Chapter XVIII

LAND USE REGULATION

A. ZONING

The most significant scheme for controlling land use in America is zoning, by which local authorities divide a municipality into various zoning districts for which only specified uses, or combinations of uses, are allowed, such as residential, industrial, commercial or agricultural uses. In *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365, 47 S. Ct. 114 (1926), the U.S. Supreme Court upheld the validity of zoning ordinance. Zoning limits particular activities to specified zones, and may be used in some cases to even completely ban certain uses from a municipality. *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 642 N.Y.S.2d 164 (1996).

In New York, municipalities are given authority to enact local zoning laws and ordinances under the New York State General City Law, Village Law, Town Law, and Municipal Home Rule Law. Since the procedures employed by cities, towns and villages are similar, a typical zoning scheme for a town in New York State will be discussed for illustration purposes. While zoning schemes in other states differ, most share elements of the same scheme, perhaps with different boards and procedures.

While a town's legislative body, the Town Board, is authorized to enact a zoning ordinance, N.Y. Town Law §264, the zoning regulations must be "made in accordance with a comprehensive plan." N.Y. Town Law §263. While New York State law sets forth the requirements for a written comprehensive plan, N.Y. Town Law §272-a, previously the courts held that such a plan need not be in writing. The Town Board is also authorized to create a Planning Board, Town Law §271, which can adopt a comprehensive plan. Further, the Planning

Board can be authorized to approve site plans, and/or give special permits, for specified uses, Town Law §274-a, and to approve subdivision plats. Town Law §§276, 277.

If a proposed use is authorized by the local zoning ordinance, and meets the requirements of the New York State Uniform Fire Prevention and Building Code, generally the town building inspector must issue a building permit. Such a permit is required before any construction begins. Following completion and inspection of a building, a certificate of occupancy must be issued prior to occupancy, in order to certify compliance with the applicable laws and regulations.

If a special permit, site plan approval, 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 Zoning Board of Appeals or the Town Board, and not the Planning Board, grants special permits.

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.

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. Anyone aggrieved by the action of a Planning Board or Zoning Board of Appeals may obtain relief by bringing a special proceeding under CPLR Article 78 brought within 30 days. *See, e.g.,* New York Town Law §§267-c, 282.

B. WETLANDS

1. Federal Wetlands Regulation

The enabling legislation for the federal wetlands program is set forth at Clean Water Act §404, 33 U.S.C. §1344, which regulates "the discharge of dredged or fill materials" within waters of the United States. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403, also gives authority for the program. Under the federal wetlands program, the U.S. Army Corps of Engineers regulates activities within wetlands pursuant to regulations set forth at 33 C.F.R. Parts 320 through 330 and 40 C.F.R. Part 230. While the Army Corps issues permits and enforces the program, EPA has enforcement authority, and can "veto" permits in "special cases." Clean Water Act §404(c), 33 U.S.C. §1344(c). The jurisdiction between the two agencies has been allocated by two Memoranda of Agreement executed in 1989.

Generally, "water quality certification" must be obtained (in New York delegated to DEC by EPA) prior to issuance of an Army Corps wetlands permit. Clean Water Act §401(a), 33 U.S.C. §1341(a). Further, activities in the "coastal zone" may require a coastal zone consistency determination from state (in New York from the New York State Department of State), pursuant to the Coastal Zone Management Act. 16 U.S.C. §1456(c)(3).

Wetlands are regulated under the Clean Water Act as "navigable waters," defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). The Supreme Court has held that the Army Corps was authorized to extend the "dredge and fill" permit system to wetlands adjacent to "waters of the United States," even though they are not navigable in fact. *U.S. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455 (1985). However, "isolated wetlands" are beyond the reach of the Commerce Clause, and not subject to federal regulation.

Solid Waste Authority of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 121 S.Ct. 675 (2001). Recently, in *Rapanos v. U.S.*, 126 U.S. 2208, 126 S. Ct. 2208, 2227 (2006), the Supreme Court decided that only "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" are subject to regulation under the Clean Water Act, and "[w]etlands with only an intermittent, physically remote hydrological connection to "waters of the United States" are not regulated.

