



Local Control of Natural Gas Drilling Operations in NY

By Todd M. Mathes, Esq.

In accordance with the NYS Environmental Quality Review Act (SEQRA), the Department of Environmental Conservation (DEC) has drafted a supplement to the Generic Environmental Impact Statement (GEIS) which underlies the State's oil, gas and solution mining regulatory program, and collected public comments on the supplemental GEIS through 2009.

The supplemental GEIS discusses potential environmental impacts, mitigation strategies and alternatives to hydraulic fracturing/horizontal well drilling operations in the Marcellus and Utica shale plays. DEC expects to issue a final supplemental GEIS in the late summer/early fall of this year. Accordingly, municipalities throughout the State's Southern Tier are readying for what could be significant development activity within their borders once DEC begins issuing permits to well drillers. This article briefly discusses the scope of authority which New York municipalities may have over such development activity.

The Power to Zone

Oil, gas and solution mining, including horizontal drilling for natural gas in the Marcellus and Utica shale plays, is regulated in New York pursuant to Article 23 of the Environmental Conservation Law (ECL) and its implementing regulations, 6 N.Y.C.R.R. Part 550. ECL §23-0303(2) provides that the State's oil, gas and solution mining regulatory program "supersede(s) all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."

The predominant view of the industry and State municipalities has, accordingly, been that municipalities are preempted from subjecting surface drilling operations and production facilities to, for example, site plan or special use permit review processes set forth under municipal zoning codes and laws. Indeed,

based upon this provision of the ECL, in 1982, a lower court invalidated a town zoning ordinance providing that no oil or gas well could be constructed in the town without prior payment of a \$2,500.00 compliance bond and \$25.00 permit fee. (See *Envirogas, Inc. v. Town of Kiantone*, 112 Misc2d 432 [Erie Co. 1982], *aff'd* 89 A.D.2d 1056.)

However, as set forth below, case law surrounding excavation mining in New York, the NY Constitution and Statute of Local Governments, and a recent decision out of Pennsylvania concerning natural gas drilling somewhat undercut this view and may actually support the proposition that natural gas well drilling operations and production facilities may be subjected to a certain amount of municipal land use control and discretion.

A. *The NY Excavation Mining Analogy*: New York's highest court has held that statutory preemption language similar to the language currently contained under ECL §23-0302(2) does not preclude a municipality from prohibiting the State-regulated activity within a particular municipal zoning district. In *Frew*

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PLANNING NEWS

Library of Congress No. 65-29356
Volume 8, No. 1, Spring 2010
Published by
New York Planning Federation
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Albany, NY 12207
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Website: www.nypf.org

The New York Planning Federation also maintains a toll-free number for members at 800 366 NYPF.

NEW YORK PLANNING FEDERATION

is a non-profit membership organization established in 1937. Our mission is to promote sound planning and zoning practice throughout New York State. Membership, which currently includes nearly 10,000 individuals, is open and welcome to anyone supporting this mission. Membership categories include municipalities, counties, public organizations, private businesses, individuals and libraries.

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welcomes comments from its readers. Manuscripts may be submitted for possible publication. Call the newsletter editor, Lael Locke, to discuss your ideas. If published, such articles may be edited to conform with format requirements and become the property of Planning News. The opinions and views expressed in Planning News are those of the authors and do not necessarily represent the views of the NYPF.

From the Executive Director



Spring is a time of change and embracing new endeavors. The New York Planning Federation is also going through a growing season and, recently, many new challenges and opportunities have been presented to us.

Our Board has been diligently working on a strategic plan to meet the goals and objectives of our organization; the plan will be presented to our membership at the 2010 annual conference in Lake Placid. One of the key items identified in the plan was the need to return to downtown Albany, and we will be moving back there on May 1. Please feel free to stop by our office when in town and use us as a resource for any planning issues you may have.

