

ADOPTING ZONING FOR THE FIRST TIME

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

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This document is intended to give general guidance.
Local governments seeking to adopt zoning for the first
time are encouraged to obtain legal counsel.

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INTRODUCTION

Cities, towns and villages in New York State are authorized by state statutes (called “enabling laws”) to regulate the use of land by enacting what is commonly referred to as “zoning.” Zoning governs the way land in a municipality is used and developed. Its goal is to carry out the municipality’s long range land use objectives. Zoning regulates the uses to which property may be devoted, the siting of development on land, and the density of development on property.

Zoning operates by dividing the whole community into separate districts, or zones. Hence, the term “zoning.” The districts are shown on the municipality’s zoning map. Within these districts, all properties are subject to a uniform set of zoning regulations which restrict the use and development of property.

The authority for adopting local zoning regulations is set forth in New York State’s “enabling” laws - General City Law §20(24), (25), Town Law Article 16, and Village Law Article 7. For example, Town Law provides, in part, as follows:

“For the purpose of promoting health, safety, morals or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the

percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes...” (*Town Law §261*).

Additionally, the Municipal Home Rule Law, and the Statute of Local Governments, provide independent “power to adopt, amend and repeal zoning regulations” through the adoption of local laws. (*Statute of Local Governments, §10(6) which is incorporated into Municipal Home Rule Law, §10(1)(ii)(a)(14)*). This source of power also may be utilized in conjunction with the zoning enabling laws described above.

Procedures to be discussed

Village Law, Article 7 and Town Law, Article 16 describe specific procedures which must be followed by villages and towns, respectively, which desire to adopt zoning regulations. Villages adopt zoning regulations by local law and towns may adopt zoning by either local law or ordinance. The term “zoning regulation” is being used here for the convenience of the reader to refer both to zoning ordinances and to zoning local laws. Since all cities in New York have adopted zoning, this booklet will address only the Village Law and Town Law procedures.

While zoning regulations are commonplace, it is important to remember that such regulations

directly impact the use of private property. For this reason, and because people traditionally are simply very interested and concerned with regulations which could limit the use of real property, the zoning enabling laws contain very specific procedures for adopting zoning, procedures unlike those for adopting other types of regulations. These procedures must be carefully followed in order to avoid court challenge for procedural defects which, if successful, would result in invalidation of the enactment.

Simply, and directly, the adoption procedure for establishing a municipality's first zoning regulations consists of the following steps:

- Step 1 - Creation of the zoning commission
- Step 2 - Performance of the zoning commission; public participation and final report
- Step 3 - Environmental assessment
- Step 4 - Performance of the legislative board; notice and public hearing
- Step 5 - Referral by the legislative board to the county planning agency or regional planning council
- Step 6 - Enactment procedures; voting and entry into the minutes
- Step 7 - Publication, posting, filing and effective date

This booklet will discuss each of these steps in some detail, however, the Department of State highly recommends early consultation with the municipal attorney for legal advice relating to adoption of zoning regulations.

The Comprehensive Plan

The enactment of zoning regulations is preceded by adoption of a "comprehensive plan" or by comprehensive planning activities. The zoning enabling laws require that zoning regulations "be made in accordance with a comprehensive plan." Originally not defined

in the enabling laws, comprehensive planning was judicially recognized as providing the factual basis for meeting underlying equal protection and substantive due process constitutional requirements. The enabling laws have been amended to define the term "comprehensive plan", and to provide a process for formally adopting a comprehensive plan. Once a comprehensive plan is adopted pursuant to these provisions, zoning regulations and other actions of the town or village must be in accordance with it. (*Town Law, §272-a and Village Law, §7-722*). While comprehensive planning is critical to the development and adoption of zoning regulations, it is the topic of another Department of State publication.



Creation of the Zoning Commission

When a village or town desires to adopt its first zoning regulations, the village board of trustees or town board is required to first appoint a zoning commission. (*Town Law §266, Village Law §7-710*).

The function of the zoning commission has been described as a “precautionary measure to make sure that the zoning shall not be adopted hurriedly or impulsively, but only after careful study and consultation with property owners.” (*Basset, Zoning, 1940 p.34*).

The zoning commission is a separate body, set apart from the responsibilities of the legislative board. This "separate" status allows the commission to focus solely upon its limited mandate to prepare draft zoning regulations.

Zoning Commission Membership

The enabling laws do not specify how many members serve on a zoning commission, but in practice a commission of fewer than 10 members has been a workable number. A commission of this size can afford a diversity of membership in terms of municipal representation, and yet be small enough to guarantee ease of administration.

There are essentially three membership appointment options available. The legislative board may select one of the following options:

- Appointment of the planning board to serve as the zoning commission.
- Appointment of a "fresh" group of citizens to serve as the zoning commission.
- Appointment of a number of official

planning board members plus a number of citizens to serve as the zoning commission.

Under the Town and the Village Law, the planning board (if one has been appointed) and the zoning commission may be composed of the same members. The appointment of the planning board (or several of its members) to the zoning commission can perform the critical service of bridging the potential gap between the community's past investment in planning and its future concern with regulating and guiding growth. If the legislative body appoints to the zoning commission persons who participated in the preparation of a comprehensive plan, these people can transmit the background decisions upon which comprehensive plan recommendations were based. Without such insight, lay planning expertise and familiarity with the plan, the commission may find itself retracing the steps already taken in the "plan" process.

On the other hand, some communities have expressed concern that a zoning commission composed entirely of planning board members may find it difficult to evaluate and determine reasonable regulations in an impartial fashion. They fear that in the lengthy and arduous task of creating the comprehensive plan, the planning board members may develop such a deep commitment to the plan that they may be unable to compromise in proposing zoning regulations.

