

WHITEMAN
OSTERMAN
& HANNA LLP

County Referrals A to Z

New York Planning Federation
2015 Annual Planning and Zoning Conference

David Everett, Esq.

&

Genevieve Trigg, Esq.

The NYS General Municipal Law

Article 12-B of the New York State General Municipal Law (“GML”) requires that certain types of municipal planning, zoning, and subdivision projects be referred to a county planning agency or a regional planning council before local action be taken on that particular project.



County Referrals: Governing Law

GML § 239-l describes the purpose and policy of county review.

GML § 239-m describes referral procedure of planning and zoning actions.

GML § 239-n describes the referral procedure of subdivision applications.

County Referrals: Purpose

The purpose of the GML referral process is to bring “pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction.”
N.Y. Gen. Mun. L. § 239-1(2).

Inter-community and county-wide considerations include:

- compatibility of various land uses;
- traffic generating characteristics;
- impact of proposed land uses on existing uses;
- protection of community character;
- drainage;
- community facilities;
- impact on existing and proposed county or state institutional or other uses;

Considerations (con't):

- official municipal and county development policies, as may be expressed through comprehensive plans, capital programs or regulatory measures; and
- such other matters as may relate to the public convenience, to governmental efficiency, and to the achieving and maintaining of a satisfactory community environment.

The Referral Process: Parties Involved

Referring body – The city, town or village body responsible for final action on proposed actions.

County planning agency – A county planning board, commission or other agency authorized by the county legislative body to review proposed actions referenced for inter-community or county-wide considerations.

Regional planning council – A regional planning board or agency established pursuant to GML § 239-h.

Actions that Must be Referred

County Referral Required For:

- Adoption or amendment of comprehensive plans
- Adoption or amendment zoning law
- Special use permits
- Site plans
- Use or area variances

Within 500' of:

- Municipal boundary
- State/County park or recreation area
- State/County highway
- County stream/drainage channel
- County/State land with public buildings on it
- Farm operation in State Ag. District (excluding area variances)



Actions that Must be Referred: Cases



- A county planning board is required to review zoning regulations which affect land within 500 feet of state owned land within the Catskill Park. 23 Op.State Compt. 558, 1967.
- State-owned lake was not a “recreation area” within meaning of GML 239-m requiring referral of a variance request to the county planning board where the property is located within 500 feet of recreation area. Sacandaga Park Civic Ass'n Inc. v. Zoning Bd. of Appeals of Town of Northampton, 296 A.D.2d 807 (3 Dept. 2002).

Actions that Must be Referred: Cases

- City storm sewer outlet replacement did not require referral to the County. Rodgers v. City of N. Tonawanda, 60 A.D.3d 1379 (4th Dept. 2009).
- Town's adoption of local law, under its police and zoning powers, prohibiting dumpings and incinerators in the Town did not require referral to the County. Drown Inc. v. Town Bd. of Town of Ellenburg, 188 A.D.2d 850, 851(3d Dept. 1992).

- GML 239-m does not direct how to measure the 500'.
- Courts require the measurement to be rational, not arbitrary.
- When in doubt, make the referral.
- Planning Board's measurement of the 500' from the area of the proposed use closest to a State recreation area was upheld and rational. Woodland Cmty. Ass'n v. Planning Bd. of Town of Shandaken, 52 A.D.3d 991, 993 (3d Dept. 2008)

It is also important to keep in mind that the county planning agency or regional planning council may enter into an agreement with the referring body or other duly authorized body of a city, town or village to provide that certain proposed actions are of local, rather than inter-community or county-wide concern, and are not subject to referral under this section. GML § 239-m(3)(c).

Agreements on Referrals: Examples

A municipality and county planning agency can mutually agree that certain smaller projects, among others, do not warrant referral because they have no identifiable county-wide or inter-community impacts:

- Area variances for residential dwellings;
- Any variance, site plan review or special permit for a temporary use;
- Any variance, site plan review or special permit required to establish a permitted home occupation within an existing residence or accessory structure;
- Any variance, site plan or special permit required for the expansion of an existing business or commercial use providing the expansion is located in a side or rear yard of the parcel and expansion does not exceed 50% of the existing structure;

Agreements on Referrals: Examples

Examples (continued) of small projects that do not warrant referral:

- Any variance, site plan review or special permit required for the establishment of a residential use on the second floor of a structure whose ground floor is occupied by a business or commercial use;
- Any action by a local municipal board that would establish a temporary developmental moratorium provided the moratorium does not exceed 3 months; and
- Any variance required pursuant to a Historic District Review that deals with architectural materials or features of an existing or new structure.

