

Incentive Zoning

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Intro: Sources of Zoning Authority

(1) New York State Constitution, Article IX (the “Home Rule” provision)

- Section I: Bill of Rights for Local Governments
- Section II: General Powers of Local Governments

(2) Statutes (Municipal Home Rule Law, General Municipal Law, County Law, General City Law, Town Law and Village Laws)

Zoning Enabling Statutes

- (1) General City Law § 20(24), (25)
- (2) Town Law § 263
- (3) Village Law § 7-704
- (3) Statute of Local Governments § 10(6)
- (4) Mun. Home Rule Law § 10

These statutes give cities, towns and villages the power to enact local zoning laws.

General Purpose of Zoning Laws

- Specify what development can occur
- Specify where development can occur
- Set rules for how property can be developed
- Guide long term community planning efforts (such as comprehensive plans)

Historical Zoning Model

Euclidean Zoning: a system of separating and regulating land uses within a municipality by type to isolate incompatible uses and protect the public

See Village of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365 (1926).

Zoning Ordinance = (1) zoning map; and (2) zoning code

Zoning Ordinances

Zoning ordinances distinguish between what uses are permitted as of right vs. those that need prior review and approval (special use permits, variances, etc.).

Generally, if a use of property or proposed action is not expressly listed as being authorized by the zoning ordinance, it requires a variance.

Special Use Permits vs. Variances

Special uses those uses expressly contemplated by a zoning ordinance that require prior approval/permitting, and may require conditions to mitigate the effects of the use at issue on surrounding properties.

Variances: requests for deviations from the zoning ordinance.

Because of the nature of the requests, the burden on an applicant seeking a special use permit is much lighter than the burden on an applicant seeking a variance. Franklin Square Donut Sys., LLC v. Wright, 63 A.D.3d 927 (2d Dep't 2009).

Variations, Generally

Two types of variations:

(1) Use variance: seeks permission to engage in a use not permitted in the zoning district at issue

(2) Area variance: seeks permission to deviate from bulk regulations in the zoning ordinance

Criteria to be applied to variance requests is set by statute. See Town Law § 267-b.

Zoning Boards of Appeals

Municipalities that have adopted zoning laws must create a ZBA. Gen. City Law § 81; Town Law § 267(2); Village Law § 7-712(2).

Duties of ZBA: (1) Hear and decide appeals from officials charged with primary administration enforcement of local zoning laws; (2) interpret the local zoning ordinance; and (3) grant variances

*ZBAs can be granted additional duties such as granting special use permits or approving site plans

Comprehensive Plans

- What is a comprehensive plan?
 - Defined by Statute (See Town Law § 272-a(2)(a)). In essence, materials and plans that set intermediate and long term goals for growth and development of a municipality.
- Adoption of a comprehensive plan is not required by law.
- **BUT**, if one is adopted, then all future land use regulations of that municipality must be in accordance with that plan. See Gen. City. Law § 28-a(12)(a); Town Law § 272-a(11)(a); Village Law § 7-722(11)(a).

Comprehensive Plans (cont'd)

Benefits of comprehensive plans:

- (1) Provides a legal defense for zoning enactments; it is easier to determine compliance with a development plan that is clearly defined
- (2) Provides authorities with a guidepost for zoning decision making
- (3) Identifies community assets and growth strategies

Challenges associated with comprehensive plans:

- (1) Reaching a consensus on long term goals is hard. Communities may not believe comprehensive planning is worth the effort.
- (2) Traditional zoning laws and restrictions can interfere with development goals.
- (3) Zoning codes are often old and updated infrequently. Newer development may not fit neatly into traditional zoning categories.

Legislative Solutions

Planned Unit Development (“PUD”)

Town Law § 261-c: A town legislative body is hereby authorized to enact, as part of its zoning local law or ordinance, procedures and requirements for the establishment and mapping of planned unit development zoning districts. Planned unit development district regulations are intended to provide for residential, commercial, industrial or other land uses, or a mix thereof, in which economies of scale, creative architectural or planning concepts and open space preservation may be achieved by a developer in furtherance of the town comprehensive plan and zoning local law or ordinance.

Legislative Solutions (cont'd)

Benefits to PUDs:

Flexibility

Since PUD laws are created at the local level municipalities can tailor them to specific community design and development goals.

