Zoning and the Comprehensive Plan

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ZONING AND THE COMPREHENSIVE PLAN

Introduction

New York's zoning enabling statutes (the state statutes which give cities, towns and villages the power to enact local zoning laws) all require that zoning laws be adopted in accordance with a comprehensive plan. The comprehensive plan should provide the backbone for the local zoning law.

To understand the power to zone, one must understand the comprehensive plan. While the Town Law, General City Law and the Village Law provide a general definition of a comprehensive plan, the adoption of a formal plan under these statutes is voluntary.

Comprehensive Plan Statutes

Town Law §272-a
Village Law §7-722
General City Law §28-a

Communities which choose not to utilize the process provided in the statutes still must comply with the comprehensive plan requirement. They do this by referring to the substantial body of court decisions which historically have provided New York's understanding of the comprehensive plan.

This publication will describe how the term comprehensive plan came into being, will analyze case law to provide the court-defined meaning of the term, and will set forth the means to adopt a formal comprehensive plan under the enabling statutes.

Historical Perspective

In describing the historical development of zoning and the events precipitating the adoption in New York of the state's first zoning enabling act, Edward M. Bassett wrote:

> It may fairly be said, however, that the zoning enabling act embodied in the New York City charter and the building zone resolution of that city constituted the first comprehensive zoning of height, area, and use in this country.[1]

He described earlier predecessors to *comprehensive zoning* as having a single purpose only, such as to establish height limitations or to prohibit certain uses.[2] The concept of *comprehensiveness*, both as to purposes and geographical scope, distinguished the first modern zoning laws. It was their comprehensiveness which caused early proponents of zoning to fear whether zoning local laws could withstand constitutional attack, yet, it was the laws' comprehensiveness which ultimately protected them from declarations of unconstitutionality. The concept of *comprehensiveness* still applies, in the statutory requirement that zoning be adopted in accordance with a *comprehensive (or well considered) plan*.[3]

Early Challenges to Zoning

Common law has long recognized that certain uses of property were, or could be, so undesirable that neighboring land owners or the community as a whole had the right to request the uses' termination. This is the theory of *nuisance*. [4] Governmental regulation of the use of property through general legislative enactment, that is, through the local zoning ordinance, went well beyond common law nuisance, but the seminal United States Supreme Court case upholding regulation of land use through zoning, *Euclid v. Ambler Realty Co.*, looked to the traditional law of nuisance, as it considered whether government possessed the power to restrict use of land by general application of law:

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality....nuisance may be merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.[5]

The Court looked to states' case law and, most importantly for this analysis, works of planning experts of the time:

> The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents....
>
> If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[6]

The comprehensive scope of zoning was used in *Ambler* to justify a general finding of constitutionality, but the door was left open for constitutional challenge should a zoning ordinance be found to lack a substantial relationship to the public health, safety, morals or general welfare. How could a community evidence that it had properly fashioned its zoning ordinance in light of the "circumstances and the locality?"

The Zoning Enabling Laws

Early zoning enabling laws were fashioned with the view that zoning risked being declared unconstitutional because it had the potential to severely limit zealously guarded property rights.[7] From the lawyer's point of view, the comprehensive plan provided the means to connect the circumstances and the locality to the zoning ordinance. It was, and is, insurance that the ordinance is reasonable and "bears a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end."[8]

The comprehensive plan is insurance that the ordinance is reasonable and bears a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end.

From the planner's perspective, the comprehensive plan provided the means to, in theory, remove the planning process from immediate political considerations and allow for more objective analysis of community growth and need:

> Inasmuch as [the zoning laws] have an intimate effect upon land they should be framed so far as possible with the knowledge and cooperation of the landowners. The enabling act requires preparatory procedure to make sure that the system is worked out as a coordinated whole. This involves the appointment of a zoning commission to prepare the proposed ordinance and zoning map, the making of a preliminary report to the local legislative body, the holding of preliminary hearings thereon, and the holding of a public hearing by the legislative body. The ordinary state enabling act provides checks and precautions to prevent hasty and impulsive changes.[9]

In Accordance with a Comprehensive Plan

In New York, the zoning enabling acts continue to require that zoning be undertaken "in accord with a well considered plan"[10] or "in accordance with a comprehensive plan."[11] Unless the town, city or village has adopted a comprehensive plan document pursuant to and as defined by recently enacted statutory authority,[12] which is described later in this publication, local officials *must* refer to the extensive body of case law to determine how zoning can meet the comprehensive plan requirement.