Everyone is aware of the financial crisis with which the state has been struggling; many training opportunities that had previously been afforded to local communities are no longer available. As a result of fewer individualized state training services, the NYPF has been asked to help our members by providing localized training. In March, we provided two training sessions for planning and zoning board members in Dutchess County; an intensive four-hour training session in the Town of Lafayette in the southern tier; and participated in a training program held in Schuylar County. Next month we are scheduled to provide four more training sessions in Sullivan County and also anticipate working with Columbia County's planning and zoning boards. We are updating our training materials and anticipate several requests for us to provide help to our ever-growing membership.

As always, the staff of the Planning Federation has worked above and beyond their job duties: Lael Locke never says no to any assignment or research asked of her; and Theresa Zakrewski has been working double duty since Stephanie Anderson's unfortunate accident in early February. We anticipate that Stephanie will be back in the office soon, so we can continue to benefit from her experience and the many contributions she has made to the NYPF since joining us last July.

We have a new employee who joined our office in February: Paul Gilbert is our newest star and, although she has only been with us about a month, has jumped in with both feet to help with training, writing and research. Paula has an undergraduate degree in planning and is currently completing her master's degree program in City and Regional Planning from SUNY Albany. She has worked for a land use attorney and is happy to bring her knowledge, skills and abilities to the NYPF.

We are currently in the process of writing new training modules, as well as a new planning and zoning guide, and also exploring updating our website. Please make sure that we have your proper contact information, including phone/fax number and email address so that we can reach you with information on any new programs that will be conducted. Happy Spring!

Judy Breselor, AICP
Executive Director NYPF

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Agricultural Protection Zoning: How well has it worked?

By Joel Russell

By Though local governments in the Hudson Valley have adopted various forms of land-use regulatory reform to protect agriculture during the past 20 years, very little information exists about how well these efforts have succeeded.

This article is the result of a 2009 study conducted by the author for the Glynwood Center in Cold Spring, NY. The original intention of the project was to develop two pilot case studies through interviews with local and county officials familiar with the results produced by zoning reforms. As the project evolved, it became apparent that the results would be more worthwhile if the analysis looked at a wider range of communities in order to generalize lessons learned.

While many books and articles have been written about agricultural and other forms of natural resource protection zoning, the existing literature focuses almost exclusively on tools and techniques, rather than empirically assessing their effect. Not surprisingly, the best reports look at how a wide variety of techniques work together synergistically to protect farmland, rather than attempting to isolate the role played by zoning.

Summary of Findings

Farmland protection zoning is never a sufficient condition for farmland preservation, and turns out to be a relatively minor factor compared to others. Communities with successful farmland protection programs have a distinctive culture in which farming, farmers and farmland are all valued for their own sake, not just for scenic value or as a way to prevent residential or commercial land development.

In addition to the cultural factor, the most important factors in successful farmland protection are leadership from within the agricultural community and support from farmers; a viable farm economy; good communication between the farm and non-farm community; stable leadership from elected officials; and a willingness by the public to support farmland preservation through direct expenditures for the purchase of development rights.

While the most successful agricultural preservation programs surveyed involved more protective zoning than found in other communities, some municipalities with agricultural protection zoning were not especially successful at preserving farmland because the other factors were not present. It stands to reason that a community that supports farming will support zoning that protects farmland, but only insofar as it is not perceived as a threat by farmers. Relying primarily on zoning to preserve land is usually perceived by farmers as taking something away from them without paying for it. A municipality's willingness to tax itself in order to preserve farmland sends a message to farmers that their community is willing to share the cost of land preservation. In the end, it is important to pass the right zoning, but even more important to do so through a process that brings a community together and strengthens the culture of agricultural support.

Successful Community Examples

Warwick: The Town of Warwick, in Orange County, is generally considered one of the greatest success stories in farmland conservation in the NYC metropolitan area. Those closest to the issue attribute the success of Warwick's program to a combination of factors, including a long tradition of concern for working farms and farmers; a community consensus on the value of local agriculture; strong and consistent leadership both within the farm community and within the town overall; and the town's willingness to implement a Purchase of Development Rights (PDR) program.

