vernal pools and other vulnerable resource areas and to concentrate development in other districts where it can be properly serviced such as a development overlay district. In setting up such a system, the legislature leaves existing zoning provisions in place, but permits more intensive development of the land in exchange for certain community benefits. (Town Law § 261-b, Village Law § 7-703 and General City Law § 81-d)

In New York, the incentives that may be offered to developers include adjustments to the density of development, for example, allowing more residential units or a greater building floor area than is otherwise permitted under the zoning ordinance. Incentives can also include adjustments to the height, open space, use or other requirements of the underlying zoning ordinance. The community benefits that can be required in exchange for these incentives include open space or parks, affordable housing, day care or elder care, or "other specific physical, social or cultural amenity of benefit to the residents of the community." Communities can require developers to make cash contributions to a conservation trust fund in return for zoning incentives. These funds can be used to purchase conservation easements or development rights of lands containing natural resources such as vernal pools.

Conservation Easements

A conservation easement is a voluntary agreement between a private landowner and a municipal agency or qualified not-for-profit corporation to restrict the use of land. (N.Y. Env't'l Conserv. Law §§ 49-0301 et. seq. and *Grogan v. ZBA*, 633 NYS 2d 809 (2d Dep't 1995)). The owner of the real property deeds an interest in the land, called a conservation easement, to a qualified public or private agency. Another term to describe this transaction is the purchase of development rights. Both impose, in effect, an equitable servitude on the protected property prohibiting any development of the site that is inconsistent with protecting the parcel's habitat or other environmental resource.

Cluster Developments

On individual sites, the law allows local land use agencies to encourage or require development to be clustered on a portion of the site to protect vernal pools and other environmental resources. (Town Law § 278, Village Law §7-738 and General City Law § 37) Normally, land is subdivided and developed in conformance with the dimensional requirements of the local zoning ordinance. Under cluster development, the locality permits a land developer to vary the dimensional requirements of Euclidean zoning, such as a requirement that each home be placed on a lot no smaller than one acre. Clustering allows homes to be placed in any configuration on a small portion of the development parcel. The land that is saved by this reconfiguration can then be left undeveloped to serve the open space, recreational, or conservation needs of the community.

Floating Zones

Higher density development in appropriate locations, beyond the area needed to protect vernal pools and other natural resources, can be achieved through floating zones, a device that is considered within the implied authority of municipal government. (*Rogers v. Tarrytown*, 302 NY 115 (1952)). A floating zone defines a use, such as an office complex, research laboratory, or multifamily housing, that the community wants to encourage. The floating zone can be affixed to a qualifying parcel of land, either upon the application of the parcel's owner or upon the initiative of the local legislature. Upon approval, the parcel is rezoned to reflect the new use and becomes a small zoning district; its development is governed by the use, dimensional and other provisions of the floating zone ordinance.

The floating zone ordinance contains a number of provisions intended to mitigate the impact of its development on the surrounding area, including vernal pools. 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 traffic and site access; water and sewer service; design continuity; effect on natural resources; visual and noise impact; preservation of open space; and the effect on nearby property values.

Transfer of Development Rights

Sustainable community development in most municipalities involves balancing resource preservation with a commitment to encourage development in appropriate areas. A technique called transfer of development rights can be used not only to encourage development in such areas but to compensate for discouraging or disallowing it in other areas, such as around viable vernal pools

and other natural resources. 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." (Town Law § 261-a, Village Law § 7-701 and General City Law § 20-f)

According to New York statute, the purpose of a transfer of development rights program is "to protect the natural, scenic or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest or value and to enable and encourage flexibility of design and careful management of land in recognition of land as a basic and valuable natural resource."

Conclusion

The fragmentation of landscapes that threatens vernal pools and other natural resources is an unfortunate and too typical result of segregating land uses into numerous discrete zoning districts. This traditional approach to municipal zoning is giving way to a more organic and integrated strategy. Hyde Park's recent attempt to identify unified landscape segments, to declare these to be its zoning districts and to provide appropriate densities and land uses in these new districts is illustrative of the extraordinary flexibility of New York law in the land use field.