# ZONING FRAMEWORK

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## A. Zoning Enabling Statutes

State Law authorizes cities, towns and villages to enact zoning laws. However, zoning is optional, and many municipalities, particularly some rural towns, do not have zoning regulations. While zoning regulations stem from the police power, *Pacific Boulevard Associates v. Long Beach*, 48 A.D.2d 857, 368 N.Y.S.2d 867 (2d Dep't 1975), *mot. den'd* 38 N.Y.2d 766, 381 N.Y.S.2d 55 (1975), they are specifically authorized by state zoning enabling legislation.

The statutes governing zoning and planning in towns are set forth in Town Law Article 16. Similar provisions for villages are set forth in Village Law Article 7, and for cities within General City Law Article 2-A. Generally, parallel procedures apply to these municipalities under these state statutes. Cities also draw authority from their individual charters.

Town Law §261 authorizes towns to enact zoning ordinances, providing:

> For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or 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; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city...

Similar authority is granted to villages under Village Law §7-700, and to cities under General City Law §20(24, 25). The Town and Village Laws set forth the procedures for adopting zoning regulations, including proper notice and public hearings. *See* Town Law §264; Village Law §7-706.

In addition, Municipal Home Rule Law §10(1)(ii)(a)(12), which allows towns, villages and cities to adopt local laws to regulate "government, protection, order, conduct, safety, health and well-being of persons or property therein," allows those municipalities to adopt zoning laws. *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 548 N.Y.S.2d 144 (1989). The procedure for adopting such laws is set forth in Municipal Home Rule Law Article 3. While it is possible to supercede some requirements of the Town Law or other enabling legislation, *see* Municipal Home Rule Law §10(1)(ii)(d)(3), the intent to do so must be clearly stated. *Turnpike Woods v. Town of Stony Point*, 70 N.Y.2d 735, 519 N.Y.S.2d 960 (1987).

Adoption of zoning regulations is subject to the State Environmental Quality Review Act ("SEQRA"), *see* Town Law §264(3); Village Law §7-706(4), and the initial adoption of zoning regulations is classified as a "Type I action." 6 N.Y.C.R.R. §617.4(b)(1). Furthermore, referral of the law to the county planning agency or regional planning council is required under General Municipal Law §239-m.

A zoning moratorium maybe adopted only as a "stopgap or interim measure where it is reasonably designed to temporarily halt development while the municipality considers, *inter alia*, comprehensive zoning changes." *Cellular Telephone v. Village of Tarrytown*, 209 A.D.2d 57, 66, 624 N.Y.S.2d 170, 176 (2d Dep't 1995), *lv. den'd* 86 N.Y.2d 701, 631 N.Y.S.2d 605 (1995). While enactment of a moratorium may be subject to the procedural requirements of the legislation it suspends, *see Ronsvalle v. Totman*, 303 A.D.2d 897, 757 N.Y.S.2d 134 (3d Dep't 2003), it is a Type II action exempt from SEQRA. 6 N.Y.C.R.R. §617.5(c)(30).

"All legislation 'by contract' is invalid in the sense that a Legislature cannot bargain away or sell its powers." *Church v. Town of Islip*, 8 N.Y.2d 254, 259, 203 N.Y.S.2d 866, 869 (1960). However, while "contract zoning" maybe improper, incentive zoning is authorized by Town Law §261-b, Village Law §7-703, and General City Law §81-c(1). Under this concept, modifications to zoning restrictions may be exchanged for specific physical, social or cultural benefits or amenities.

Zoning regulations are subject to preemption by state or federal legislation. For example, in *Town of Alexandria v. MacKnight*, 281 A.D.2d 945, 723 N.Y.S.2d 591 (4th Dep't 2001), the Fourth Department refused to enjoin a floating dock system that failed to comply with an approved site plan, since "[t]he floating dock system is located on the navigable waters of the State and thus plaintiff lacks authority to regulate the construction or use of that system." While the Mined Land Reclamation Law preempts regulation of mining activities, it allows zoning of mines into particular areas of a town, or their total exclusion. *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 642 N.Y.S.2d 164 (1996).