Finally, the commission's membership can insure representation of specific geographic areas or of population groups that may be especially concerned or affected by adoption of zoning regulations. It presents the opportunity to appoint highly skilled and knowledgeable residents to this task thereby taking advantage of their additional expertise and abilities.



Performance of the Zoning Commission; Public Participation and Final Report

A zoning commission is created to “recommend the boundaries of the various original districts and appropriate regulations to be enforced therein.” (*Town Law §266, Village Law §7-710*). These zoning recommendations, based on the comprehensive plan, should be developed with the input of the general public. The zoning commission is required to hold at least one public hearing on its “preliminary report” before the report may be adopted and transmitted to the town board or village board of trustees.

A zoning commission is a public body and its meetings are open to the public as provided in the Open Meetings Law. (*Article 7 of the Public Officers Law*). Additionally, the zoning commission may find it useful to conduct several public informational sessions as it prepares its preliminary report. The zoning commission can answer questions from the public and the public can participate in a discussion of the proposed zoning regulations.

Not only will this direct public participation prior to the conduct of formal public hearings be beneficial to the public, but it can be of equal benefit to the zoning commission. The commission itself will profit from the suggestions of residents and their detailed knowledge of local conditions. In addition, public awareness of the reasoning behind certain zoning proposals will tend to decrease areas of conflict and increase public support for the zoning effort.

Public support and knowledge are invaluable as a prelude to the public hearing or hearings

to be held by the zoning commission.

The zoning commission is required to hold a public hearing on the preliminary zoning text and zoning map.

The required public hearing performs two important functions. First, it provides an opportunity for the public to be heard before government action is taken which is an essential facet of due process. Second, the comments received at the hearing could provide the commission with additional information, resulting in a more refined set of draft zoning regulations that should not need major changes prior to adoption by the legislative board.

At the zoning commission hearing, or hearings if more than one is held, the initial "testing" of the draft text and map begins. It is at these hearings that the public comes to be heard as part of the formal process.

The state's zoning enabling acts contain no specific requirements relative to the zoning commission's public hearing notice. The enabling acts do, however, detail the legislative board's notice requirements in conducting its mandated hearings prior to adopting a zoning regulations. (*Town Law §264 and Village Law §7-706*). It is both advisable and common practice for the zoning commission to conduct itself in an identical manner. In following this same procedure, notice to the public would be published in a newspaper of "general circulation." The number of days prior to the hearing that this notice must appear is 10 days. Compliance with the 10 day notice would also be consistent with general provisions for public hearings held by village boards of trustees. (*Village Law, §1-2100*).

The content of the commission's public notice should give the average reader reasonable or "fair" warning that land in which he or she has

an interest may be affected by the regulations that will be discussed. The printed notice need not contain a portion of the zoning map or the text of the regulations. However, the proposed action and the location affected must be clearly stated in general terms. The notice should also state that the purpose of the hearing is to hear from the public.

Reference should be made within the notice to the fact that the full, preliminary text of the regulations and map, which are the subject of the hearing, will be available for public inspection in the clerk's office and possibly at other convenient locations. In order to keep the legislative board informed of its work, it is a good idea for the zoning commission to send the board a copy of the draft text and map prior to the public hearing.

The zoning commission should be prepared for a lengthy hearing. The initial hearing notice may even include multiple dates and times for the zoning hearings. If a hearing does become a lengthy session, it may be best to adjourn the hearing and reconvene to the next scheduled meeting, or to a later date.

A public hearing has physical aspects which are important to consider. Attention should be given to the building where the hearing is to be held to assure adequate seating and that all who wish to participate will be reasonably accommodated pursuant to the Americans with Disabilities Act.

The format of the public hearing may vary, but generally there is an introductory explanation of the commission's work and the objectives sought, along with a general review of the proposed regulations. This introduction should be followed by a period for comment from the audience. Copies of the hearing agenda should be made available for those present.

Clear and fair rules of order should be

established as a guide for public participation during the hearing. For example, speakers may be asked to register. A sincere effort should be made to encourage participation by as many members of the audience as possible. With this announced purpose in mind, individuals should be requested to limit the length at which they speak. If necessary, the board can limit the time in which a speaker can make his or her initial comments, and if requested, grant the speaker additional time once everyone has had the opportunity to speak. All present must be assured that there will be a time when each will have his or her opportunity to be heard.

A detailed record should be kept of the proceeding. Persons in support of the issues under consideration, as well as those in disagreement, should be heard, and their names, addresses and statements accurately recorded. Petitions in support of and petitions in disagreement with issues under consideration should be accepted by the commission. The zoning commission should also give persons the opportunity to comment in detail with a written statement. This statement would be entered into the minutes of record of the hearing. The commission should set a reasonable deadline on the receipt of these statements for entry in the record.

The zoning commission must prepare a final report and submit it to the legislative body.

Following the hearing, the commission should review the suggestions, giving each one careful consideration, with the possibility of doing further study to resolve issues brought forth at the hearing.

There is a need, throughout the span of the commission's labors, to provide a liaison with the legislative board. The most efficient and effective manner in which this can be done is for members of the legislative board to be

present at each of the commission's meetings. Additionally, the commission may make periodic progress reports to the legislative board.

After considering the record of the public hearing, the commission prepares the final report for submission to the legislative board. The zoning commission adopts its final report and directs its submission to the legislative body by resolution.