Warwick's PDR program was originally established in 1999 by a bond referendum. It is currently funded through a Community Preservation Fund (CPF) by a 0.75% property tax surcharge, exempting the first \$100,000 in value of improved land. The CPF required state enabling legislation and was approved in a 2006 local referendum. As of January, 2009, it had raised \$1.3 million which leveraged state, county, federal and non-profit money. So far, 13 farms have been protected, encompassing 2,500 acres; total funds raised have been leveraged to \$18 million.

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Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126 (1987), the Court of Appeals was asked to determine whether a distinction existed between the impermissible regulation of the extractive mining industry within the scope of the State's regulatory program, and the permissible exercise of zoning and municipal home rule authority outside the scope of the State's regulatory program. Although, at the time of the Court's decision the preemption language pertaining to the extractive mining industry expressly "*preempted all local laws relating to the extractive mining industry*,"¹ the Court did uphold the Town of Carroll's decision to prohibit extractive mining in the Town's AR-2 zoning district. The Court's decision was based, at least in part, on its plain meaning interpretation of the statutory language "*relating to the extractive mining industry*" and its conclusion that the Town's zoning ordinance "*relate[d] not to the extractive mining industry but to an entirely different subject matter and purpose; i.e. 'regulating the location, construction and use of buildings, structures, and the use of land in the Town...'*"

B. The N.Y. Constitution and Statute of Local Governments: Article IX of the NYS Constitution provides broad authority to local governments to enact local laws relating to the safety, health and well-being of persons or property therein. Accordingly, the Constitution directed the State legislature to enact a "*Statute of Local Governments*," and further provided that any legislation that would diminish or impair a power conferred by this Statute be re-enacted during a subsequent term of the legislature. The authority of local governments to regulate the use of land within

their jurisdiction is one of the powers expressly conferred by the Statute of Local Governments (see Statute of Local Gov't. §10(6)). Seemingly, therefore, a New York law that would "drastically curtail" the power of a local government to establish zoning regulations, including ECL §23-0303(2), would be subject to the re-enactment requirement of Article IX §2(b)(1) of the Constitution.² ECL §23-0303(2) was never re-enacted during a subsequent term of the legislature.

C. The Pennsylvania Analogy: Similar to the New York Court's decision in *Frew Run*, a set of decisions recently reached by Pennsylvania's highest court shed some light on the future debate likely to occur between industry proponents and New York municipalities. In *Huntley & Huntley v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (2009), the Pennsylvania Court was asked to determine whether section 602 of the Pennsylvania Oil and Gas Act preempted the Borough of Oakmont's decision to zone-out natural gas well drilling operations. Section 602 of the Pennsylvania Oil and Gas Act provides that municipal ordinances may not "impose conditions, requirements or limitations on the same features of oil and gas operations regulated by the Act." Thus, the Court concluded that the scope of the preemption question implicated by the Borough of Oakmont's decision to zone-out natural gas well drilling operations "distilled to whether the location of a gas well in a particular area of the Borough is a feature of gas well operations that the Act addresses." Although gas well locations are restricted pursuant to section 601.206 of the Act through the inclusion of certain setback requirements, the Court held that the preemp-

¹ ECL §23-2703(2) currently provides that the State's excavation mining regulatory program "[s]upersede[s] all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent a NY local government from (a) enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation or permit; or (b) enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts. Where mining is designated a permissible use in a zoning district and allowed by special use permit, conditions placed on such special use permits shall be limited to the following: (i) ingress and egress to public thoroughfares controlled by the local government; (ii) routing of mineral transport vehicles on roads controlled by the local government; (iii) requirements and conditions as specified in the permit issued by the department under this title concerning setback from property boundaries and public thoroughfare rights-of-way natural or man-made barriers to restrict access, if required, dust control and hours of operation, when such requirements and conditions are established pursuant to subdivision three of section 23-2711 of this title; or (iv) enforcement of reclamation requirements contained in mined land reclamation permits issued by the state." This language was adopted by the State legislature in 1991 as a response to the Court's decision in *Frew Run Gravel Products Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987).