"Comprehensive" is defined as "[i]ncluding much; comprising many things; having a wide scope; inclusive..." and "plan" is defined as "[a] method or scheme of action; a way proposed to carry out a design; project...."[13] Put together, the words "comprehensive plan" intimate that the way proposed must be capable of being discerned and it must be inclusive. Case law has agreed.

From the planner's perspective, a plan is "inclusive" and comprehensive when it addresses a wide range of planning issues, perhaps through a series of component, topic-related plans. These could include such matters as transportation patterns and future needs, natural and built resources inventories, population trends and so forth. From the lawyer's point of view, a zoning law or

amendment is "inclusive" when it has been enacted after and in accordance with careful study and consideration and when it carries out a greater "purpose" of the community.

A common theme in the cases interpreting the requirement that zoning be in accordance with a comprehensive plan is that the zoning law (or amendment) be carefully studied before it is enacted. In *Thomas v. Town of Bedford,*[14] the Court of Appeals upheld a rezoning from residential to research-office use, finding that it had been enacted after careful study and consultation with experts and after extensive public hearings. In *Udell v. Haas*, the Court of Appeals stated that "one of the key factors" to be used by the courts in determining whether zoning is "in accordance with a comprehensive plan" is whether forethought has been given to the community's land use problems. The court went on to say:

> Where a community, after a careful and deliberate review of 'the present and reasonably foreseeable needs of the community', adopts a general developmental policy for the community as a whole and amends its zoning law in accordance with that plan, courts can have some confidence that the public interest is being served.[15]

Where a local government can show that suitable studies and deliberations preceded adoption of the zoning law amendment, the potential that a zoning action reflects comprehensive planning, increases. To this end, environmental assessments and impact statements can support a conclusion that a local zoning enactment "reflected a sufficient degree of comprehensiveness of planning."[16]

Environmental Reviews and Zoning

It is not unusual for State Environmental Quality Review Act (SEQRA) challenges and comprehensive planning challenges to go hand in hand. SEQRA requires expansive environmental review and thoughtful consideration of alternatives to governmental actions.[17]

Both the broad definition of "environment" for SEQRA purposes and the process of evaluating environmental impacts under SEQRA "afford[s] an excellent opportunity for the local decision maker to weigh factors that courts have traditionally used in looking at whether an underlying context of comprehensive planning was maintained."[18] Briefly stated, adoption and amendment of zoning laws are "actions" for purposes of SEQRA.[19] Prior to undertaking any action, a government agency must determine the "significance" of the action by evaluating potential significant adverse environmental impacts the action may have.[20] Actions which may include the potential for at least one significant adverse environmental impact require the preparation of an environmental impact statement (EIS).[21] An EIS "must assemble relevant and material facts upon which an agency's decision is to be made. It must analyze the significant adverse impacts and evaluate all reasonable alternatives."[22]

Substantive compliance with SEQRA has been defined by the courts to require that a governmental agency take a "hard look" at the record, which includes potential environmental impacts and alternative decisions, and make a "reasoned elaboration of the basis for its decision.[23] This standard is similar to the *Udell v. Haas* requirement for "careful and deliberate review" as evidencing comprehensive planning, discussed above. Perhaps for this reason, evidence that a local legislative

body studied a well-prepared EIS prior to adoption of a zoning law amendment has been upheld by the courts as meeting the comprehensive planning requirements.[24]

Spot Zoning

Perhaps the most important theme in the cases interpreting the requirement that zoning be in accordance with a comprehensive plan is the language in the leading cases indicating that the courts will look to see whether zoning is for the benefit of the whole community. Zoning must further the general welfare, but this requirement does not preclude future amendment to the zoning law in order "to respond to changed conditions in the community... . The question is whether the change "conflict[s] with the fundamental land use policies and development plans of the community ... ."[25]

A review of cases relating to "spot zoning" is illustrative, for spot zoning is the antithesis of zoning undertaken in accordance with a well-considered plan. Spot zoning stereotypically refers to the rezoning of a small parcel of land to a use category different from the surrounding area.