As the product of an official governmental body, the final report should be of a formal character. One format could be the following:

- A formal transmittal letter and a copy of the resolution of the zoning commission by which the commission adopted the final report.
- A statement of membership appointments with reference as to the date of the official creation of the commission and its responsibilities under the enabling acts.
- A copy of the recommended zoning regulations with a full explanation of its provisions.
- A description of the public meetings and the public hearings conducted by the commission in performing its mandated responsibilities, including the date, time, place, and attendance at the meeting or hearing.
- A description of the actions taken that altered the preliminary zoning text and map as a result of both the commission's own initiative and the public hearings conducted by the commission.

Upon adoption of a resolution by the legislative board accepting the final report, the zoning commission passes out of existence.



Environmental Assessment

An agency of government, including a local government, may not undertake, fund or approve any “action” until it complies with the State Environmental Quality Review Act (*SEQRA*; see *Article 8 of the Environmental Conservation Law and implementing regulations at 6 NYCRR part 617*). The term “action” includes the adoption or amendment of a zoning local law or ordinance. (*6 NYCRR §617.2(b)*). The adoption of an initial zoning local law or ordinance is considered a “Type I” action, which means that it is an action more likely to require the preparation of an environmental impact statement (EIS). (*6 NYCRR §§617.3, 617.4*).

The SEQRA regulations explain the purposes of SEQRA as follows:

“The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.” (*6 NYCRR §617.1(c)*).

The SEQRA processes apply in addition to the adoption processes required by the zoning enabling laws.

The “lead agency” is primarily responsible for determining whether an action may have a

significant adverse impact and for preparing or overseeing preparation of an environmental assessment or environmental impact statement. Since the town board or village board of trustees adopt zoning laws or ordinances, it is logical that they be designated “lead agency” status. (6 NYCRR, §617.2(u)). The SEQRA also requires, however, early consideration of environmental impact and the initial determination of potential “significance.” (6 NYCRR §617.6). Since the preparation of the zoning commission report and proposed zoning regulations could constitute the bulk of the decision-making process (for example, the report could be ultimately accepted and used with little change by the local legislative body), there is a need to consider environmental impact even at the zoning commission stage.

There are at least two ways the town board or village board of trustees can assure early consideration of environmental impact. When creating the zoning commission, the local legislative body could direct the zoning commission to prepare an environmental assessment form as part of its final report to the local legislative body. (6 NYCRR §617.6(a)). The local legislative body would use the environmental assessment form, if deemed complete, to determine whether adoption of the zoning regulations may have a significant adverse impact on the environment. A “positive declaration” of significance would require the preparation of an environmental impact statement by the legislative body.

Alternatively, since the initial adoption of zoning is a “Type I “ action, as described above, the local legislative body could direct the zoning commission to prepare a draft environmental impact statement (DEIS) for the recommended zoning regulations as part of its final report. The local legislative body would then use the DEIS, if deemed complete, to determine whether a final environmental

impact statement is needed. (6 NYCRR, §617.6(a)(4), §617.7, §617.9).

Under both possibilities described above, the local legislative body remains responsible for determining whether the action is significant and whether the environmental assessment or the DEIS is adequate, while still allowing for early consideration of environmental impacts as the draft zoning regulations are being prepared. They are not the exclusive means, undoubtedly, for complying with SEQRA. For example, if the local government has already adopted a comprehensive plan according to the zoning enabling statutes, an environmental review would have taken place then. Possibly a generic environmental impact statement was prepared and could now be used to undertake the environmental review. The local legislative body will want to consider the appropriate method of complying with SEQRA, and seek legal counsel on this as with all procedural matters, well before appointing the zoning commission.

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Performance of the Legislative Board; Notice and Public Hearing

Upon receiving the zoning commission's final report, the local legislative body may accept the report by resolution. The zoning commission ceases to exist when the legislative body accepts its report. (*Town Law, §266(5); Village Law, §7-710(5)*).

The local legislative board is not constrained by the enabling laws to adopt the zoning regulations proposed by the zoning commission. If the local legislative body proposes to adopt the zoning regulations recommended by the zoning commission or zoning regulations it has fashioned on its own after receipt of the zoning commission's report, it must first hold at least one public hearing upon proper notice to the public. The public hearing should not be held until the DEIS has been prepared and deemed adequate, or until a negative declaration has been made.

The notice must be published in a newspaper of general circulation at least ten days before the public hearing. (*Town Law, §264(1); Village Law, §7-706(1)*). Legislative bodies are advised to strictly comply with this time period. Proper notice, as to both time and content, can not be understated. In a case concerning the rezoning of a residential parcel, the court in *Vizzi v. Town of Islip* described the underlying purposes served by notice as follows:

“The published notice is the fundamental vehicle for communicating to the public any local legislative changes which affect residential interests. It may be the only informational source that warns local property owners of zoning changes affecting their land's use and value, either

adversely or beneficially, directly or indirectly. The viability of the statutory scheme of public hearing in relation to zoning changes is dependent upon proper advance notice.” *Vizzi, 71 Misc.2d 483 at 485*.

The notice must reasonably inform the public of the purpose of the hearing, the general character and scope of the proposed regulations and the time(s) and place(s) where the hearing will be held. (*Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 NY2d 668; Coutant v. Town of Poughkeepsie, 69 AD2d 506; 2525 East Ave. v. Town of Brighton, 33 Misc. 2d 1029, aff'd 17 Ad2d 908; Vizzi v. Town of Islip, 71 Misc. 2d 483*). The text of the proposed zoning regulations need not be published to meet this standard, but some local governments do publish the text for informational purposes. When a summary rather than the full text is provided in the public notice, the notice should identify the location(s) where the full text of the proposed zoning regulations may be seen. This will include the office of the town or village clerk. It is advisable to have public notices reviewed by the municipal attorney before publication.

