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### ***Abstract***

The New York state legislature has created a system of local boards to govern the use and conservation of land and the quality of life as it is affected by land use. The local legislature adopts zoning and land use regulations; after a zoning code is adopted by this first group, a zoning board of appeals is created to perform quasi-judicial and administrative functions; and a planning board is created to perform advisory and administrative functions related to community planning and land use decision-making.

### ***Resource***

#### **SERIES I: Basic Tools and Techniques**

#### **Issue Number 3**

#### **LOCAL BOARDS AND PRACTICES**

#### **DEFINITION:**

Three boards are principally responsible for making land use decisions in most localities. The first of these is the local legislature, such as the village board of trustees, the town board or the city council. The second is the zoning board of appeals which must be created when a zoning code is first adopted by the local legislature. The zoning board performs quasi-judicial functions as a local appeals board and can be delegated administrative functions. The third is the planning board which may be created to perform a variety of advisory and administrative functions related to community planning and land use decision-making.

The local legislature adopts and amends zoning and land use regulations and sometimes retains the authority to issue certain permits or perform other administrative functions. For example, the legislature may provide in the zoning regulations that certain uses are permitted only upon the issuance of a special permit and retain the authority to review and

issue those permits instead of delegating that authority either to the planning board or the zoning board of appeals. Normally, however, the legislature will establish these boards and delegate important quasi-judicial functions to them, such as the authority to issue special permits and to review and approve or deny applications for site plan and subdivision approval.

#### **PURPOSE:**

The New York state legislature has created these local bodies for the purpose of providing a framework of local governance regarding the use and conservation of the land and the quality of life as it is affected by land use. This framework includes legislative, judicial and administrative functions performed by the legislature, zoning board of appeals and planning board. Observable in the laws governing their operation are a number of familiar legal doctrines including separation of powers, citizen participation, public notice, access to information and board deliberations, the right to be heard, the right to impartial decision-making and the right to appeal certain of these decisions. The end result sought is to provide for the public health, safety and welfare.

The essential function of the zoning board of appeals, and the reason its creation is legally required, is to grant variances from the strict application of the zoning regulations in circumstances when they create demonstrable hardships for the owners of properties. One important purpose of the advisory role played by the planning board, which consists of appointed members often with special expertise or training in land use matters, is to provide an impartial and professional perspective on locally controversial decisions based on the long range needs of the community contained in the comprehensive plan or other local policy documents.

#### **WHEN:**

There are over 1,500 cities, towns and villages in New York. All of them have local legislatures. All of the cities, approximately 85% of the villages and approximately 65% of the towns have adopted zoning codes and must, by law, form zoning boards of appeals. All of the cities and approximately 85% of the towns and villages in New York have created planning boards.

#### **AUTHORITY:**

State statutes require that when a local government adopts zoning regulations it must establish a zoning board of appeals consisting of three or five members. In towns and villages, appointments to the board are made by the legislature; in cities, the mayor or city manager may make appointments.

State law permits the local legislature to establish a planning board consisting of five or seven members. In the case of towns, appointments to the planning board are made by the local legislature; in the case villages, by the mayor; and in the case of cities, appointments can be made by the mayor or city manager.

State statutes allow the local legislature to retain the authority to review and approve applications for subdivision, site plan and special permits or to delegate this authority either to the planning board or the zoning board of appeals. Subdivision review authority can be delegated to the planning board and site plan authority can be delegated to the planning board or other administrative body, such as the zoning board of appeals. State law requires variances and appeals from the determinations of the official charged with zoning enforcement to be heard by the zoning board of appeals.

City charters may contain special provisions for the functions and procedures of these local bodies and all local governments may adopt unique provisions under their authority to supersede the provisions of general state law that are otherwise applicable to land use actions.

## **IMPLEMENTATION:**

### ***Local Legislature***

The central role in the field of local land use control is played by the elected local legislative body. It has the authority to adopt and amend the zoning ordinance, subdivision regulations, site plan controls and special permit provisions, as well as wetlands ordinances, historic district protections and open space plans. It may also create other local boards and agencies such as the planning board and zoning board of appeals and decide what authority to delegate to these boards.