Agreements on Referrals

- Minimizes unnecessary review time by the county for small projects without impacts on county or state resources.
- Minimizes delays in local land use review process
- Agreements can be formalized by resolutions adopted by the county planning board and the referring agency.

Materials to be Referred

GML § 239-m requires that a “**full statement of such proposed action**” be submitted to the county planning agency by the referring body.

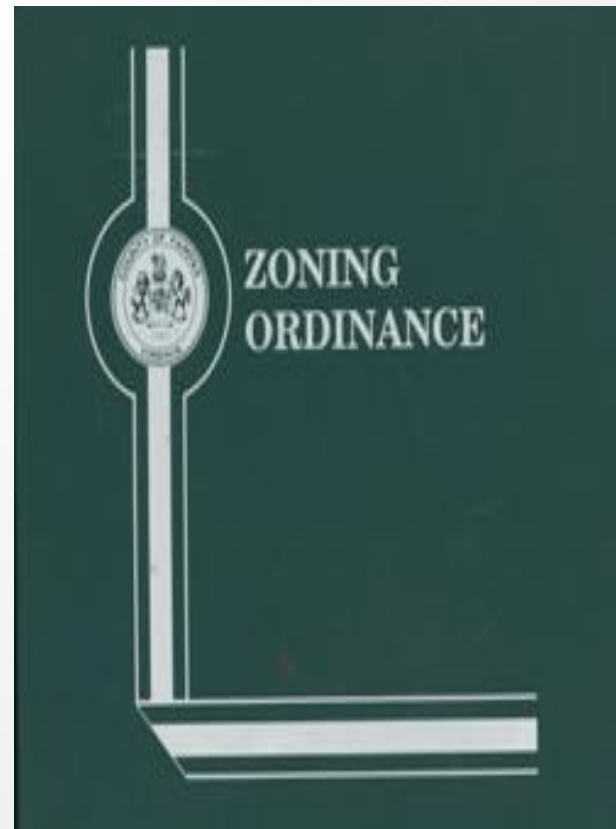


A “full statement” typically includes:

- All materials required by and submitted to the local board as an application on a proposed action;
- All materials required by and submitted to the local board in order to make its determination of significance under SEQRA, including a completed environmental assessment form (“EAF” – Part 1 only);
- Any additional materials agreed upon by the referring body and the county planning board.

Materials to be Referred: Zoning Laws

- For new zoning, the complete text of the new zoning ordinance or local law.
- For zoning amendments, the complete text of the amended law or ordinance and revisions to existing provisions.



Materials to be Referred: Area and Use Variances

For area and use variances, an explanation that justifies the need for a variance in accordance with criteria set forth in state statute (i.e. the applicant's written demonstration that they or the land in question meet the tests for the granting of a variance) should be provided to the county planning agency.

Materials to be Referred: Agricultural Districts

If the project is within 500' of farm operation located in an Agricultural District, under Agriculture and Markets Law 305-a, an Agricultural Data Statement should be referred to the county planning agency as well.



Courts generally hold that as long as the county planning agency has all the materials that the referring body would need to make its determination, the materials are sufficient.

The fact that the Town Planning Board did not refer Parts 2 and 3 of the EAF did not invalidate the referral because the County Planning Board had in its possession the same material that the Town Planning Board was considering in making its determination of significance.

Batavia First v. Town of Batavia,
26 A.D.3d 840 (4th Dept. 2006)

A town planning board did not fail to provide the county agency with all statutorily required materials, where, at time of its recommendation, the agency had before it all the studies and documentation that the planning board considered in issuing its resolution.

Basha Kill Area Ass'n v. Planning Bd. of Town of Mamakating,
46 A.D.3d 1309 (3 Dept. 2007)

Materials to be Referred

- The town board's submission to the county planning board regarding proposed zoning changes, along with a draft generic environmental impact statement (DGEIS) prepared by the applicant contained the requisite full statement of the proposed zoning action so as to comply with GML § 239-m.
- The DGEIS was an adequate substitute for the completed environmental assessment form that was required.