The local legislative body must serve written notices of the public hearing to certain public bodies. Service may be made either personally or by mail. The notices must be served on the officers or persons identified in the enabling laws when the proposed zoning regulations will affect property within five hundred feet of: the property of a housing authority; the boundary of a city, village, town or county; or the boundary of a state park or parkway. (*Town Law, §264(2); Village Law, §7-706(2)*). These bodies are given a right to be heard at the public hearing but are not given a right to judicial review. (Other bases for judicial review could apply. For example, the Westchester County Charter does afford the right to judicial review in this instance).

The same considerations regarding space requirements, the need for multiple hearing dates and rules of order as discussed for the zoning commission public hearing apply here.

Must a local legislative body hold yet another public hearing, upon renewed notice, when changes are made to the proposed zoning regulations after the public hearing is held? Perhaps. It is not uncommon for changes to be made at this point, since the public hearing provides the opportunity for new information and various points of view to be presented to the legislative body. Whether a new public hearing is required will turn on whether the change was embraced within the public notice. Changes made after the public hearing which make the proposal substantially different from that noticed will require new notice and opportunity to be heard:

“When events subsequent to the publication of notice lead to an amendment that is substantially different from that which was noticed, new notice and opportunity to be heard may be required.... However, where the amendment as adopted is embraced within the public notice, the notice has satisfied its purpose of alerting the public to potential and contemplated revisions of the local ordinance, and the notice will generally be deemed sufficient....”
(Gernatt Asphalt, Inc. v. Town of Sardinia, 87 NY2d 668 at 679. See also Lighthouse Shores v. Town of Islip, 41 NY2d 7; Coutant v. Town of Poughkeepsie, 69 AD2d 506). Again, the municipal attorney should be consulted if this situation arises.

No Referendum Authorized

Occasionally, a legislative board may seek to gauge public opinion on the proposed zoning regulations by holding a referendum. However, there is no statutory authority, either

by ordinance or local law, authorizing the submission of zoning to a referendum. (Elkind v. New Rochelle, 5 N.Y.2d 836, 1954 Op. Atty. Gen. July 16, 1979 Op. Atty. Gen. 253)



Referral by the Legislative Board to the County Planning Agency or Regional Planning Council

Before the legislative board (the “referring body”) can take final action on adopting zoning regulations, the regulations - in their final form - must be referred to an appropriate county planning agency or regional planning council (the “reviewing body”) under General Municipal Law §239-m. The Town and Village Laws contain a cross-reference to this referral requirement.

General Municipal Law, Section 239-1 and Section 239-m, provide that any municipal zoning regulation, or amendment to a zoning regulation, which would change the district classification of, or the regulations applying to, real property lying within a distance of 500 feet from the boundary of:

- any city, town, or village;
- any existing (or proposed) county or state park or other recreation area;
- any right-of-way of any existing (or proposed) county or state parkway, thruway, expressway, road or highway;
- any existing (or proposed) right-of-way or any stream or drainage channel owned by the county or for which the county has established channel lines;
- any existing (or proposed) boundary of any county or state-owned land on which a public building or institution is situated;
- a farm operation located in a state agricultural district;

must be referred to the county planning agency or regional planning council having jurisdiction of the area.

A “full statement” must be referred:

“The term "full statement of such

proposed action" shall mean ... a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance pursuant to the State Environmental Quality Review Act... . When the proposed action referred is the adoption or amendment of a zoning ordinance or local law, "full statement of such proposed action" shall also include the complete text of the proposed ordinance or local law as well as all existing provisions to be affected thereby, if any, if not already in the possession of the county planning agency or regional planning council" (*General Municipal Law §239-m(1)(c)*).

Alternatively, the statutes allow the reviewing body and the referring body to jointly decide what constitutes a full statement. (*General Municipal Law §239-m(1)(c)*). For example, local background materials which would explain the reasons for adopting the proposed zoning regulations, such as the comprehensive plan or the zoning commission's final report, could be included by mutual agreement.

Within 30 days after receipt of the "full statement", or such longer period as may have been agreed to, the reviewing body must report its recommendations to the local legislative board. If it does not report within the 30-day period, or longer period agreed to, the local legislative board may act. (*General Municipal Law, §239-m(4)(b)*).

Review Considerations

The County Planning Agency or Regional Planning Council, when reviewing proposed zoning regulations, considers several factors:

- The compatibility of various land uses with one another.
- Traffic generating characteristics of various land uses:

- In relation to the effect of such traffic on other land uses.
- In relation to the adequacy of existing and proposed thoroughfare facilities.
- The impact of proposed land uses on existing and proposed county or state institutions or other uses.
- The protection of the community character as regards:
 - Predominant land uses.
 - Population density.
- The relationship between residential and non-residential areas.
- Community appearance.
- Drainage.
- Community facilities.
- Official development policies, municipal and county, as may be expressed through comprehensive plans, capital programs or regulatory measures.
- Other such matters as may relate to:
 - Public convenience.
 - Governmental efficiency.
 - Achieving and maintaining a satisfactory community development.

It might be helpful to mention some possible reasons for county planning agency or regional planning disapproval of local zoning regulations resulting from a referral review. Here are some examples:

- A zoning action which would establish an incompatible inter-municipal development such as a heavy industrial zoning district adjacent an abutting community's single-family residential zone.
- A zoning regulation which ignores regional housing needs and demands.
- A zoning district provision which allows high intensity development to conflict with a proposed county or state facility or scheduled improvement to an existing facility, such as highway relocation or widening.