Wetlands are defined under federal law as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. §328.3(b). However, such waters do not include "prior converted croplands," §328.3(a)(8), meaning wetlands filled or drained for agricultural use prior to December 23, 1985. Wetlands are presently delineated using the Corps' 1987 Wetlands Delineation Manual (after withdrawal of the more inclusive 1989 Manual by the Energy Development Appropriations Act of 1992), which uses a "multi-parameter" approach to delineating wetlands. The required parameters, all three of which must be satisfied, are:

1. Hydric soils;
2. Hydrophytic vegetation; and
3. Wetland hydrology.

There are no official maps of federal wetlands (although maps prepared by agencies such as the Soil Conservation Service are helpful in the delineation process), but rather determination of their existence depends upon case-by-case delineation. Because of the difficulty in identifying the three wetland factors, and delineating wetland boundaries, an expert may be necessary to

determine whether or not a wetland is present. Often, what may appear as dry land to the layman may, in fact, be a federal wetland.

Nearly any activity filling a federal wetland requires a permit. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Nonetheless, in *National Mining v. U.S. Army Corps of Eng*ineers, 145 F.3d 1399 (D.C. Cir. 1998), the court invalidated *Tulloch* rule, which required permits for "incidental fallback" involving no new fill. A more recent attempt to promulgate a new *Tulloch* rule was struck down. *National Association of Home Builders v. U.S. Army Corps of Engineers*, 2007 U.S. Dist. LEXIS 6366 (D.D.C. 2007). Further, "normal farming, silvicultural and ranching activities" are exempt. Clean Water Act §404(f)(1)(A), 33 U.S.C. §1344(f)(1)(A).

Many minor actions are given automatic "nationwide permits" (as well as categorical water quality certification from DEC), and do not require individual permits. 33 C.F.R. Part 330, Appendix B. Nationwide permits are subject to standard conditions. 33 Part 330, App. C. However, there is some authority for the Corps to override a nationwide permit in a particular case due to adverse effects on the aquatic environment, or to add further conditions. 33 C.F.R. §330.1(d).

If a nationwide permit is not available, an individual permit must be obtained by application to the Army Corps, and the necessary water quality certification (and, if required, a coastal zone consistency determination). Alternatives must be compared, and "no discharge of dredged or fill material shall be permitted if there is a practicable alternative which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. §230.10(a).

In evaluating an application, the Army Corps and EPA regulations favor a hierarchical approach to evaluating proposed projects in wetlands. Accordingly, projects should avoid impacts to wetlands to the maximum extent possible, minimize unavoidable impacts, and compensate for all impacts that can neither be avoided nor minimized, in order to attempt to achieve the goal of "no net loss" of wetlands. *Memorandum of Agreement Between EPA and Army Corps Concerning the Determination of Mitigation Under Clean Water Act Section 404(b)(1) Guidelines*, effective Feb. 7, 1990. While compensatory mitigation may not be used in the evaluation of the least damaging alternative, off-site wetland "banks" are a possible alternative. *Id.*

An applicant is required to look at alternative sites, including those he or she does not even own. *Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988). Further, practical alternatives are presumed to be available for uses that are not "water dependent" (*e.g.* boating and fishing). 40 C.F.R. §230.10(a)(3).

2. New York State Wetland Regulation

Many states, including New York, have their own program to regulate wetlands. Thus, in New York, there are two separate programs (three in certain municipalities) that classify and regulate the use of wetlands. The definition of "wetland" is different under each system, so that a federal wetland may not be a state wetland, or vice-versa. Regulation of wetlands under either program may result in significant restrictions on use of property.