The question of whether a rezoning constitutes spot zoning should be answered by determining whether the rezoning was done to benefit individual owners rather than pursuant to a comprehensive plan for the general welfare of the community

Size of the parcel is relevant but not determinative, however, for illegal "spot zoning" occurs whenever the "change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community."[26] The landmark case in the field of spot zoning is *Rogers v. Village of Tarrytown*,[27] in which the Court of Appeals defined the rezoning of relatively small parcels of land in terms of the comprehensive planning requirement:

> Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community. [28]

The fact that rezoning will benefit the landowner will not, on its own, invalidate the rezoning action, but, to be in accordance with a comprehensive plan, the rezoning must also further some clearly identified public purpose. In *Save Our Forest Action Coalition, Inc. v. City of Kingston,* a 107 acre parcel within a residential district was rezoned light industrial in order to accommodate a local manufacturing firm and the local development corporation. The court rejected a spot zoning challenge:

> Here, the primary motivation for the zoning amendment was to support local economic development through retention of the City's largest employer and to reap associated economic and tax benefits in connection with the development of a business park. The determination was made after an extensive review process, including a consideration of the impact on adjoining residential areas, consistency with existing zoning plans, environmental concerns and the availability of other

> suitable sites....In our view, the record discloses that sufficient 'forethought has been given to the community's land use problems' ... and that there was a 'reasonable relation' between the rezoning determination and the worthwhile goal of improving the economic health of the community....[citations omitted] [29]

If the record shows that the zoning amendment seeks to accomplish valid public purposes and that "sufficient forethought" has been given it, the comprehensive plan requirement is met, even where the zoning amendment affords distinct treatment to a relatively small parcel.[30] Hence, if the evidence reveals that the rezoning was not enacted to benefit the community as a whole or was enacted without regard to the community, the rezoning will fail to meet the comprehensive plan requirement.[31]

Regional Housing and the Comprehensive Plan

Zoning must be enacted to benefit the community, but what constitutes a "community" when housing is at issue?

In 1975, the Court of Appeals decided the case of *Berenson v. Town of New Castle*[32] which broadened the concept of comprehensive plans to include regional needs. Although the case is often cited for its impact on so-called "exclusionary zoning" practices, the decision actually extends the statutory mandate that zoning be in accordance with a comprehensive plan.

Zoning regulations should be based on a comprehensive plan which examines the housing needs of the community and the region

The zoning ordinance in question in *Berenson* excluded multi-family residential housing as a permitted use in any zoning district in the town. The court recognized the right of a municipality to set up various types of use zones, with no requirement that each must contain some sort of housing balance, stating that its concern was not whether each zone was a balanced community but whether the municipality itself was to be "a balanced and integrated community." The court then proceeded to lay down a test for this determination, the first branch of which was that a "properly balanced and well-ordered plan for the community" had been provided (citing *Udell v. Haas*, *supra*). It is the second branch of the test that expands the concept of comprehensive plans, namely, whether a zoning ordinance evidences that consideration is given to regional needs and requirements. The court stated that:

> ... There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met. Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality. Thus, the court, in examining an ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities.[33]

The "regional needs" branch of the *Berenson* case has not been expanded beyond consideration of regional housing needs, and neither does it require that a particular development project include low-income housing.[34] Instead, the question is whether the needs of the community and the region have been accommodated somewhere in the zoning law.[35]