Benefits of referral

Referral is an important aid to the local planning and zoning process. Here are just a few examples of the broader benefits of referral:

- Local planning and zoning bodies are provided with advice and assistance from professional county and regional staff.
- Zoning actions are coordinated among municipalities, helping in the recognition of inter-community considerations.
- Local tax dollars are saved in cases where deficiencies in the referral, overlooked by the municipal body, would otherwise have resulted in expensive litigation or unanticipated infrastructure improvements.
- Other planning agencies (county, regional and state) can better orient studies and proposals for solving local as well as county and regional needs.
- Other levels of government are made aware of, and made sensitive to, the types of problems facing local legislators.

Referral can be a two-way street. Review by the county or region can assist that agency in determining potential growth areas, enabling it to anticipate facilities and service expansions to provide for future development demands.

Local action which is contrary to the county or regional planning agency's recommendation of denial or modification

If the reviewing body responds, it can either recommend approval, modification, or disapproval of the proposed zoning regulations, or it can report that the proposed regulations have no significant county-wide or inter-community impact. (*General Municipal Law, §239-m(4)(a)*).

As stated above, the reviewing body is accorded a minimum of 30 days to respond to a referral. The local legislative body is not free to act on the proposed zoning regulations until the referral is returned with a recommendation, or 30 days elapses, whichever occurs first. (*General Municipal Law, §239-m(4)(b)*).

If the reviewing board recommends approval, or reports no significant impact, the local legislative body may act on the proposal as it chooses. If the reviewing board recommends disapproval or modification, then the local legislative body may only approve the proposal without modification by a “supermajority” vote, which is a vote of a majority plus one of all the members thereof. (*General Municipal Law, §239-m(4)(b), §239-m(5)*).

If the thirty day period elapses with no recommendation having been received, the local legislative body is free to adopt the zoning regulations by majority vote. A recommendation of disapproval or modification received after the 30 days has elapsed will only trigger the “supermajority” rule if it is received more than two days prior to the date of the local board’s approval vote. (*General Municipal Law, §239-m(4)(b)*).

Within thirty days after taking final action, the legislative body must file with the county planning agency or regional planning agency a report of the final action it has taken. A legislative body which acts contrary to a recommendation of modification or disapproval of the proposed zoning regulations must set forth the reasons for the contrary action in the report. (*General Municipal Law, §239-m(6)*).



Enactment Procedures; Voting and Entry into the Minutes

Upon complying with the requirements of referral, the local legislative board enters the last phase of the zoning adoption procedure. As with the taking of any official action, zoning may be adopted by the legislative body only at a duly constituted meeting at which a quorum of members is present. (*General Construction Law, §41; Public Officers Law §102(1), 103*).

Voting and entering zoning text into the minutes

Both town and village legislative boards may adopt zoning regulations by an affirmative vote of a majority of the board's total membership. Total membership of the board is the full number of board members, as if there are no vacancies or absences. (*General Construction Law, §41*).

Recall, however, that a supermajority vote is required to act contrary to the county or regional planning board recommendation.

Failure to adopt by a proper vote will result in invalidation of the zoning law or ordinance upon successful court challenge. It is vital that the record of the vote be memorialized in the minutes of the legislative body’s meeting in order to thwart such a challenge. (*See Home Depot USA, Inc. V. Baum, 663 NYS2d 73; Public Officers Law, §106(1)*).

Exclusive of the zoning map, every zoning ordinance or local law adopted must be entered in the minutes of the legislative board. (*Town Law, §264(1); Village Law §7-706(5)*). The minutes must "describe and refer" to any map adopted in connection with a zoning ordinance or local law. In towns, the town

clerk must maintain a separate file or filing cabinet for each map adopted in connection with a zoning ordinance or zoning amendment. (*Town Law §264(1)*) The Village Law merely requires that the village clerk maintain the zoning maps. (*Village Law, §7-706(6)*).

The entering of the zoning ordinance or local law must be accomplished with care and diligence. The town or village clerk need not hand copy the entire regulations into the minutes of the board's adoption. Printed copies of the regulations can be carefully bound or permanently placed within the minutes taken by the clerk.

The purpose of these requirements is to assure that an official copy of the zoning regulations, every amendment to them, and an updated zoning map be available at the local clerk's office where it can be readily accessed. Village and town clerks generally have responsibility to record and have custody of all village or town local laws or ordinances. (*Town Law, §30; Village Law §4-402*).

Map quality and maintenance

The map must clearly and definitively show the zoning district boundary lines. Imagine the citizen, reading the restriction set forth in new zoning district regulations, then examining the zoning map to find that he or she cannot determine whether his or her property falls within the new district - or even if he or she is in any way affected by the regulation.

There will be changes to the text of the regulations as the zoning ordinance or local laws are amended over the years. Changes to the regulations may alter zoning district boundaries or may insert additional zoning districts with specific requirements. Such amendments usually depend on the zoning map for their delineation and clarification. Therefore, the legislative body will need to

make complementary amendments to the zoning map. It will be essential that the zoning map be kept current.

SEQRA Findings

If adoption of the zoning regulations has been the subject of a final environmental impact statement, the town or village legislative body must make a written findings statement at the time of or before adoption of the zoning regulations. (*6 NYCRR §617.11(c)*). The findings generally memorialize careful consideration of the impacts, if any, identified in the review process and specifically must address the topics identified in 6 NYCRR, §617.11(d).