Typically, three boards are involved in the zoning process. The first is the legislative body (town board for towns, village board of trustees for villages, and city council for cities), which enacts and amends zoning laws, and may also retain power to approve special use permits. The second is

the zoning board of appeals, which hears variance applications, and appeals from rulings of enforcement officials. *See* Town Law §267; Village Law §7-712; General City Law §81. The third is the planning board, which may be empowered to approve site plans, subdivisions, and special permits. *See* Town Law §271; Village Law §7-718; General City Law §27.

## B. Comprehensive Plans

"[T]he comprehensive plan is the essence of zoning." *Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893 (1968). Zoning must be accomplished in accordance with a comprehensive or well-considered plan. *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 124 (1951). *See* Town Law §§263, 272-a(11)(a); Village Law §§7-704, 7-722(11)(a); General City Law §28-a(12)(a).

Under the case law, there was no requirement that a comprehensive plan be in writing, *Herrington v. Town of Mexico*, 91 Misc.2d 861, 398 N.Y.S.2d 818 (Sup. Ct. Oswego Co. 1977). In fact, the term "comprehensive plan" was unclear:

> No New York case has defined the term "comprehensive plan". Nor have our courts equated the term with any particular document. We have found the "comprehensive plan" by examining all relevant evidence (*Rodgers v. Village of Tarrytown*, 302 N. Y. 115, 122, *supra*; *Thomas v. Town of Bedford*, 11 N Y 2d 428, 434-435, supra). As the trial court noted, generally New York cases "have analyzed the ordinance * * * in terms of consistency and rationality" (40 Misc 2d 265, 267-268). While these elements are important, the "comprehensive plan" requires that the rezoning should not conflict with the fundamental land use policies and development plans of the community (*see Santmyers v. Town of Oyster Bay*, 10 Misc 2d 614, 616; *Linn v. Town of Hempstead*, 10 Misc 2d 774; *Place v. Hack*, 34 Misc 2d 777; *Walus v. Millington*, 49 Misc 2d 104). These policies may be garnered from any available source, most especially the master plan of the community, if any has been adopted, the zoning law itself and the zoning map.

*Udell v. Haas*, 21 N.Y.2d 463, 471-2, 288 N.Y.S.2d 888, 895-6 (1968).

However, in 1993, the State Legislature defined the requirements for comprehensive plans, which are set forth in Town Law §272-a., Village Law §7-722, and General City Law §28-a. This new law now specifies the requirements for a comprehensive plan, and requires that they be in writing. According to a Memorandum explaining the law contained in the Bill Jacket for Laws of 1993, c. 209, the purpose of the law was to define the "comprehensive plan" to which the zoning enabling statutes require consistency:

> ... current statutes require that zoning regulations "shall be made In accordance with a comprehensive plan..." (Town Law §263, Village

> Law §7-704). Yet, there is no current statutory guidance for the definition or content of a comprehensive plan.
>
> ... the comprehensive plan is at best a nebulous concept. This bill eliminates the term "master plan" and makes clear that the comprehensive plan is used as the basis for land use regulation.....

The legislation does not affect the validity of "existing master plans, comprehensive plans, or land use plans." Town Law §272-a(1)(h); Village Law §7-722(1)(h); General City Law §28-a(2)(h).

The statute sets forth specific contents of a comprehensive plan, Town Law §272-a(3); Village Law §7-722(3); General City Law §28-a(4). While the planning board may prepare and make recommendations on the plan, it must be adopted by the local legislative body after public hearing. Town Law §272-a(4-7); Village Law §7-722(4-7); General City Law §28-a(5-8). Upon adoption, all of the municipality's land use regulations must be in accordance with the comprehensive plan. Town Law §272-a(11)(a); Village Law §7-722(11)(a); General City Law §28-a(12)(a). Furthermore, "[a]ll plans for capital projects of another governmental agency... shall take such plan into consideration." Town Law §272-a(11)(b); Village Law §7-722(11)(b); General City Law §28-a(12)(b).