Evidence of Comprehensive Planning

Finally, how may a comprehensive plan be discerned? A comprehensive plan need not be a single document. It need not be a formally adopted plan.[36] Instead, whether an inclusive scheme of action exists or has been undertaken is an evidentiary matter more complex than pulling out the single planning document. For instance, the courts will find evidence of a plan in the zoning actions themselves, if those actions are in furtherance of a land use policy which benefits the entire community.[37] In *Asian Americans for Equality v. Koch*, the Court of Appeals stated:

> A well-considered plan need not be contained in a single document; indeed, it need not be written at all. The court may satisfy itself that the municipality has a well-considered plan and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies... .[38]

Environmental reviews, impact statements and findings under the State Environmental Quality Review Act could evidence the plan.[39] Legislative findings relating to the adoption of an ordinance or local law could evidence the plan,[40] as could minutes of the legislative body[41] and relevant studies.[42] A previously adopted master plan or comprehensive plan may evidence comprehensive planning.[43] In *Town of Bedford v. Village of Mount Kisco* the Court of Appeals held that:

> ...zoning changes must indeed be consonant with a total planning strategy, reflecting consideration of the needs of the community....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. Indeed sound planning inherently calls for recognition of the dynamics of change.[citations omitted][44]

Examples of where courts have found evidence of comprehensive planning

- ***a zoning law***
- ***environmental reviews & findings***
- ***legislative findings relating to adoption of a law or ordinance***
- ***minutes of the legislative body***
- ***studies***
- ***previously adopted plan***

What must the evidence that comprehensive planning occurred, show? The "courts have required the municipal governing body to zone in accordance with a land use policy which is in the interest of the overall community." [45] The local legislative body must show that it has given "some thought to the community's land use problems" [46] and, implicitly, must have fashioned it's zoning as a

regulatory means to address these problems:

> The function of land regulation is to implement a plan for the future development of the community....Its exercise is constitutional only if the restrictions are necessary to protect the public health, safety or welfare. The requirement of a comprehensive or well-considered plan not only insures that local authorities act for the benefit of the community as a whole but protects individuals from arbitrary restrictions on the use of their land... .[47]

The connection between *planning* and *regulation* serves both the underlying constitutional need to find a reasonable relationship between the ends sought to be achieved and the means chosen, and the strong underlying policy concern that regulation through zoning serve the entire community. The "challenged zoning resolution itself need not be a well-considered plan, as long as it is in accord with one."[48] Whether the zoning law or amendment was adopted pursuant to a comprehensive planning *process* is an evidentiary question which may be answered by a single comprehensive plan document, minutes of legislative meetings, the text of the zoning law itself and environmental impact statements, among other means.

Adoption of a Comprehensive Plan

Until recently, the court-fashioned definition of "comprehensive plan" alone provided guidance to towns, villages and cities as they drafted and enacted zoning laws. While the court-fashioned definition provides guidance in determining whether a zoning law has a rational basis, it does not require, or allude to, a process by which a local government may create, debate and adopt long range visions for their communities. Recent statutory change has provided structure and clarity to the term comprehensive plan.

Chapter 209 of the Laws of 1993 amended the zoning enabling statutes to define and provide the process for adopting a "comprehensive plan."[49] Under these provisions, a comprehensive plan:

> ... means the materials, written and /or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement,

What may a comprehensive plan address?

Goals, objectives and policies for the immediate and long-range enhancement growth and development of the community

Existing and proposed land uses, and their intensity

Agricultural uses, historical resources, cultural resources, natural resources, coastal resources and sensitive environmental areas

Population, demographic and socio-economic trends

Transportation facilities

Utilities and infrastructure

Housing resources and needs

Infrastructure

Other governmental plans and regional needs;

Economic development;

Proposed means to implement goals, objectives and policies.

growth and development of the town located outside the limits of any incorporated village or city. [50]