Publication, Posting, Filing, and Effective Date

Once the zoning regulations have been adopted by the legislative body, the enabling statutes require that general notice of their adoption be provided to the community through publication and posting.

Publication

In the case of both a town and village, the zoning enabling statutes require that a copy, summary or abstract of the ordinance (for towns) or local law (for villages) be published at least once in a newspaper. The Town Law and Village Law differ to a degree on this issue. Town Law specifies that publication be made in a newspaper published in the town, or one in the county which has town circulation, and designated by the town board. (*Town Law, §264(1) and §64(11); see also General Construction Law, §60 and Public Officers Law, §70-a*). The Village Law requires publication in a newspaper designated by the village board as its "official" newspaper. (*Village Law, §7-706(5); General Construction Law, §60 and Public Officers Law, §70-a*).

To reduce publication costs, many towns and villages opt to publish a summary or abstract rather than the entire text of the zoning regulations. Summaries should be carefully written and frequently are reviewed by the municipal attorney prior to publication.

An affidavit of publication, routinely provided by the newspaper publisher, must be filed with the municipal clerk. (*Town Law, §133 and §264(1); Village Law, §7-706*).

Posting

The Village Law, §7-706(5) requires that both the text of the zoning law and a summary or abstract of the zoning map must be posted conspicuously near the main entrance to the office of the village clerk. An affidavit of posting is filed with the village clerk. There is no requirement of posting in towns.

Filing with the Secretary of State

Within twenty days of the adoption of a zoning local law, the town or village clerk must file a copy of the local law, including any zoning map which is part of the local law, with the Secretary of State's office. (*Municipal Home Rule Law, §27*). Filing must be made in the manner prescribed by the Department of State regulations for filing local laws. These regulations are included as an appendix to this publication and to the Department of State publication, "Adopting Local Laws." The clerk will receive a post card from the Secretary of State's office verifying that the law was filed. This card serves as proof of filing, and should be maintained by the clerk.

Effective Date

The effective date of a zoning enactment differs depending upon whether it is adopted by ordinance or local law.

When a town adopts zoning using its ordinance power, the zoning ordinance will become generally effective ten days after publication of the ordinance or the summary thereof, as described above.

When a town adopts zoning by local law, the zoning law will become effective on the twentieth (20th) day after adoption, unless a different date is prescribed in the local law, provided that the law has been filed with the

Secretary of State. When a village adopts a zoning local law, it becomes effective upon its filing with the Secretary of State. (*Village Law*, §7-706(7)).

No local law may become effective until filed with the Secretary of State. (*Municipal Home Rule Law*, §27(1)).

The only exception to these rules is that after adoption and prior to its general effective date, the municipal legislature may wish to accelerate the effective date of the ordinance or law in its application to particular persons and circumstances. In such cases, the legislature may accelerate the date of the ordinance's or law's effect by "personal service" on the individual(s) involved. This requires the direct "service" of the local law or amendment, accompanied by the clerk's certification of adoption, showing its date of passage and entry into the minutes. (*Town Law*, §264(1); *Village Law*, §7-706(7)).

Availability to the Public

Local laws and ordinances are public records which must be made available to the public. Zoning regulations have a broad impact on the town or village residents, and are frequently consulted by real estate professionals, builders, architects, homeowners and attorneys, among others. Because of this, many local governments have current copies of their zoning regulations readily available at the office of the clerk or zoning enforcement officer for a fee sufficient to cover reproduction costs.

ADOPTING LOCAL LAWS

This booklet has focused on how the zoning enabling statutes in the Town Law and the Village Law direct that zoning regulations be adopted. The New York Municipal Home Rule Law and the Statute of Local Governments also give local governments in New York the power to adopt local laws on a wide variety of topics. Among these, for cities, towns and villages, is the power to adopt zoning. These statutes have been utilized directly by many local governments to address land use regulation issues not specifically identified in the zoning enabling laws (e.g. aesthetics, architectural review, historic preservation). The Municipal Home Rule Law also empowers towns to adopt local laws upon any matter for which they have ordinance power, which would include zoning. Finally, towns and villages are accorded limited power to supersede the Town Law or Village Law, respectively, unless otherwise prohibited by law. (*Municipal Home Rule Law*, §10(1)(ii)(e)(3) - for villages; §10(1)(ii)(d)(3) - for towns). The courts have upheld the use of the "supersession power" in the land use context. (*Sherman v. Frazier*, 84 AD2d 401; *Kahmi v. Town of Yorktown*, 74 NY2d 423; *North Bay Associates v. Hope*, 116 AD2d 704; *Walker v. Hempstead*, 84 NY2d 360).

Hence, the Municipal Home Rule Law is frequently used by local governments which seek to remove any doubt that the underlying power exists to regulate in the manner proposed, especially where a new or innovative type of regulation is being considered. It must be used where the Town or Village Law is being superseded.

The Municipal Home Rule Law also provides the procedure for adopting local laws. This procedure applies to *all* local laws, regardless of topic. Towns or villages which adopt zoning by local law, using the authority given

them in the zoning enabling statutes *or* the authority of the Municipal Home Rule Law, will still look to the Municipal Home Rule Law, Article 3 for the procedure to adopt the zoning local law. The Department of State publication, “Adopting Local Laws,” may be consulted for these procedures.