Adoption of the comprehensive plan is subject to the requirements of SEQRA. Town Law §272-a(8); Village Law §7-722(8); General City Law §28-a(9). It is a "Type I action." 6 N.Y.C.R.R. §617.4(b)(1). The "plan may be designated to also serve as, or be accompanied by, a generic environmental impact statement." Town Law §272-a(8); Village Law §7-722(8); General City Law §28-a(9). No further SEQRA compliance is required "for subsequent site specific actions that are in compliance with the conditions and thresholds established" in the GEIS. *Id.*

## C. Zoning Ordinances and Local Laws

While the Village Law only allows zoning by "local law," Village Law §7-700, towns and villages may adopt zoning ordinances or local laws. Town Law §261; General City Law §20(24, 25). Under the doctrine of "legislative equivalency," a local legislation can only be amended by the same procedures as it was enacted, so that neither an ordinance nor a local law can be amended by resolution. *Paradis v. Town of Schroeppel*, 289 A.D.2d 1027, 735 N.Y.S.2d 278 (4th Dep't 2001); *Naftal Assocs. v. Town of Brookhaven*, 221 A.D.2d 423, 633 N.Y.S.2d 798 (2d Dep't 1995). *See* Municipal Home Rule Law §10(1)(ii)(d)(3).

## D. Rezoning and Spot Zoning

The zoning enabling statutes set the procedure, including public notice and hearing, for adoption of map changes or other amendments to zoning regulations. *See* Town Law §265; Village Law §7-722(11)(b); General City Law §28-a(12)(b). If a protest petition is filed by the owners of 20% of land that is either being rezoned, immediately adjacent within 100 feet, or directly opposite within 100 feet, a three-quarters vote of the legislative body is required. *Id.*

The referral requirements of General Municipal Law §239-m, *Ferrari v. Town of Penfield Planning Board*, 181 A.D.2d 149, 585 N.Y.S.2d 925 (4th Dep't 1992), and SEQRA apply

torezoning. *Kirk-Astor Drive Neighborhood Assoc. v. Town of Pittsford*, 106 A.D.2d 868, 483 N.Y.S.2d 526, 528 (4th Dep't 1984), *app. dis'd* 66 N.Y.2d 896, 498 N.Y.S.2d 791 (1985). Rezoning of more than 25 acres, or to facilitate an action that meets other Type I thresholds, is a Type I action under SEQRA. 6 N.Y.C.R.R. §617.4(b)(2,3).

Zoning changes should be "enacted for the benefit of or with regard to the neighbors of the parcel or the community as a whole." *Cannon v. Murphy*, 196 A.D.2d 498, 500, 600 N.Y.S.2d 965, 968 (2d Dep't 1993). Where the amendment is not made in accordance with a comprehensive plan, it is illegal. *Kravetz v. Plenge*, 84 A.D.2d 422, 476 N.Y.S.2d 422 (4th Dep't 1982); *Reuschenberg v. Town of Huntington*, 143 A.D.2d 265, 532 N.Y.S.2d 148 (2d Dep't 1988). The courts have labeled such illegal amendments "spot zoning." *Kravetz v. Plenge*, 84 A.D.2d 422, 476 N.Y.S.2d 422 (4th Dep't 1982).

Spot zoning of a particular parcel in contravention of the community's comprehensive plan must be voided. *Osiecki v. Town of Huntington*, 170 A.D.2d 490, 565 N.Y.S.2d 564 (2d Dep't 1991), *lv. den'd.* 78 N.Y.2d 863, 578 N.Y.S.2d 877 (1991). To allow a town to ignore the existing plan "would invite the kind of *ad hoc* and arbitrary application of zoning power that the comprehensive planning requirement was designed to avoid." *Id.* at 491, 565 N.Y.S.2d at 565. "If a particular zoning amendment benefits only the owner of the property affected, the amendment is 'spot zoning' whether there is or is not a comprehensive plan." *Levine v. Oyster Bay*, 46 Misc.2d 106, 259 N.Y.S.2d 247, 253 (Sup. Ct. Nassau Co. 1964) [citation omitted].

"Spot zoning has been defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners." *Cannon v. Murphy*, 196 A.D.2d 498, 500, 600 N.Y.S.2d 965, 966 (2d Dep't 1993). "The real test for spot zoning is whether the change is other part of a well–considered plan calculated to serve the general welfare of the community." *Id.* at 967 [*citing Collard v. Incorporated Vil. of Flower Hill*, 52 N.Y.2d 594, 600, 439 N.Y.S.2d 326]. A zoning amendment must be "calculated to benefit the entire community, not individual or special interests." *Los Green, Inc. v. Weber*, 156 A.D.2d 994, 548 N.Y.S.2d 832, 833, (4th Dep't 1989).