New York State regulates freshwater wetlands, pursuant to authority vested in DEC under New York ECL Article 24. The program defines wetlands on the basis of vegetation, *see* ECL §24-0107, and generally applies to only wetlands of at least 12.4 acres in area, or of

"unusual local importance," which are mapped on freshwater wetland maps of the various municipalities in the state. ECL §24-0301. The maps are available in town and city halls, county clerk's offices, and at DEC Regional offices. However, the maps are only approximations -- the stroke of the pen may be tens of feet wide -- and a field delineation, approved by DEC Regional office staff, is the best way to ensure whether or not land is in a state wetland. Generally, state wetlands are less inclusive than federal wetlands, so that the mere fact that an area is not on the state map does not mean it is not subject to the federal program.

Permits from DEC are required for "regulated activities" within the wetlands, or the 100 foot buffer strip around them. ECL §24-0701(2). New York regulates a broader scope of activities than under the federal program, including drainage, dredging, excavation, removal of soil, filling, erecting structures, and polluting, ECL §24-0701(2), but not most fishing and agricultural activities. ECL §24-0701(3,4). Frequently, alteration of a wetland also requires a permit from DEC under the Stream Protection Act, Title 5 of ECL Article 15.

Regulations set forth at 6 N.Y.C.R.R. Parts 662-665 prescribe the procedure for obtaining permits, and include a chart of activities that are either "usually compatible," "usually incompatible," or "incompatible," 6 N.Y.C.R.R. §663.4(d), and standards for issuance of permits that depend upon compatibility, 6 N.Y.C.R.R. §663.5. "Letters of Permission" are available for certain minor actions. Even activities that would have no significant effect on the environment may be prohibited under the wetlands program. *Goldhirsch v. Flacke*, 114 A.D.2d 998, 495 N.Y.S.2d 436 (2d Dep't 1985), *app. den'd* 67 N.Y.2d 604, 500 N.Y.S.2d 1026 (1986).

An application for a wetlands permit is subject to the uniform DEC permit procedures established under ECL Article 70. Review of a wetlands permit decision, whether to the

Freshwater Wetlands Appeals Board or the courts under CPLR Article 78, is subject to a 30-day statute of limitations. ECL §24-1105.

By procedures set forth in Title 5 of ECL Article 24, a municipality may be authorized to administer the state program in lieu of DEC. Further, a municipality may enact its own wetlands regulation scheme, pursuant to municipal enabling legislation, if the local program is "at least as protective of freshwater wetlands" as the state regulatory program. ECL §24-0509. Many municipalities (including the Town of Pittsford in Monroe County) have their own local wetland regulations, which may encompass small wetlands not regulated by either DEC or the Army Corps. However, some of these programs might not withstand court challenge if they are not "as strict as" the state program.

Tidal wetlands, which are commonly encountered in downstate New York, are subject to a similar regulatory scheme set forth at ECL Article 25, and 6 N.Y.C.R.R. Parts 660 and 661.

New York ECL Article 34 and 6 N.Y.C.R.R. Part 505 establish a similar scheme for regulation of designated "coastal erosion hazard areas," which requires DEC permits for even minor activities, and often totally prohibits permanent construction on fragile beaches or cliff areas. The program is based upon maps that specify the location of coastal erosion hazard areas subject to regulation.

C. MINING

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201, *et seq.*, establishes a program for the regulation of surface mining activities and the reclamation of coal-mined lands, under the administration of the Office of Surface Mining, Reclamation and Enforcement, in the Department of the Interior. The law sets forth minimum uniform

requirements for all coal surface mining on federal and state lands, including exploration activities and the surface effects of underground mining. Mine operators are required to minimize disturbances and adverse impact on fish, wildlife and related environmental values and achieve enhancement of such resources where practicable. Restoration of land and water resources is ranked as a priority in reclamation planning.

Many states have similar programs. In New York, the Mined Land Reclamation Law, set forth at Title 27 of ECL Article 23, provides for the regulation of mining, and requires approval of a mining and reclamation plan, and a bond to secure completion of the reclamation plan, prior to issuance of a mining permit. ECL §§23-2713, 23-2717. Regulations implementing this program are set forth at 6 N.Y.C.R.R. Part 422. Well drilling is also regulated at 6 N.Y.C.R.R. Part 552.