Local governments seeking to adopt zoning for the first time should consult their municipal attorneys early on to determine what source of authority they will be using to enact the zoning and the appropriate procedures for adoption. Case law has indicated that since the Municipal Home Rule Law provides an alternative procedure for adopting zoning, zoning local laws may be enacted pursuant to the Municipal Home Rule Law procedures, alone. (*Pete Drown Inc. v. Town Board of the town of Ellenburg*, 229 AD2d 877; *Kahmi v. Town of Yorktown*, 74 NY2d 423; *Yoga Society of New York, Inc. v. Town of Monroe*, 56 AD2d 842, appeal dismissed 42 NY2d 910; *Village of Savora v. Soles*, 84 AD2d 683; *Kasper v. Town of Brookhaven*, 142 AD2d 213; but see *Stone v. Village of Baldwinsville*, 138 Misc. 2d 164). The full extent of the alternative power afforded by such statutes, however, has not been fully explored. In *Kahmi v. Town of Yorktown*, the Court of Appeals described the power to adopt zoning accorded by the Statute of Local Governments, §10(6) (upon which the supersession power rests), as “afford[ing] a limited field for local lawmaking in the area of planning and zoning.” (74 NY2d 423 at 433). Any town or village which seeks to adopt zoning and to dispense with any procedure set forth for adoption by the zoning enabling statutes should well-consider the underlying authority and method (for example, by properly enacted supersession provisions) for doing so. (In particular, see *Turnpike Woods, Inc., v. Stony Point*, 70 NY2d 735 where the supersession power is being used. See also, *Town of Islip v. Zalak*, 164 AD2d 83).

CONCLUSION

This booklet attempts to clarify the adoption and enactment process by describing seven linked steps. When each step is performed according to law, the result will be a validly instituted municipal zoning ordinance or local law.

At the completion of the adoption procedure, it will be necessary for the legislative board to provide for the enforcement and interpretation of the zoning ordinance or local law by appointing an enforcement officer and a board of appeals. The zoning enforcement officer bears the prime responsibility in handling individual inspection, permit issuance, and possible citation of violations. The zoning officers’ decisions are subject to appeal to the zoning board of appeals and then possibly to the courts.

The enforcement process should not involve the legislative board. The functions of the legislative board do not include questions of enforcement or interpretation of the zoning ordinance or law. These are the respective roles of the zoning enforcement officer and the board of appeals, which are the subject of other Department of State publications.

LOCAL GOVERNMENT PUBLICATIONS

If you would like more information relating to local government powers and responsibilities, please contact the Department of State's Division of Local Government. Some of the publications available to local officials are:

Guide to Planning and Zoning Laws in New York State. This essential publication for municipal officials, attorneys and planning boards is newly revised. It has the complete text of relevant laws.

Adopting Local Laws. This booklet is a plain language, step-by-step guide to drafting and adopting a local law. It provides useful information on the scope of the home rule power and is invaluable for the municipal clerk or attorney.

Zoning Board of Appeals. Newly revised, this booklet explains the legal framework surrounding the powers and duties of zoning boards of appeals.

Zoning Enforcement for Towns and Villages. Newly added to the Department of State's technical series, this booklet explores the zoning enforcement process, including options for enforcement and sample forms.

Record Keeping Tips for Zoning Administration. Tips on managing zoning-related paperwork. Sample forms.

Contact the Division of Local Government Services at the address listed on the inside cover for a complete list of publications you can order. Several publications are also available for downloading from the Department of State's Internet home page. The Internet address is:

<http://www.dos.state.ny.us>

APPENDIX

TOWN LAW

§ 264. Adoption of zoning regulations.

1. Method of procedure. The town board shall provide for the manner in which such regulations, restrictions and the boundaries of such districts including any amendments thereto shall be determined, established and enforced. However, no such regulations, restrictions or boundaries shall become effective until after a public hearing in relation thereto, at which the public shall have an opportunity to be heard. At least ten days' notice of the time and place of such hearing shall be published in a paper of general circulation in such town.

Every zoning ordinance and every amendment to a zoning ordinance (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the town board; such minutes shall describe and refer to any map adopted in connection with such zoning ordinance or amendment and a copy, summary or abstract thereof (exclusive of any map incorporated therein) shall be published once in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate, and affidavits of the publication thereof shall be filed with the town clerk. Such ordinance shall take effect ten days after such publication, but such ordinance or amendment shall take effect from the date of its service as against a person served personally with a copy thereof, certified by the town clerk under the corporate seal of the town; and showing the date of its passage and entry in the minutes. Every town clerk shall maintain a separate file or filing cabinet for each

and every map adopted in connection with a zoning ordinance or amendment and shall file therein every such map hereafter adopted; said file or filing cabinet to be available at any time during regular business hours for public inspection.

2. Service of written notice. At least ten days prior to the date of the public hearing, written notice of any proposed regulations, restrictions or boundaries of such districts, including any amendments thereto, affecting property within five hundred feet of the following shall be served personally or by mail by the town upon each person or persons listed below:
 - (a) The property of the housing authority erecting or owning a housing project authorized under the public housing law; upon the executive director of such housing authority and the chief executive officer of the municipality providing financial assistance thereto.
 - (b) The boundary of a city, village or town; upon the clerk thereof.
 - (c) The boundary of a county; upon the clerk of the board of supervisors or other person performing like duties.
 - (d) The boundary of a state park or parkway; upon the regional state park commission having jurisdiction over such state park or parkway.
3. Additional requirements. The procedural requirements set forth herein shall be in addition to the requirements of the provisions of sections two hundred thirty-nine-l and two hundred thirty-nine-m of the general municipal law relating to review by a county, metropolitan or regional planning board;

the provisions of the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations which are codified in title six part six hundred seventeen of the New York codes, rules and regulations and any other general laws relating to land use and any amendments thereto.