**E. Building Inspector**

Typically, local zoning regulations are administered by the building inspector, who may be known by titles such as "code enforcement officer." Town Law §138 specifically provides:

> The town board of any town... may appoint a town building inspector... and fix the compensation thereof. Such inspector shall have charge of the enforcement of such codes, ordinances, rules and regulations of the town and of the zoning ordinance of the town, if there be one, and for such purposes such inspector, and his assistants, if any, shall have the right to enter and inspect at any time any building, structure or premises and to perform any other act necessary for the enforcement of such codes, ordinances, rules or regulations, or any of them. In any such town, the town board may appoint a deputy building inspector to assist the building inspector in the duties of his office.

## F. Non−Conforming Uses

"Due to constitutional and fairness concerns regarding the undue financial hardship that immediate elimination of non−conforming uses would cause to property owners," New York courts have become tolerant of non−conforming uses. *Toys R Us v. Silva*, 89 N.Y.2d 411, 417, 654 N.Y.S.2d 100, 103 (1996). "It is the law of this state that non−conforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance." *People v. Miller*, 304 N.Y.2d 105, 107 (1952); *see also Matter of Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 287, 434 N.Y.S.2d 150 (1980).

This rule arises out of substantive due process guarantees of the United States (Fourteenth Amendment) and New York States (Article I §7) Constitutions, which prohibit the taking of private property without just compensation. Zoning regulations that confiscate a landowner's vested rights in continuing a previously legal land use are unconstitutional. *See Toys R Us v. Silva*, 89 N.Y.2d 411, 417, 654 N.Y.S.2d 100, 103 (1996); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974); *People v. Miller*, 304 N.Y.2d 105 (1952); 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:05.

"Although zoning aims at the elimination of non−conforming uses, zoning cannot prohibit an existing use to which the property is devoted at the time of enactment." *Keller v. Haller*, 226 A.D.2d at 639, 640, 641 N.Y.S.2d 380, 382 (2d Dep't 1996). "A substantial user has a right to continue his use. He has a vested right which enjoys constitutional protection against municipal zoning power." 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:05. The owner of the property must merely show that this alleged pre−existing use was legal prior to the regulatory change that made it illegal. *Keller*, 226 A.D.2d at 640, 641 N.Y.S.2d at 382; s*ee also Town of Ithaca v. Hull*, 174 A.D.2d 911, 571 N.Y.S.2d 609 (3d Dep't 1991).

A non−conforming use is lost through abandonment, which is typically defined by the local zoning law. 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:42. The general rule is that "abandonment of a non−conforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment." *Toys R Us v. Silva*, 89 N.Y.2d 411, 421, 654 N.Y.S.2d 100, 105 (1996). However, "the inclusion of a lapse period in the zoning provision removes the requirement of intent to abandon−−discontinuance of non−conforming activity for the specified period constitutes an abandonment regardless of intent." *Toys R Us v. Silva*, 89 N.Y.2d 411, 421, 654 N.Y.S.2d 100, 105 (1996); *citing Prudco Realty Corp. v. Palermo*, 60 N.Y.2d 656, 657-8, 467 N.Y.S.2d 830, 831-2 (1983).

The non−conforming use rule applies to outdoor uses. In *Village of Valatie v. Smith*, 83 N.Y.2d 396, 610 N.Y.S.2d 941 (1994), mobile homes qualified as legal non−conforming uses, while in *Town of Southampton v. Sendlewski*, 156 A.D.2d 669, 549 N.Y.S.2d 434 (2d Dep't 1989), a junkyard was eligible for non−conforming status. Recreational uses such as marinas, *Town of Islip v. P.B.S. Marina*, 133 A.D.2d 81, 518 N.Y.S.2d 427 (2d Dep't 1987); *Gilchrist v. Town of Lake George Planning Board*, 255 A.D.2d 791, 680 N.Y.S.2d 320 (3d Dep't 1998); and shooting ranges, *Millerton Properties Associates v. Town of North East Zoning Board of Appeals*, 227 A.D.2d 562, 643 N.Y.S.2d 169 (2d Dep't 1996), have qualified as non−conforming uses. Even outdoor storage has been found to be a protected non−conforming use. *Iazzetti v. Village of Tuxedo Park*, 145 Misc.2d 78, 546 N.Y.S.2d 295 (Sup. Ct. Orange Co. 1989); *Incorporated*

*Village of Lindenhurst v. Retsel Enterprises, Inc.*, 140 A.D.2d 521, 528 N.Y.S.2d 609 (2d Dep't 1988). For mines, the entire parcel is grandfathered, even though only part of it has been mined. *Matter of Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 434 N.Y.S.2d 150 (1980).