² Notably, however, the Court of Appeals has previously failed to give life to the re-enactment procedure required by Article IX. In *Wambat Realty Corp. v. State of NY*, 41 N.Y.2d 490 (1977), the Court of Appeals dismissed the re-enactment language provided by Article IX. Addressing a challenge to the express supersession of local zoning authority by the Adirondack Park Agency Act, the Court in *Wambat* held that the power of the Legislature to act in its usual manner on matters of state concern (i.e., matters other than the property, affairs or government of a local government), is not impaired by the re-enactment language of Article IX, §(2)(b)(1).

tive scope of the Act did not prohibit municipalities from regulating which types of land uses are appropriate within their municipal boundaries. Accordingly, the Borough of Oakmont's prohibition was upheld.

On the other hand, in *Range Resources Appalachia, LLC v. Salem Township*, 964 A.2d 869 (2009), the Court invalidated the Township's zoning ordinance which required a municipal permit for all drilling-related activities, regulated the location, design and construction of access roads, gas transmission lines, water treatment facilities and well heads, established a procedure for residents to file complaints regarding surface and ground water contamination, allowed the Township to declare drilling a public nuisance and to revoke or suspend a permit, and established requirements for site access and restoration. As explained by the Court, while the preemptive scope of section 602 of the Oil and Gas Act "is not total in the sense that it does not prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality," it does

preempt local attempts to regulate "the 'technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration)."

In sum, it remains somewhat unclear whether, or at least to what extent, municipalities may subject the natural gas well drilling industry to local zoning and land use controls, but there is support in the analogous New York and Pennsylvania court decisions. It is clear, however, that the use of roadways may be limited. As a result, it is advantageous for the industry and municipalities to work together on the use of roadways to avoid unnecessary damage, expenses and delays to operations. ■

The author is an attorney at Whiteman Osterman & Hanna, LLP and a member of the Firm's Environmental, Municipal and Land Use Practice Groups. This article was based on one published in the January/February 2010 NY Zoning Law and Practice Report (Vol. 10, No. 4) entitled "Natural Gas Production and Municipal Home Rule in New York," authored by Mr. Mathes and Michael E. Kenneally, associate counsel at the NYS Association of Towns.

Ed Jackson Honored

Edwin (Ed) Jackson, a New York Planning Federation board member, is being honored for his volunteer service to the Town of Tusten (Sullivan County), in the areas of planning, zoning and community improvement.

Jackson will be presented the Volunteer Award in an April 25th ceremony conducted by the Upper Delaware Council (UDC). The organization gives these awards to "honor individuals, organizations and projects that have enhanced the quality of life or protected the resources of the Upper Delaware River Valley."

Congratulations to Ed from the NYPF board and staff on an honor well-deserved. ■



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72nd Annual Conference Information

The New York Planning Federation will be returning to Lake Placid this year for its 72nd annual planning and zoning conference. The dates are September 26th-28th, and the location is, once again, the High Peaks Resort.

We are currently developing sessions and speakers, and a preliminary agenda will be announced in the summer issue of "Planning News." However, we have included both conference and hotel registration forms in this issue for those of you who want to get a head start on planning for the event.

In addition to a wide range of basic and advanced planning and zoning topics, we anticipate offering a number of CM credits again this year for planners, as well as sessions approved for Code Enforcement Officers and attorneys.

There's still time to send us your suggestions for courses. If there's a hot button issue that you want to hear addressed, tell us what it is. Or if there's an ongoing situation in your municipality that needs clarification, let us know. You can send ideas to Lael Locke -- llocke@nypf.org.

We look forward to seeing you again in Lake Placid this fall. The weather should be ideal, the foliage at its peak, the shopping and dining great, and the conference itself will fulfill not only the annual training requirements, but provide hours of valuable information above and beyond the basics.

By the way, the New York Planning Federation annual conference has been consistently praised for years as one of the best, diverse and most informative in New York State – if you've never been, plan on attending; if you've been coming for years, we look forward to welcoming you once again. ■

The NYPF Top Ten

We've just finished a review of our files to determine where the New York Planning Federation has been most effective over the years in attracting membership. Following are the top ten counties with the number of member municipalities given in parentheses.