4. Public hearing. The public, including those served notice pursuant to subdivision two of this section, shall have an opportunity to be heard at the public hearing. Those parties set forth in paragraphs (a), (b), (c) and (d) of subdivision two of this section, however, shall not have the right of review by a court as hereinafter provided.

§ 266. Adoption of first zoning ordinance.

1. In order to avail itself of the powers conferred by this article, such town board

shall appoint a commission to be known as the zoning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein.

2. Where a planning board already exists it may be appointed as the zoning commission.
3. Such commission shall make a preliminary report and hold one or more public hearings thereon as deemed appropriate by the commission before submitting its final report.
4. The town board shall not hold its public hearing or take action until it has received the final report of such commission.
5. Upon adoption of a resolution by the town board accepting the final report, such commission shall cease to exist as a separate body.

VILLAGE LAW

§ 7-706. Method of procedure.

1. The board of trustees shall provide for the manner in which such regulations, restrictions and the boundaries of such districts including any amendments thereto shall be determined, established and enforced. However, no such regulations, restrictions or boundaries shall become effective until after a public hearing in relation thereto, at which the public shall have an opportunity to be heard. At least ten days notice of the time and place of such hearing shall be published in a paper of general circulation in such village.
2. Service of written notice. At least ten days prior to the date of the public hearing, written notice of any proposed regulations, restrictions or boundaries of such districts, including amendments thereto, affecting property within five hundred feet of the following shall be served personally or by mail by the village upon each person or persons as listed below:
 - (a) the property of the housing authority erecting or owning a housing project authorized under the public housing law; upon the executive director of such housing authority and the chief executive officer of the municipality providing financial assistance thereto;
 - (b) the boundary of a city, village or town; upon the clerk thereof;
 - (c) the boundary of a county; upon the clerk of the board of supervisors or other person performing like duties;
 - (d) the boundary of a state park or parkway; upon the regional state park commission having jurisdiction over such state park or

parkway.

3. Public hearing. The public, including those served notice pursuant to subdivision two of this section, shall have the opportunity to be heard at the public hearing. Those parties set forth in paragraphs (a), (b), (c) and (d) of subdivision two of this section, however, shall not have the right of review by a court as hereinafter provided.
4. Additional requirements. The procedural requirements set forth herein shall be in addition to the requirements of the provisions of sections two hundred thirty-nine-l and two hundred thirty-nine-m of the general municipal law relating to review by a county, metropolitan or regional planning board; the provisions of the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations which are codified in title six part six hundred seventeen of the New York codes, rules and regulations and any other general laws relating to land use and any amendments thereto.
5. Filing. Every zoning law and every amendment thereto (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the village board and a copy, summary or abstract thereof (exclusive of any map incorporated therein) shall be published once in the official newspaper and a copy of such local law or amendment together with a summary or abstract of any map incorporated therein shall be posted conspicuously at or near the main entrance to the office of the village clerk and affidavits of the publication and posting

thereof shall be filed with the village clerk. Such minutes shall describe and refer to any map adopted in connection with such local law or amendment.

6. Map. Each village clerk shall maintain every map adopted in connection with a zoning local law or amendment.
7. Effective date. Such local law shall take effect upon filing in the office of the secretary of state, but such local law or amendment shall take effect from the date of its service as against a person served personally with a copy thereof, certified by the village clerk; and showing the date of its passage and entry in the minutes.

§ 7-710. Adoption of first zoning local law.

1. In order to avail itself of the powers conferred by this article, the board of trustees of any village shall appoint a commission to be known as the zoning

commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein.

2. Where a planning board already exists in the village, it may be appointed as the zoning commission.
3. Such commission shall make a preliminary report and hold one or more public hearings thereon as deemed appropriate by the commission before submitting its final report.
4. The board of trustees shall not hold its public hearing, or take action, until it has received the final report of such commission.
5. Upon adoption of a resolution by the board of trustees of the village accepting the final report, such commission shall cease to exist as a separate body.

SUMMARY OF RULES FOR FILING LOCAL LAWS WITH THE SECRETARY OF STATE

1. Each local law shall be filed with the Secretary of State as required by Section 27 of the Municipal Home Rule Law. The cited statute provides that a local law shall not become effective before it is filed in the office of the Secretary of State.

2. At least one copy filed with the Secretary of State shall be an original or first copy. The others may be legible carbons or photo copies.

3. Each local law shall be filed on a form provided by the Department of State. In case additional pages are required, they must be of the same legal size as the form provided. For convenience, printed, mimeographed or typewritten copies of the local law may be pasted on the form, but these must not be of a size larger than the form and printing must be on one side of the sheet only. Only true and legible copies will be accepted for filing.

4. Each copy of a local law filed with the Secretary of State shall have affixed to it a certification by the Clerk of the County legislative body or the City, Town or Village Clerk or other officer designated by the local legislative body. There shall also be attached or annexed thereto a certification executed by

the County Attorney, Corporation Counsel, Town Attorney, Village Attorney or other authorized Attorney that the local law contains the correct text and that all proper proceedings have been had or taken for its enactment. Certification forms will be forwarded together with local law forms upon request.

5. Only the number, title and text of the local law shall be filed. In case of a local law amending a previously enacted local law or ordinance, the text must be that of the law as amended. Do not include in copy parts of old law to be omitted.

6. For the purpose of filing with the Secretary of State, number local laws consecutively, and start with number one in each calendar year. It is suggested that introductory identifying numbers be used while a proposed local law is being considered.

For filing purposes, local laws shall be mailed or delivered as follows:

Department of State
State Records and Law Bureau
41 State Street
Albany, New York 12231
(518) 474-2755