Ability to develop multiple lots/parcel simultaneously. Where traditional zoning concerns lot-by-lot development and review, PUD laws may permit development to occur on multiple parcels and/or across multiple owners simultaneously.

PUDS can promote mixed use development by blending compatible land uses.

PUD provisions must be added to a community's zoning law/ordinance through the same process as adopting any zoning law or amendment.

Legislative Solutions (cont'd)

INCENTIVE ZONING

A system by which municipalities permit deviations from the use and bulk requirements of the zoning code (i.e., bonuses or incentives) in return for the developer providing amenities the municipality could otherwise not require.

While flexibility is incentive zoning's primary strength, that flexibility can be easily abused.

History of Incentive Zoning

- Born out of the overhaul of New York City's original 1916 zoning ordinance in the 1960s
- Historically, New York City zoning was preoccupied with the preservation of light and space. Planners wanted to incentivize developments that would do this.
- 1961 Ordinance: “density bonus” opportunity.

Incentive Zoning Laws

- In 1991, New York became the first state to enact standard enabling legislation for incentive zoning. See Gen. City. Law § 81-D; Town Law § 261-b; Village Law § 7-703.
- Legislative Purpose: “to advance the town’s specific physical, cultural and social policies in accordance with the town’s comprehensive plan and in coordination with other community planning mechanisms or land use techniques.” Town Law § 261-b(2).

Incentive Zoning Laws (cont'd)

Town Law § 261-b: local incentive zoning laws must:

- (1) Specify the incentives that may be granted to the applicant;
- (2) Specify the community benefits/amenities that the applicant may offer the Town;
- (3) Indicate the criteria for approval and method of determining the adequacy of community amenities to be accepted in exchange for zoning incentives granted by the Town;
- (4) Describe the procedure for obtaining incentives, including the application and review process, and placing terms and conditions on any approval; and
- (5) Provide for a public hearing, with a requirement that notice of said hearing be given by publication in the official newspaper at least five days in advance of the hearing.

Focus on Affordable Housing

- Before an incentive zoning law can be enacted or amended the enabling statutes require the municipality to examine the impact of the proposed incentive zoning system on the development of affordable housing. Town Law § 261-b(3)(g).
- This analysis considers the affordable housing gained by any incentives granted to an applicant, and those lost if an applicant provides an amenity to the municipality. To proceed with the enactment the municipality must find an approximate equivalence between the affordable housing lost or gained.
- If there is no approximate equivalence the town must decide to take “reasonable action to compensate for any negative impact on the availability or potential development of affordable housing” caused by the adoption of the incentive zoning law.

What are “amenities”?

Amenities are intended to be true additionalities; that is, benefits the municipality cannot require as extractions or mitigating conditions under the zoning ordinance or the State Environmental Quality Review Act (“SEQRA”).

Amenities should properly and adequately enrich the community (i.e., preserving a theatre, or improving public transportation).

Cash Payments as Amenities

- If a suitable or appropriate community benefit is not immediately feasible or practical, the municipality may require the applicant to make a cash payment in lieu of an amenity. Town Law § 261-b(1)(b).
- If a cash payment is accepted in lieu of an amenity or other community benefit the money must be deposited in a trust to be used by the town exclusively for specific community benefits. Town Law § 261-b(3)(h). See Residents for Reasonable Development v. City of New York, 128 A.D.3d 609 (1st Dep't 2015).
- Improper “quid pro quo” cash payments violate the incentive zoning law. See Matter of Mun. Art Soc’y of N.Y. v. City of New York, 137 Misc.2d 832 (Sup Ct. N.Y. Cnty.) (finding improper quid pro quo where funds were to be paid into the City’s general operating account instead of being set aside for public improvements).

Cash Payments as Amenities (cont'd)

Town of Babylon, NY, Code §89-86(B)

Every applicant shall pay a fee of \$0.03 per square foot of the project, not to exceed \$15,000, to the Town of Babylon Green Building Fund. An applicant who achieves LEED-certified status shall have this fee refunded.

Town of Ogden, NY, Zoning Code § 211-9

If the Town Board finds that a community benefit is not suitable on site or cannot be reasonably provided, the Town Board may require a cash payment in lieu of the provision of the amenity or bonus. These funds shall be placed in a trust fund to be used by the Town Board exclusively for amenities specified in these provisions. Payments shall be made by the applicant prior to the issuance of any permit, stripping of any ground cover, site grading, or any other site improvements or construction activities.