A legal non–conforming use can only be established if the use was lawfully existing at the time of the new enactment. 1 Salkin, *New York Zoning Law & Practice* (4th ed.) §10:10; *Heimerle v. Village of Bronxville*, 168 Misc.2d 483, 5 N.Y.S.2d 1002 (Sup. Ct. Westchester Co. 1938), *aff'd* 256 A.D. 993, 11 N.Y.S.2d 367 (2d Dep't 1939). "A non–conforming use may not be established through an existing use of land which was commenced or maintained under an illegally issued permit." 1 Salkin, *New York Zoning Law & Practice* (4th ed.) §10:11; *Rudolf Steiner Fellowship Found. v. De Luccia*, 90 N.Y.2d 453, 461, 662 N.Y.S.2d 411, 415 (1997). Furthermore, under its police powers, a municipality can regulate preexisting uses. *Concerned Citizens of Perinton, Inc. v. Town of Perinton*, 261 A.D.2d 880, 689 N.Y.S.2d 812 (4th Dep't 1999), *mot. den'd* 94 N.Y.2d 756, 703 N.Y.S.2d 73 (1999), *cert. den'd* 529 U.S. 1111, 120 S. Ct.1965 (2000).

The "special facts" doctrine applies to bar a municipality from passing a new law directed at preventing a particular landowner's use.

> This doctrine has been invoked where arbitrary and dilatory tactics of an administrative body delayed a property owner's application pursuant to which that owner was entitled to a permit as a matter of right, in order to thereafter change a zoning ordinance and defeat the property owner's rights and nullify the application.

*Preble Aggregate, Inc. v. Town of Preble*, 263 A.D.2d 849, 850, 694 N.Y.S.2d 788, 792 (3d Dep't 1999), *lv. den'd* 94 N.Y.2d 760, 706 N.Y.S.2d 81 (2000).

## G. Vested Rights

**1. Non–conforming Uses.** "Due to constitutional and fairness concerns regarding the undue financial hardship that immediate elimination of non–conforming uses would cause to property owners," New York courts have become tolerant of non–conforming uses. *Toys R Us v. Silva*, 89 N.Y.2d 411, 417, 654 N.Y.S.2d 100, 103 (1996). However, "[t]he law nevertheless generally views non–conforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination." *Id.*

Thus, it is the law of this state that non–conforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance." *People v. Miller*, 304 N.Y.2d 105, 107 (1952); *see also Matter of Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 287, 434 N.Y.S.2d 150 (1980). This rule arises out of substantive due process guarantees of the United States (Fourteenth Amendment) and New York States (Article I §7) Constitutions, which prohibit the taking of private property without just compensation. Zoning regulations that confiscate a landowner's vested rights in continuing a previously legal land use are unconstitutional. *See Toys R Us v. Silva*, 89 N.Y.2d 411, 417, 654 N.Y.S.2d 100, 103 (1996); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7 (1974); *People v. Miller*, 304 N.Y.2d 105 (1952); 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:05.

"Although zoning aims at the elimination of non–conforming uses, zoning cannot prohibit an existing use to which the property is devoted at the time of enactment." *Keller v. Haller*, 226 A.D.2d at 639, 640, 641 N.Y.S.2d 380, 382 (2d Dep't 1996). "A substantial user has a right to continue his use. He has a vested right which enjoys constitutional protection against municipal zoning power." 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:05. "A change in ownership of a non–conforming... structure does not affect the right to continue the use, as zoning deals with land use and not land ownership." 1 Salkin, *New York Zoning Law and Practice* §10:24, 10:52, 10:53 [4th ed].