The local legislature is also responsible for adopting and amending the official map and the comprehensive plan of the community: documents that articulate local policy that guide and direct the deliberations and decisions of all three bodies. The local legislature, in summary, is responsible for creating the substantive provisions that affect land use controls, creating the agencies that implement and enforce those controls and developing many of the procedures that the planning and zoning board of appeals must follow.

### ***Zoning Board of Appeals***

The zoning board of appeals is created by the local legislature and may have either three or five members. It is authorized to grant variances and interpret provisions of zoning ordinance; however, when acting in this capacity, its jurisdiction is appellate only. Persons aggrieved by the determinations, orders and decisions of the administrative official charged with the enforcement and interpretation of the zoning code can appeal them to the zoning board of appeals. A majority of the members of the board must vote to reverse any such determination, order or decision.

In hearing such an appeal, the zoning board of appeals is operating in a quasi-judicial fashion. The law requires that aggrieved persons appeal within 60 days of the date of a disputed determination, order or decision. This requires the filing of a notice of appeal, including the grounds for the appeal and the relief that is requested. The board must hold a hearing on the appeal and publish a public notice of the hearing at least five days before it is to be held. At

the hearing, board members and parties to the proceedings have the right to cross examine any witnesses regarding matters that are truly relevant to the issues being decided. The decision of the board must be handed down within 62 days of this hearing, unless the parties mutually agree to an extension.

The zoning board of appeals may also be delegated the authority to review applications for permits. In this case, it is exercising original jurisdiction, rather than serving as an appeals board. A person aggrieved by a determination of the zoning board of appeals with regard to the issuance of a permit would appeal directly to the courts through an article 78 proceeding.

### ***Planning Board***

The local planning board is created by the local legislature and may have either five or seven members. It can perform a number of advisory functions and is often delegated the authority to review and approve site plan and subdivision applications and to issue special permits. The legislature can delegate a variety of advisory functions to a local planning board, including the preparation of the comprehensive plan, zoning provisions, or site plan and subdivision regulations; reviewing and commenting on requests for specific zone changes or amendments to the comprehensive plan or other regulations being considered by the legislature; and reviewing and commenting on proposed changes in the official map, the adoption of capital budgets or other matters affecting the development of the community.

### **LIMITATIONS AND CONCERNS:**

***Basic Due Process Requirements:*** The decisions of local land use bodies must be made in an open and fair manner, by impartial board members, and must be based on reliable evidence that is contained in the record of the board's deliberations. These guarantees are secured by the federal and state constitution and by a variety of state statutes. Among other mandated procedures, state and local requirements often specify that land use actions can be taken only after a hearing is held following adequate notice and where the public is invited to be heard in a fair and impartial manner. This applies to the adoption and amendment of zoning provisions and decisions on most applications for development permits.

***Basing Decisions on Facts in the Record:*** In making decisions on site plan and subdivision applications and the issuance of variances and special permits, local boards must keep a detailed record of their deliberations. These records can be in narrative form rather than verbatim transcripts. The findings of the board and its decision should be based on reliable evidence contained in this record. The record may be the minutes of the board, if prepared in enough detail to satisfy these requirements.

Keeping and filing a detailed record insures that board decisions are not arbitrary, capricious or an abuse of discretion. They provide the type of information parties need to decide whether to appeal board decisions and they create the type of record that a court or review board will need to determine the validity of decisions made by land use boards.

***Requirement to Provide Information to the Public:*** Local land use agencies are governed by the state freedom of information law which provides public access to governmental records. The records that are subject to public access include photos, maps, designs, drawings, rules, regulations, codes, manuals as well as reports, files and opinions. Boards may establish reasonable rules regarding access, time to respond, copying, mailing and paying for the information requested.

***Requirement to Hold Open Meetings:*** Local public bodies, including the legislature and planning board, are required by the state open meetings law to allow the public access to their meetings. Although the open meetings law does not apply to "quasi-judicial proceedings," under the village, town and general city law, sessions of the zoning board of appeals and planning board are subject to open meetings requirements.

All assemblies of these local bodies must be open to the public, including special meetings with applicants or opponents attended by members of the board and even site visits conducted by the local legislature, planning boards and zoning boards of appeals. Although closed, executive sessions may be held in certain circumstances, courts will scrutinize whether there was a valid reason to hold the meeting in private. Where the deliberations are held in closed session and the public permitted to know after the fact about decisions that were made in private, both the letter and spirit of the open meetings law are violated.