It's both interesting and gratifying to note that our top ten range across the state: numbers one and two are in western New York, numbers three through seven are in the Hudson Valley, and numbers eight through ten are, respectively, in central New York, the Capital District and back in the western part of the state. This is a good indicator that the Planning Federation's name and reputation is becoming known statewide.

OUR TOP TEN COUNTIES ARE:

Erie (30)	Monroe (25)
Orange (21)	Westchester (20)
Dutchess (19)	Columbia (18)
Ulster (18)	Onondaga (17)
Saratoga (15)	Ontario (14)

The New York Planning Federation is the only statewide organization that places its emphasis on training planning board and ZBA members. We offer a wide range of affordable training options, including basic and advanced land use programs, as well as special topics tailored to municipal needs. We'd love to speak with you about increasing membership in your county. Please contact us at nypf@nypf.org to learn more. ■

Grudging Tolerance: Decisions regarding nonconforming uses

By Patricia E. Salkin

The early drafters of zoning ordinances recognized that as new zoning ordinances were adopted and amended, many uses legally existing up to the point of new enactments would no longer be permitted.

The concept of nonconforming uses was developed to address the perceived legal and political problems that could result from such an outcome, by essentially grandfathering in uses that legally existed prior to changes in the zoning law. It was believed that, over time, these nonconforming uses would cease to exist naturally through market forces. The early drafters also took steps to reduce the life expectancy of these nonconforming uses by limiting their right to change, expand, alter, repair, restore or recommence after the use stopped for a specific period of time.

Many municipalities also use amortization as a technique to more actively eliminate certain offending nonconforming uses. The expectation of gradual elimination of nonconforming uses has not been realized and, today, problems associated with the desire to eliminate them still constitute a fair amount of reported land litigation.

In New York, absent a state statute dealing with this subject, the regulation of nonconforming uses is left largely to municipalities and the unique approaches and language that individual localities choose to employ with respect to these uses. Municipalities are left to examine the common law, or judicial decisions, to figure out the limits of drafting and interpreting nonconforming use provisions in local zoning laws and regulations. What follows is a brief discussion of cases recently decided by courts in New York addressing some nonconforming use challenges. For a more detailed discussion of these, and other cases, visit www.lawoftheland.wordpress.com.

Size of parcel in determining nonconforming status:

In June 2009, the NY Court of Appeals handed down a decision in *Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 2009 WL 1850964 (6/30/2009), where

the owner of about 280 acres within the Town sought a declaration that all of its property located outside the Town's "AG-Special Aggregate District" is permitted as a nonconforming use, although it currently only operates a hard rock quarry on approximately one-half of the land. The quarry, which had been acquired through a series of land transactions between 1929-1991, had been operating since 1929, long before the adoption of the 1942 zoning ordinance (amended in 1969), that included the land where active quarrying was taking place. The quarry consists of mineral extraction sites located primarily at the center of the property, as well as processing areas, buffer zones and roads. At issue was not the land where the activities were currently taking place, but rather the other half of the land owned by the mining company, mainly areas maintained as mineral reserves; hence, these lands had not been quarried.

The Court of Appeals noted that courts and municipal officials have a "grudging tolerance" for the law of nonconforming uses which generally protects uses in existence at the time a zoning ordinance is adopted, while viewing nonconforming uses as detrimental to the zoning scheme, and favoring reasonable restrictions over such uses

and their eventual elimination. The Court said that, while every inch of the land need not have been used for the stated purpose in order for vested nonconforming rights to attach, utilizing just a small portion may not be

enough to trigger nonconforming status. In explaining that, with respect to quarrying operations, a prior nonconforming use cannot be limited solely to the land that was actually excavated before the zoning law took effect; the Court said that mining is a unique industry,

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The expectation of gradual elimination of nonconforming uses has not been realized and, today, problems associated with the desire to eliminate them still constitute a fair amount of reported land litigation.

Around the same time that the original PDR program was put in place, the town also changed its zoning, reducing rural densities from 2 acres to 4 acres per unit and instituting a mandatory cluster subdivision provision allowing development at a 3-acre density, as long as 50% of the land is preserved. (NOTE: This zoning follows the basic methodology of Randall Arendt's "four-step" planning process, described by Mr. Arendt at the NYPF 2009 annual conference.)