Adoption of a comprehensive plan pursuant to these provisions is voluntary. If a city, town or village chooses to utilize this process, the resultant plan may range from a set of policy or vision statements to a very lengthy document composed of many subject-specific component plans (e.g. transportation, natural resources, historic resources, population statistics, etc.). Once adopted, however, all land use regulations must be in accordance with it.[51] This usually means (though not mandated) that plan adoption is followed by the adoption of a series of zoning laws designed to 'implement' the comprehensive plan. For these communities, then, the statutory requirement that zoning be "in accordance with" a comprehensive or well-considered plan refers to the comprehensive plan adopted pursuant to Town Law, §272-a, Village Law, §7-722 or General City Law, §28-a, as the case may be. For those communities which choose not to adopt a comprehensive plan pursuant to these statutes, the traditional, court-fashioned definition continues to apply. [52]

A comprehensive plan may include, "at the level of detail adapted to the special requirements of the town," statements of goals, objectives or policies, transportation facilities, agricultural practices, housing resources, existing land uses, educational and cultural facilities, parklands, economic strategies and anything else consistent with the orderly growth and development of the local government.[53] The plan is adopted by the local legislative body, but may be prepared by the legislative body or, at the direction of the legislative body, by a planning board or special board. If prepared by a planning board or special board, the board shall, by resolution, refer the proposed plan to the local legislative body. [54]

Benefits of a comprehensive plan

- **Provides a process for identifying community resources, long range community needs, and commonly held goals**
- **Provides a process for developing community consensus**
- **Provides a blueprint for future governmental actions**

Local governments considering adopting a comprehensive plan must consider SEQRA procedures as early in their deliberations as possible.[55] Adoption of a comprehensive plan is a "Type 1 action" for purposes of SEQRA review, meaning that it is an action "more likely to require the preparation of an EIS."[56] The local legislative body, as the agency responsible for adopting the plan, would be the "lead agency" and would be responsible for assuring that SEQRA requirements are met.[57]

The board preparing the comprehensive plan must hold one or more public hearings and other meetings, as it deems necessary, to assure full opportunity for citizen participation in the preparation of the proposed plan. [58] Additionally, the legislative body must hold a public hearing on the proposed plan prior to adoption. [59]

The proposed comprehensive plan must be submitted to the appropriate county or regional planning agency for review pursuant to General Municipal Law, §239-m.[60] Comprehensive plans must be periodically reviewed by the local government which has adopted it. [61] Adopted plans and

amendments are filed with the municipal clerk and with the county planning agency. [62]

Once adopted, all land use regulations must be consistent with the comprehensive plan. This will require the local government to consider whether its existing land use laws must be amended before, or at the same time as, adoption of the comprehensive plan. In the future, the plan must be consulted prior to adoption or amendment of any land use regulation. Plans for capital projects of *another governmental agency* on lands included in the adopted comprehensive plan, must take the plan into consideration. [63]

Conclusion

New York requires that zoning be adopted in accordance with a well-considered or comprehensive plan. This requirement reflects both underlying constitutional considerations and a public policy which views zoning as a tool to plan for the future of communities. Over the years the New York courts have defined the comprehensive plan to be the legislative body's process of careful consideration and forethought which results in zoning calculated to serve the general welfare of the community.

Recently the zoning enabling statutes have been amended to provide a process for adoption of a comprehensive plan, a formal planning document, which can provide goals and objectives for that community. Once adopted, land use regulations must be consistent with it. For those communities which choose not to adopt a formal comprehensive plan pursuant to these statutes, the requirement that zoning be "in accordance" with a comprehensive plan still applies, but the long-standing court-fashioned definition of comprehensive planning, continues.

ENDNOTES

1. *Zoning*: *The Laws, Administration, and Court Decisions During the First Twenty Years,* Bassett, Edward M. (1940), p.23.

2. *Id.* at 22-23.

3. Town Law, §263,Village Law, §7-704, General City Law, §20(25).

4. *Zoning and Land Use Controls*, Rohan, Patrick J. (1998), §16.02[2].

5. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

6. *Id.,* at 394.