A landowner has the burden of proof to show that it has established a non–conforming use. *Town of Aurora v. Kranz*, 63 N.Y.2d 996, 483 N.Y.S.2d 1012 (1984). The owner of the property must merely show that this alleged pre–existing use was legal prior to the regulatory change that made it illegal. *Keller*, 226 A.D.2d at 640, 641 N.Y.S.2d at 382; s*ee also Town of Ithaca v. Hull*, 174 A.D.2d 911, 571 N.Y.S.2d 609 (3d Dep't 1991).

A non–conforming use is lost through abandonment, which is typically defined by the local zoning law. 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:42. The general rule is that "abandonment of a non–conforming use requires both an intent to relinquish and some overt act or failure to act, indicating that the owner neither claims nor retains any interest in the subject matter of the abandonment." *Toys R Us v. Silva*, 89 N.Y.2d 411, 421, 654 N.Y.S.2d 100, 105 (1996). "[I]t is the conduct of those who were owners *as of the date of the "upzoning*" which is controlling," and not the intent of a new owner. *Concerned Citizens of Montauk, Inc. v. Lester*, 62 A.D.2d 171, 174, 404 N.Y.S.2d 360, 363 (2d Dep't 1978). However, "the inclusion of a lapse period in the zoning provision removes the requirement of intent to abandon—discontinuance of non–conforming activity for the specified period constitutes an abandonment regardless of intent." *Toys R Us v. Silva*, 89 N.Y.2d 411, 421, 654 N.Y.S.2d 100, 105 (1996); *citing Prudco Realty Corp. v. Palermo*, 60 N.Y.2d 656, 657-8, 467 N.Y.S.2d 830, 831-2 (1983); *see also Village of Spencerport v. Webaco Oil Co.*, 33 A.D.2d 634, 305 N.Y.S.2d 20, 21 (4th Dep't 1969).

The non–conforming use rule applies to outdoor uses. In *Village of Valatie v. Smith*, 83 N.Y.2d 396, 610 N.Y.S.2d 941 (1994), mobile homes qualified as legal non–conforming uses, while in *Town of Southampton v. Sendlewski*, 156 A.D.2d 669, 549 N.Y.S.2d 434 (2d Dep't 1989), a junkyard was eligible for non–conforming status. Recreational uses such as marinas, *Town of Islip v. P.B.S. Marina*, 133 A.D.2d 81, 518 N.Y.S.2d 427 (2d Dep't 1987); *Gilchrist v. Town of Lake George Planning Board*, 255 A.D.2d 791, 680 N.Y.S.2d 320 (3d Dep't 1998); and shooting ranges, *Millerton Properties Associates v. Town of North East Zoning Board of Appeals*, 227 A.D.2d 562, 643 N.Y.S.2d 169 (2d Dep't 1996), have qualified as non–conforming uses. Even outdoor storage has been found to be a protected non–conforming use. *Iazzetti v. Village of Tuxedo Park*, 145 Misc.2d 78, 546 N.Y.S.2d 295 (Sup. Ct. Orange Co. 1989); *Incorporated Village of Lindenhurst v. Retsel Enterprises, Inc.*, 140 A.D.2d 521, 528 N.Y.S.2d 609 (2d Dep't 1988). For mines, the entire parcel is grandfathered, even though only part of it has been mined. *Matter of Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 434 N.Y.S.2d 150 (1980).

Nonetheless, a "purely incidental use of property for recreational or amusement purposes only" is not protected by the doctrine of non–conforming uses. *People v. Miller*, 304 N.Y.2d 105, 109 (1952) (pigeon raising not protected). The question is whether the use is "purely incidental," or a "substantial loss and hardship upon the individual property owner." *Miller* 304 N.Y.2d at 108.

A legal non–conforming use can only be established if the use was lawfully existing at the time of the new enactment. 1 Salkin, *New York Zoning Law & Practice* (4th ed.) §10:10; *Heimerle v. Village of Bronxville*, 168 Misc.2d 483, 5 N.Y.S.2d 1002 (Sup. Ct. Westchester Co. 1938), *aff'd* 256 A.D. 993, 11 N.Y.S.2d 367 (2d Dep't 1939). "A non–conforming use may not be established through an existing use of land which was commenced or maintained under an illegally issued permit." 1 Salkin, *New York Zoning Law & Practice* (4th ed.) §10:11; *Rudolf Steiner Fellowship Found. v. De Luccia*, 90 N.Y.2d 453, 461, 662 N.Y.S.2d 411, 415 (1997). A municipality is not estopped by an illegal permit. *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176 (1988). However, there is generally no need to comply with a new permit requirement. *360 Jericho Turnpike Associates v. Incorporated Village of Mineola*, 261 A.D.2d 468, 690 N.Y.S.2d 278, 279 (2d Dep't 1999); *Millerton Properties Associates v. Town of North East Zoning Board of Appeals*, 227 A.D.2d 562, 643 N.Y.S.2d 169 (2d Dep't 1996).