Fleckenstein v. Town Of Porter And Chemical Waste Management, LLC. 309 A.D.2d 1188 (4 Dept. 2003).

Materials to be Referred

- All items received by the local board after referral to the county planning agency must be forwarded on to the county planning agency.
- If the county planning agency finds that there are materials missing they will generally notify the local board so that the missing material can be submitted.

Materials to be Referred



- Some county planning agencies may have additional requirements, such as a cover letter, that must accompany all referrals. Be sure to contact your county planning agency for any additional referral requirements.
- Avoid having applicants make referrals directly to the county. The referring body should officially make the referral.

Failure to Make Referral

Failure to comply with GML § 239-m is not a mere procedural irregularity, but rather “a jurisdictional defect involving the validity of a legislative act”. Lamar Adver. of Penn, LLC v. Vill. of Marathon, 24 A.D.3d 1011, 1012 (3d Dept. 2005)(quoting Matter of Zelnick v. Small, 268 A.D.2d 527, 529 (2d Dept. 2000)).

The result of failing to refer an action to the county planning agency, is that the action will be null and void.

Timing Considerations

- 10 day notice before public hearing must be provided to the county with a “full statement”
- The county planning agency shall review and reply within 30 days after receipt of a full statement of any proposed action (unless otherwise agreed upon by the county and referring body)
- The date of receipt is the postmark date, if mailed, or the date of delivery, if hand-delivered.



Timing Considerations

- If a county planning agency determines more time is needed to review a referral, it may approach the referring body and, if mutually agreeable, arrange for an extension of the review period.
- Municipalities should avoid requesting expedited reviews by the county and must factor the county's time to reply when scheduling votes on actions that are subject to GML §239-m referral.

- If a county planning agency or regional planning council report is received after the 30 days or such period as may be agreed upon, but is received two or more days prior to a meeting at which the referring body will take final action (i.e., vote on the project), the county's recommendations must be considered.

If no reply from the county planning board has been received within the 30 day time period, the referring body may take action without county reply.



Timing Considerations

- The referring body does not have jurisdiction to take action until the 30 day wait period has expired.
- Courts have held that acting without GML §239-m jurisdiction is an administrative error, which nullifies the action of the local board.

Frigault v. Town of Richfield Planning Board,
107 A.D.3d 1347 (3d Dept. 2013)

County Planning Agency Review

The county planning agency or regional planning council shall review any proposed action referred for inter-community or county-wide considerations and recommend approval, modification, or disapproval, of the proposed action, or report that the proposed action has no significant county-wide or inter-community impact. GML § 239-m(4)(a).

County Planning Agency Review

County Planning Agency's recommendations can include:

- Advisory comments; and/or
- Binding recommendations



County Planning Agency Review: Advisory Comments

- Advisory comments are helpful insights or suggestions for the local referring board to consider in its review of the application.
- Advisory comments can be ignored by the referring body if they disagree; or
- Referring boards can ask applicant to address advisory comments or make project changes to incorporate advisory comments

County Planning Agency Review: Binding Recommendations

- Binding recommendations either require adherence by the local board or, if the local board feels strongly that the recommendation should not be adhered to, a supermajority vote (i.e. a simple majority plus one) to override the county planning agency's recommendation.
- In doing so, the local board must state in the findings of its decision and in writing to the county planning agency, the rationale for taking that contrary action.

County Planning Agency Review

- An important distinction to make is that the county planning agency does not have actual decision-making or permitting authority for items referred for review under GML §239-1, -m and -n.
- The land use approval process in New York State is overseen by local municipal boards, which have jurisdiction for nearly all procedural matters, including environmental review and public hearings.
- Therefore, the strongest hand that a county planning agency can have is to issue a binding recommendation.
- County planning agencies are not involved agencies under SEQRA and cannot act as a local agency for a local project.

County Planning Agency Review

There are four types of recommendations that a county planning agency can issue:

- Approval
- Modification
- Disapproval
- Local Determination

County Planning Agency Review

Approval: not binding on the municipality;
therefore, no supermajority is needed to disapprove.