While Warwick's agricultural protection zoning is not as effective as it could be, and does not preserve as much agricultural land as in zoning required by some other communities, the town enjoys a culture of support for farmland preservation shared by farmers and non-farmers alike. Also, because Warwick's zoning is supplemented by its PDR program, the overall programmatic success for agricultural preservation has been more successful here than in most other communities that have instituted zoning to protect farmland. Additionally, political support for farmland protection has been steady and reliable and has not weakened with changing leadership.

The one area where Warwick has been faulted is in providing for affordable housing. The town is highly desirable because of its land protection policies and willingness to spend public dollars on quality of life issues, with the result that it has priced out people who are needed to teach in its schools, provide emergency services and work in local businesses and farms. Warwick's leaders are aware of this issue and have taken measures in their zoning to provide for affordable housing in the future.

Red Hook: The Town of Red Hook is often cited as the most successful Dutchess County community in protecting farmland. As in Warwick, the keys to success have been leadership from within the farming community, broad public support and political stability. A strong PDR program that complements regulatory measures shows the community's commitment to respecting the financial expectations of farmland owners.

The town developed a strong farmland protection plan and has forged intermunicipal cooperation between the Town of Red Hook and the Villages of Red Hook and Tivoli, both of which lie within the town but have separate zoning. While the town uses low-density zoning combined with mandatory cluster to encourage

farmland preservation, this is only one of many tools and, in fact, is not the primary one. Red Hook has also recognized that farming is an important business and has proposed an "agricultural business district."

According to county planners, Red Hook is not using agricultural protection as a pretext for exclusionary zoning, as appears to be the case in some other communities. Rather, the town is genuinely committed to protecting agricultural land and farming as a business, while also making good faith efforts to provide affordable housing, in order to ensure that those people who keep the community functioning are not precluded from living in it. ■

This article will conclude in our next newsletter.

The author is a planning consultant and land use attorney based in Northampton, MA with a national practice focused on natural resource protection and smart growth. He is a fellow of the Glynwood Center in Cold Spring, NY and has written more than 50 zoning laws. For more information see www.joelrussell.com. This article is adapted with permission from "Practicing Planner," the online publication of the American Institute of Certified Planners, the professional institute of the American Planning Association. Copyright 2010 by the American Planning Association.

NYPF on the move

The New York Planning Federation is moving back to Albany after a nearly ten year absence! We're very excited that this new location will put us within walking distance of state offices, as well as those of the Association of Towns and NYCOM.

Our new address as of May 3rd will be One Columbia Place, Albany, NY 12207. It's an historic brick office building close to the Capital and courthouses. Please make a note of the address change, as well as our new phone and fax numbers. They are 518 512 5270 (phone) and 518 512 5274 (fax). We'll also be sending out official change of address notices to our members in May, should you misplace this copy of "Planning News."

If you're in the Albany area this summer, please stop in and see us. We'd love to show you around the office and beautiful neighborhood. ■

since landowners commonly leave portions of their land as mineral reserves to be excavated at a future time. Therefore, owners may establish a nonconforming use extending to boundaries of their property, notwithstanding the fact that quarrying may not have actually taken place in particular areas.

However, the Court said that this does not give quarrying companies “carte blanche” to engage in future quarrying operations on the property. Rather, as here, the owners and its predecessors acquired the property exclusively for mining and quarrying operations, noting that no part of the land was used for any other purpose. Further, a processing structure was built in the center of the property where bulk materials had been removed for decades, and service roads had been constructed to move the materials after processing. The Court also noted that the processing plant contains a building for packaging materials, a repair shop and offices. Similar to its analysis in *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, the Court said the nonconforming use extends throughout the property, even though the principal excavation was limited in geographic area.