What are not “amenities”?

Conditions that could have been imposed by the municipality regardless of whether amenities were offered, and SEQRA mitigation measures.

If the “amenities” proposed primarily benefit the developer economically, they are not truly amenities for incentive zoning purposes. See Western New York Dist., Inc. of Wesleyan Church v. Village of Lancaster, 17 Misc. 3d 798, 817 (Erie Cnty. Sup. Ct. 2007) (Incentive zoning is “based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive.”).

Example: Town of Beekman Incentive Zoning Law

Town of Beekman Code, ch. 155, 155-55(B) (2001)

- Clearly specifies that “amenities” are not measures that could be required as conditions during the planning process, nor or they mitigation measures that could be required by SEQRA.

Lists specific “amenities” that qualify for incentives:

- (1) Permanent conservation of natural areas or agricultural lands;
- (2) Provision of passive or active open space and related improvements;
- (3) Permanent protection of scenic views;
- (4) Public Parks and recreational facilities;
- (5) Public access to waterfronts;
- (6) Public trails and trail linkages; or
- (7) Cultural or historic facilities deeded to municipality or qualified not for-profit agencies.

Example: Town of Ossining Incentive Zoning Law

Town Law Art. Six, “Affordable Housing”, §§ 200-32 to 220-35

- Amenity: Whenever there is a residential development of 10 or more units created by subdivision or site plan approval, no fewer than 10% of the total number of units must be below-market rate units (i.e., affordable housing). If there are 5 to 9 units, at least one affordable unit must be created.
- Incentive: The developer is granted a maximum permitted density bonus based on the size of the property.

Limitations on Incentive Zoning

- First, “do no harm”. The use of incentive zoning should not cause significant environmentally damaging consequences and must be compatible with the development otherwise permitted. Town Law § 261-b(3)(c).
- Second, incentive zoning is not a “blank check” for development. Zoning rules exist to protect the community.
- Third, incentive zoning should not be used in a manner that undermines the public trust.

Limitations on Incentive Zoning (cont'd)

- Fourth, incentive zoning provisions must be adopted and implemented in accordance with a municipality's comprehensive plan. Town Law § 261-b(2) (“The purposes of the system of incentive [] zoning shall be to advance the town’s specific physical, cultural, and social policies in accordance with town’s comprehensive plan and in coordination with community planning mechanisms or land use techniques.”).
 - A town’s comprehensive plan may consist of multiple planning documents. Udell v. Haas, 21 N.Y.2d 463, 471 (1968) Stone v. Scarpato, 285 A.D.2d 467, 469 (2d Dep’t 2001).
- Fifth, the enabling legislation provides that incentives “may” be provided, not “must”.

Incentive Zoning Case Law

The only Court of Appeals case discussing incentive zoning in detail is Asian Americans for Equality v. Koch, 72 N.Y.2d 121 (1988).

“Special district zoning—exemplified by the Manhattan Bridge District questioned here—represents a significant departure from this traditional *Euclidian* zoning concept. It is based on the idea that zoning can be used as an incentive to further growth and development of the community rather than as a restraint. It is one of several imaginative legislative schemes intended to encourage, or even coerce, private developers into making the City a more pleasant and efficient place to live and work. Incentive zoning is based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive. The economic incentive frequently used, and the one used in the Manhattan Bridge District amendment, is the allowance of greater density within a proposed building, more floor area than permitted under general zoning rules, if developers provided certain amenities for the community. The amendment awards bonus points which entitle developers to expand their construction in return for increased construction of other, uneconomic projects such as low-cost housing, slum rehabilitation or public facilities. The bonus awarded for each amenity must be carefully structured, however, to make the cost-benefit equation favorable enough to induce the developer to provide the desired uneconomic benefit to the city but sufficiently limited to avoid a windfall to it.”

Challenging Zoning Determinations, Generally

“Zoning determinations enjoy a strong presumption of validity, which can only be overcome by a showing that the decision was unreasonable and arbitrary.” Rayle v. Town of Cato Bd., 295 A.D.2d 978 (4th Dep’t 2002). The standard is one of “reasonable doubt”.

Challenges to zoning determinations may only be made by “aggrieved” persons. Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead, 69 N.Y.2d 406, 412 (1987).