Disapproval: a binding recommendation that requires a supermajority vote to take contrary action.

Modification: a binding recommendation requiring that certain changes be made to the application or conditions imposed on the approval. A supermajority vote is required to take contrary action.

County Planning Agency Review

Local Determination: A county planning agency can find that an action is of local concern and defer the decision to the local board alone. The county agency may attach advisory comments to its report for the local board to consider when making its determination.

County Planning Agency Review: Cases

Recommendations of disapproval by the regional planning board with respect to a proposed change of zoning and statement of reasons must be sent to the local board that referred the project in written form. If the planning agency fails to do so, any disapproval will not be effective and no supermajority vote to override will be required. Voelckers v. Guelli, 58 N.Y.2d 170 (1983).

It was unnecessary for a town board to include a statement of reasons for acting contrary to recommendations of the county division of planning and development where the memorandum sent by the division purported to approve the proposed zoning law “with modifications” but did not suggest specific modifications or clearly and unequivocally prescribe a course of action for the town to follow prior to enactment of the zoning law. Weinstein Enterprises, Inc. v. Town of Kent, 135 A.D.2d 625 (2d Dept. 1987).

County Planning Agency Review: Report of Final Action

- Within 30 days after final action, the referring body shall file a report with the county planning agency or regional planning council of the final action that was taken.
- A referring body which acts contrary to a recommendation of modification or disapproval of a proposed action shall set forth the reasons for the contrary action in such report.
- Village board's failure to timely file a report of final action with the county planning department after adopting an amendment to the village zoning law was a mere procedural irregularity that did not warrant annulment of the law.

Marcus v. Board of Trustees of Village of Wesley Hills,
96 A.D.3d 1063 (2 Dept. 2012).

“Re-referral” describes the situation where, after the county planning board has issued its recommendations on an application, revisions are made to the application that are so substantial that re-submission to the county planning board or regional planning council is required.



Ferrari v. Town of Penfield Planning Bd., 181 A.D.2d 149 (4th Dept 1992).

Other Considerations: Constitutional

- A business owner who had been afforded a proper hearing with due notice and an opportunity to present all of his evidence to the local zoning board with respect to his special permit application for approval of business signs was not deprived of any constitutional procedural safeguards by GML 239-1 or -m where the Monroe County Planning Council disapproved the application.
- Absent an affirmative vote of the majority plus one of the ZBA members, the County's disapproval could not be overruled. McEvoy Dodge West Ridge, Inc. v. Zoning Bd. of Appeals of Town of Greece, 69 Misc.2d 55 (Sup. Ct. 1972).

Other Considerations: Procedural

- A county planning commission was not a necessary party to an Article 78 proceeding in which a contract vendee for a parcel of real property challenged the Town of Riverhead Town Board's denial of a special use permit.
- The Town Board had referred the application to the county commission and the commission recommended that the permit be denied.
- The Board did not override the commission's decision by supermajority and thus, the Town's action was the final agency action reviewable in such a proceeding.

Headriver, LLC v. Town Bd. of Town of Riverhead,
2 N.Y.3d 766 (2004).

Contact Us:

David Everett, Esq.

DEverett@woh.com

Genevieve Trigg, Esq.

Gtrigg@woh.com

Whiteman Osterman & Hanna LLP

One Commerce Plaza, Suite 1900

Albany, N.Y. 12260

518-487-7600

www.woh.com

Disclaimer

The information and materials contained on this presentation were prepared by Whiteman Osterman & Hanna LLP for general informational purposes only, and are not intended, and should not be considered, to be legal advice or legal opinion. Transmission, receipt or use of this presentation does not constitute nor create an attorney-client relationship. No recipients of content from this presentation should act, or refrain from acting, based upon any or all of the contents of this presentation. Whiteman Osterman & Hanna LLP, does not wish to represent anyone desiring legal representation based on viewing any material on this presentation where such material does not comply with all laws and rules of professional ethics of the state in which such person is located.

Whiteman Osterman & Hanna LLP does not warrant that the information contained on this presentation is accurate or complete, and hereby disclaims any and all liability to any person for any loss or damage caused by errors or omissions, whether such errors or omissions result from negligence, accident or any other cause.