### 2. Changes in the Law

Where the law is changed a "after the final administrative determination but prior to the culmination of the judicial review process," the new law will apply unless the landowner has acquired "vested rights." 2 Salkin, *New York Zoning Law and Practice* (4th ed.) §33:23; *Theirbault v. Town of Farmington Planning* Board, 199 A.D.2d 1059, 608 N.Y.S.2d 910 (4th Dep't 1993); *Lawrence School Corp. v. Morris*, 167 A.D.2d 467, 562 N.Y.S.2d 707 (2d Dep't 1990); *Pokoik v. Silsdorf*, 40 N.Y.2d 769, 390 N.Y.S.2d 49 (1976). Vested rights are normally only acquired by commencement of actual construction of a substantial improvement. *Jaffee v. RCI Corp.*, 119 A.D.2d 854, 500 N.Y.S.2d 427 (3d Dep't 1986); *Paliotto v. Dickerson*, 22 A.D.2d 929, 256 N.Y.S.2d 55 (2d Dep't 1964).

In some situations, where a municipality illegally denies a permit, and then changes the law to make the use illegal, a landowner's proposed use may be grandfathered. 1 Salkin, *New York Zoning Law and Practice* (4th ed.) §10:19. However, in *Lawrence School Corp. v. Morris*, 167 A.D.2d 467, 562 N.Y.S.2d 707 (2d Dep't 1990), even though a permit was arbitrarily revoked, the landowner had to comply with a new law.

Under its police powers, a municipality can regulate preexisting uses. *Concerned Citizens of Perinton, Inc. v. Town of Perinton*, 261 A.D.2d 880, 689 N.Y.S.2d 812 (4th Dep't 1999), *mot. den'd* 94 N.Y.2d 756, 703 N.Y.S.2d 73 (1999), *cert. den'd* 529 U.S. 1111, 120 S. Ct.1965 (2000).

### 3. Special Facts Doctrine

The "special facts" doctrine applies to bar a municipality from passing a new law directed at preventing a particular landowner's use.

> This doctrine has been invoked where arbitrary and dilatory tactics of an administrative body delayed a property owner's application pursuant to which that owner was entitled to a permit as a matter of right, in order to thereafter change a zoning ordinance and defeat the property owner's rights and nullify the application.

*Preble Aggregate, Inc. v. Town of Preble*, 263 A.D.2d 849, 850, 694 N.Y.S.2d 788, 792 (3d Dep't 1999), *lv. den'd* 94 N.Y.2d 760, 706 N.Y.S.2d 81 (2000); *see also Lawrence School Corp. v. Morris*, 167 A.D.2d 467, 562 N.Y.S.2d 707 (2d Dep't 1990); *Theirbault v. Town of Farmington Planning* Board, 199 A.D.2d 1059, 608 N.Y.S.2d 910 (4th Dep't 1993).

### H. Planning Board.

If a special permit or subdivision approval is required, a landowner must first submit the matter for Planning Board approval (which cannot occur until there is compliance with SEQRA) before he or she can obtain a building permit. In some towns, the Planning Board grants special permits.

### I. Zoning Board of Appeals.

If the proposal is not allowed by the zoning ordinance, the only way an applicant can proceed to obtain a building permit is by first either obtaining a variance from the Zoning Board of Appeals, or else by convincing the Town Board to enact a "rezoning" amendment to change the district in which his land is zoned (either of which must be preceded by SEQRA review). A "use variance," which involves a change in the allowable use of land, is more difficult to obtain than an "area variance," which gives relief from dimensional requirements. Town Law §267-b. A Zoning Board of Appeals may be empowered to grant special permits.

### J. Referral to County Planning.

Often, zoning approvals must be referred to the county planning board or department for review prior to action by town officials. General Municipal Law §§239-m, 239-n.