***Requirement to Avoid Conflicts of Interest:*** State statutes require that every applicant for a variance, zoning amendment, special permit, or site plan or subdivision approval must provide full information regarding any interest of a municipal officer in the matter presented. This disclosure is relevant to the deliberations of land use bodies because state law prohibits municipal officers, including members of any administrative board or other agency, from participating in public matters in which they have a private conflict of interest. Planning and zoning board members have been prevented, under these laws, from deliberating and voting on matters in which they have a private interest in the project or a special connection with the applicant, including a financial investment, a familial relationship, an employment relationship or any significant contractual relationship.

***Limitations on the Actions of the Zoning Board of Appeals:*** The zoning board of appeals may not hear appeals from the actions of the local legislature, acting in its legislative capacity. The denial of a request for the rezoning of a parcel, for example, may not be appealed to the board. The zoning board of appeals also has no power to review the legal validity of the provisions of the zoning code; it may only interpret provisions of the zoning upon appeal by aggrieved persons from adverse determinations by the responsible administrative official. Zoning boards of appeal may not grant variances that have such an impact as to constitute a rezoning of the land, a function within the province of the legislature. Where the board granted a variance from a two acre residential development requirement to allow development on lots of one acre, the court held that its action constituted an invalid rezoning, rather than a variance of its strict application, where the parcel affected was 40 acres in size.

***Limitations on the Actions of the Planning Board:*** A planning board may not consider or issue variances, hear appeals from the official responsible for zoning administration or issue

interpretations of zoning provisions. Planning boards may not act outside their delegated authority or base their decisions on standards not contained in state or local laws and regulations over which they have jurisdiction.

#### **CITATIONS:**

1. Under Village Law § 7-712, Town Law § 267 and General City Law § 81, local governments are required to create zoning boards of appeals when they adopt zoning regulations, and to appoint their members and delegate additional administrative duties to them.

2. Under Village Law § 7-718, Town Law § 271 and General City Law § 27, local governments are authorized to create planning boards, appoint their members, and to refer various matters to planning boards for advisory opinions.

3. The authority of local governments to supersede general state law can be found at Municipal Home Rule Law § 10(1)(ii)(d)(3). Provisions that must be followed to properly supersede a general state law are found at Municipal Home Rule Law §22(1) and discussed in *Turnpike Woods v. Town of Stony Point*, 519 N.Y.S.2d 960.

4. The requirements to provide information to the public are found in the Public Officers Law, Article 6. § 86(4) requires maps, drawings, regulations and other documents pertaining to land use decision making to be provided to the public on request.

5. The requirements of state law regarding the conduct of open meetings is found in the Public Officers Law, Article 7. Although quasi-judicial proceedings are excluded from this requirement under § 108(1), the meetings of the zoning board of appeals must be open under the provisions of the Village Law § 7-712-1(1), the Town Law § 267-a(1) and the General City Law § 81-a(1).

6. In *Gernatt Asphalt Products v. Town of Sardinia*, 208 A.D.2d 139, 622 N.Y.S.2d 395 (4th Dep't 1995) when a town board adopted amendments to the zoning ordinance after a closed session in which the public was not involved, its action was nullified by the court for failure to conform to the open meetings provisions.

7. The General Municipal Law, Article 18, governs and prohibits conflicts of interest on the part of municipal officials; § 809 requires applications for land use decisions to disclose any interest of any municipal officer in the matter presented.

8. In *Keller v. Morgan*, 149 A.D.2d 801, 539 N.Y.S.2d 589 (3rd Dep't 1989), where a member of a local planning board had a 25% interest in the land subject to a subdivision application, it was held that the board member had a conflict of interest. On the other hand, there was no conflict of interest when a planning board member was the president of a supply company that did a few hundred dollars of business with the applicant for subdivision approval. See *Parker v. Town of Gardiner Planning Bd.*, 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep't 1992).

#### **REFERENCES:**

1. The Short Course, A Basic Guide for Planning Boards and Zoning Boards of Appeal in New York State, Published by the New York Planning Federation, 1996, 488 Broadway, Albany, N.Y. 12207; (518) 432-4094.