7. See *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 370 Footnote 4 (1972); *appeal dismissed* 409 U.S. 1003.

8.*Fred F. French Investing Co., Inc. V. City of New York*, 39 N.Y.2d 587, 596 (1976); *appeal dismissed*, 429 U.S. 990.

9. Bassett, at 28.

10. General City Law, §20(25).

11. Town Law, §263 and Village Law, §7-704.

12. General City Law, §28-a; Village Law, §7-722; Town Law, §272-a; More about these below.

13. *Webster s New International Dictionary, second edition* (1958).

14. 11 N.Y.2d 428 (1962).

15. 21 N.Y.2d 463, 470 (1968).

16. *Daniels v. Van Voris*, 241 A.D.2d 796, 798 (1997).

17. Environmental Conservation Law, §8-0109 and 6 NYCRR §617.9(b). See, eg. *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668 (1996). Similarly, earlier zoning cases held that the deliberate and careful consideration should include a review of reasonable alternatives. (*Udell v. Haas*, *supra*; *Northeastern Environmental Developers v. Town of Colonie*, 72 A.D.2d 881 (1979); *appeal dismissed*, 49 N.Y.2d 800.

18. See *SEQRA and the Zoning Law s Requirement of a Comprehensive Plan*, Damsky, Sheldon W., 46 ALBANY LAW REVIEW 1292, 1297 (1982).

19. 6 NYCRR §617.2(b)(3).

20. 6 NYCRR §617.7(c).

21. 6 NYCRR §617.7(a)(1).

22. 6 NYCRR §617.9(b)(1).

23. This is commonly referred to as the "hard look test." *H.O.M.E.S. v. New York State Urban Development Corp.*; 69 A.D.2d 222 (1979); *Matter of Jackson v. New York State Urban Development Corp*., 67 N.Y.2d 400 (1986); *Apkan v. Koch*, 75 N.Y.2d 561 (1990); *motion to amend denied*, 76 N.Y.2d 846; *Kahn v. Pasnik*, 90 N.Y.2d 569 (1997).

24. See *Gernatt Asphalt Products, Inc., supra* and *Neville v. Koch, supra; Skenesborough Stone, Inc., v. Village of Whitehall*, 679 N.Y.S.2d 727 (1998); *Akpan v. Koch*, *supra*.

25. *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, *supra* at 685 (1996) citing *Udell v. Haas*, 21 N.Y.2d 463, 472 (1968).

26. *Cannon v. Murphy*, 196 A.D.2d 498, at 500 (1993), *leave for appeal dismissed*, 79 N.Y.2d 757; citing *Collard v. Incorporated Village of Flower Hill*, 52 N.Y.2d 594, 600 (1981).

27. *Rogers v. Village of Tarrytown,* 302 N.Y. 115 (1951).

28. *Id.,* at 124.

29. 246 A.D.2d 217, 221-222 (1998).

30. Similarly, floating zones, which are zoning districts created within a zoning law for "landing" on the zoning map at some future date, have been upheld in light of spot zoning challenges. *Beyer v. Burns*, 150 Misc.2d 10 (1991).

31. *Cannon v. Murphy*, *supra*; *Schoonmaker Homes - John Steinberg, Inc. v. Village of Maybrook*, 178 A.D.2d 722 (1991), *leave to appeal denied*, 79 N.Y.2d 757; *Lazore v. Board of Trustees of Village of Messena,* 191 A.D.2d 764 (1993); *Daniels v. VanVoris, supra*; *Rye Citizens Committee v. Board of Trustees for The Village of Port Chester*, 671 N.Y.S.2d 528 (1998).

32. 38 N.Y.2d 102 (1975).

33. 38 N.Y.2d 102, 110-111 (1975).

34. In *Gernatt Asphalt*, *supra*, the Court of Appeals specifically declined to expand the *Berenson* test for exclusionary zoning to encompass industrial uses.

35. *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 133 (1988).

36. *Neville v. Koch*, 173 A.D.2d 323 (1991) *affirmed* 79 N.Y.2d 416.