To have standing to challenge a zoning determination, the petitioner must establish both an injury-in-fact and show the asserted injury is within the zone of interest sought to be protected by the statute alleged to have been violated. Soc’y of Plastics Indus v. Cnty. of Suffolk, 77 N.Y.2d 761, 769 (1991).

Comprehensive Plan Based Challenges

As with other zoning measures, incentive zoning provisions can be challenged on the grounds that they are inconsistent with the community's comprehensive plan.

In zoning law challenges based on alleged inconsistency with a Town's comprehensive plan, the plaintiff must establish a "clear conflict" with the comprehensive plan." Restuccio v. City of Oswego, 114 A.D.3d 1191 (4th Dep't 2014).

"What is mandated is that there be comprehensiveness of planning, rather than special interest, irrational *ad hocery*. The obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan." Infinity Consulting Group, Inc. v. Town of Huntington, 49 A.D.3d 813 (2d Dep't 2008) (citing Town of Bedford v. Village of Mount Kisco, 33 N.Y.2d 178, 188 (1973)).

Comprehensive Plan Based Challenges

Factors considered by the Courts:

- Whether forethought has been given to the community's land use problems. Kravetz, 84 A.D.2d 422, 429-430 (4th Dep't 1982).
- Whether changing conditions supports a change in zoning plans. Id.
- Whether the zoning change fails to advance the goals of the comprehensive plan. See, e.g., Oseicki v. Town of Huntingon, 170 A.D.2d 490 (2d Dep't 1991); Land Master Montg I, LLC v. Town of Montgomery, 13 Misc. 3d 870 (Sup. Ct. Orange Cnty. 2006).
- Whether the record supports the zoning determination at issue.

Alleged Inconsistency with Enabling Legislation

The petitioner in Brighton Grassroots v. Town of Brighton, 179 A.D.3d 1500 (4th Dep't Jan. 31, 2020) argued the incentive zoning law adopted by the Town of Brighton was inconsistent with its enabling legislation (Town Law § 261-b) because it allowed private parties to seek whatever incentives they wanted in exchange for any amenity.

This argument was rejected by the Fourth Department. Id. at 1501 (“Contrary to the petitioner’s contention, section 261-b does not require an incentive zoning law to specifically adopt a prospective formula weighing the costs and benefits of awarding any particular incentive under the law.”).

“Spot” Zoning Challenges

Spot zoning challenges are premised on cases where a municipality singles out one parcel of land for discriminatory zoning treatment. As a result, that parcel is zoned differently from the surrounding property for the benefit of the property owner and to the detriment of the surrounding property owners. Kravetz, 84 A.D.2d at 428; see, e.g., Cannon v. Murphy, 196 A.D.2d 498 (2d Dep’t 1993).

Spot zoning is treated as a violation of Town Law § 263. See Little Joseph Realty, Inc. v. Town Bd. of Town of Babylon, 52 A.D.3d 478 (2d Dep’t 2008).

“Spot” Zoning Challenges (cont’d)

Factors relevant to claims alleging “spot” zoning:

Among the factors to be considered in evaluating a claim of spot zoning are whether the rezoning is consistent with a comprehensive plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the recommendations of professional planning staff. [] **No single factor is dispositive and the ultimate test is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community.**

Matter of Yellow Lantern Kampground v. Town of Cortlandville, 279 A.D.2d 6, 9-10 (3d Dep’t 2000) (internal citations and quotations omitted); see also West Branch Conservation Ass’n v. Town of Ramapo, 284 A.D.2d 401 (2d Dep’t 2001).

Fact that a zoning determination is consistent with the Town’s comprehensive plan weighs against the likelihood that a Court will find spot zoning occurred. Restuccio v. City of Oswego, 114 A.D.3d 1191, 1192 (4th Dep’t 2014).

Incentive Zoning: Key Takeaways

- (1) Incentive zoning provides a means of furthering identified community goals that are typically uneconomic for developers and which may otherwise not be provided.
- (2) Develop a structured system. Ambiguity encourages abuse.
- (3) Make sure the incentive zoning system comports with long term community planning goals.
- (4) Real “amenities” are not SEQRA mitigation measure or other conditions the municipality could require for development in the normal course. They must be true additionalities.
- (5) Cash can be an amenity, but it must be set aside in a trust and earmarked for specific community improvements.
- (6) Don't give away the store. Make sure there is parity between the incentives offered and amenities received.

Questions?

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