37. In *Gernatt Asphalt Products, Inc. supra,* at 685 the Court of Appeals found that "[t]he amendments at issue in this case are, by their very nature, in accord with the comprehensive plan

manifested in the Zoning Ordinance of the Town of Sardinia originally enacted."

38. 72 N.Y.2d 121, 131.

39. Damsky, *supra*; *Schoonmaker Homes - John Steinberg, Inc. v. Village of Maybrook, supra*; *Rye Citizens Committee v. Board of Trustees for Village of Port Chester*, *supra.*

40. This was the case in *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178 (1973). In *Gernatt Asphalt Products, Inc.* the Court of Appeals upheld the town's zoning amendment after being able to say that "the record reveals that..." and "the record further reveals that... ." Conversely, in *Eggert v. Town Board of the Town of Westfield*, 217 A.D.2d 975, 181(1995) the relevant zoning amendment was struck down for failure to comply with the comprehensive plan requirement with the explanation that, "... [t]he record does not contain any detailed explanation by the Town Board... ."

41. *Lazore v. Board of Trustees for Village of Massena*, *supra*.

42. *Cohen v. Vecchio*, 197 A.D.2d 499 (1993); *leave to appeal denied*, 83 N.Y.2d 751.

43. *Tilles Investment Co. v. Town of Huntington*, 74 N.Y.2d 885 (1989). This case also implies that subsequent amendments to a zoning ordinance need not indicate an intent to abandon a previously adopted plan. The rule in this case would <u>not</u> apply, however, to a comprehensive plan adopted pursuant to Town Law, §272-a, Village Law, §7-722 or General City Law, §28-a as adopted by Chapter 209 of the Laws of 1993 (see discussion, *infra.*).

44. 33 N.Y.2d 178, 188 (1973).

45. Damsky, at 1295.

46. *Eggert*, at 181.

47. *Asian Americans*, at 131.

48. *Neville v. Koch*, *supra* at 324.

49. Town Law, §272-a; Village Law, §7-722; and General City Law, §28-a.

50. Town Law, §272-a(2)(a); similar definitions exist for villages (Village Law, §7-722(2)(a)) and cities (General City Law, §28-a(3)(a)).

51. Town Law, §272-a(11); Village Law, §7-722(11); General City Law, §28-a(12).

52. The new statutes specify that "[n]othing herein shall be deemed to affect the status or 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).

53. Town Law, §272-a(3); Village Law, §7-722(3); General City Law, §28-a(4).

54. Town Law, §272-a(4); Village Law, §7-722(4); General City Law, §28-a(5).

55. Town Law §272-a(8); Village Law §7-722(8); General City Law §28-a(9). See *King v. Saratoga Board of Supervisors*, 89 N.Y.2d 341 (1996).

56. 6 NYCRR §617.4(a); 6 NYCRR §617.4(b)(1).

57. 6 NYCRR §617.2(u); 6 NYCRR §617.6(b); 6 NYCRR §617.7(a); 6 NYCRR §617.9(a); 6 NYCRR §617.11. See *Matter of Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674 (1988).

58. Town Law, §272-a(6); Village Law, §7-722(6); General City Law, §28-a(7).

59. *Id.,* Note that a lead agency may hold a public hearing under SEQRA, after acceptance of a draft EIS. 6 NYCRR §617.9(a)(4). This hearing may be held concurrently with hearings under the zoning enabling laws so long as both statutory time periods for notice of the hearings are met. See 6 NYCRR §617.9(a)(4). As to the SEQRA hearing, note the post-hearing comment period. 6 NYCRR §617.9(a)(4)(iii).

60. Town Law §272-a(5)(b); Village Law §7-722(5)(b); General City Law, §28-a(6)(b).

61. Town Law §272-a(10); Village Law §7-722(10); General City Law §28-a(11).

62. Town Law §272-a(12); Village Law §7-722(12); General City Law §28-a(13).

63. Town Law, §272-a(11)(b); Village Law, §7-722(11)(b); General City Law, §28-a (12)(b).