Zoning law may prohibit expansion of nonconforming uses: In *Mimassi v. Town of Whitestown Zoning Board of Appeals*, 2009 WL 3791873 (11/13/2009), the Appellate Division, Fourth Department, the Court agreed with the ZBA that the property owner’s use of a barn for residential apartments constitutes an illegal expansion of a nonconforming use. Here, prior to the purchase of the property by the petitioner, and prior to the current zoning code, a farmhouse located on the subject property had been converted into a three-family dwelling, and was thus allowed to continue as a pre-existing nonconforming use, as multi-family housing is no longer permitted in the district.

After adoption of the current zoning code, the property owner converted a barn on the subject property into eight apartment units. The code enforcement officer issued an order to remedy violation, ordering the removal of the tenants from the barn since the petitioner was in violation of the zoning code and had failed to obtain a building permit before constructing the multi-family units. On appeal, the ZBA affirmed the order to remedy a violation, determining that the barn apartment

units violated the Code and were not entitled to nonconforming use status. The appellate court agreed, finding that the use of the barn as a multi-family dwelling constituted a violation of the zoning code prohibiting expansion of a pre-existing nonconforming use.

The constitutionality of amortization periods: The Appellate Division, Second Department, in *Suffolk Asphalt Supply, Inc. v. Board of Trustees of Village of Westhampton*, 2009 WL 260959 (2/3/2009), acknowledged that there is no fixed formula in New York to determine what constitutes a reasonable amortization period. Rather, the Court said that the local law will be presumed valid, and the owner carries the burden of demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the amortization local law.

To determine reasonableness, courts will make a fact-specific inquiry and consider the length of the amortization period in relation to the investment and nature of the use. Improvements made to the property, the character of the neighborhood and the detriment caused to the property owner will also be considered. With respect to ability to recoup investment, the Court explained that, while this will factor into a reasonableness determination, an owner is not guaranteed to recoup the full cost of the investment, but the amortization period should not be so short that it would result in a substantial loss. Since the plaintiff did not submit any evidence as to the amount actually invested in the business, the Court said a question of fact remained as to whether the amortization period set forth in the local law is reasonable and constitutional as applied to the plaintiff. ■

The author is the Raymond & Ella Smith Distinguished Professor of Law at Albany Law School. She is the author of “New York Zoning Law & Practice,” 4th ed.; “American Law of Zoning,” 5th ed.; and editor of the bi-monthly “New York Zoning and Planning Law Report.” Salkin is also the chair of the American Planning Association’s Amicus Curiae Committee.



HIGH PEAKS RESORT RESERVATION FORM

NY Planning Federation

Sunday, September 26- Tuesday, September 28, 2010
RESERVATION FORM

Mark (X) on line by package rate selection. **All package rates are quoted per person.**

Two Night Package Rates- Arrival Sunday, September 26- Departure Tuesday, September 28

_____ **Single Occupancy-** \$407.20 _____ **Double Occupancy-** \$273.20 _____ **Triple Occupancy-** \$235.20

Package Rates include overnight room for September 26 and 27 plus Sunday 9/26 Reception; Monday 9/27 breakfast, AM / PM Breaks and Lunch; Tuesday 9/28 Breakfast, AM/ PM Breaks and Lunch plus Service Charge. Excludes tax.

One Night Package Rates- Arrival Sunday, September 26- Departure Monday, September 27

_____ **Single Occupancy-** \$232.60 _____ **Double Occupancy-** \$157.10 _____ **Triple Occupancy-** \$135.27

Package Rates include overnight room for September 26 plus Sunday 9/26 Reception; Monday 9/27 breakfast, AM / PM Breaks and Lunch plus Service Charge. Excludes tax.

One Night Package Rates- Arrival Monday, September 27- Departure Tuesday, September 28

_____ **Single Occupancy-** \$247.00 _____ **Double Occupancy-** \$166.50 _____ **Triple Occupancy-** \$139.67

Package Rates include overnight room for September 27 plus Monday 9/27 AM/ PM Breaks and Lunch; Tuesday 9/28 Breakfast, AM/ PM Breaks and Lunch plus Service Charge. Excludes tax.

- The cut-off date for making reservations will be Thursday, August 19, 2010. A deposit of \$350.00 per room will be required along with reservation by credit card or check. Reservations received after the above date will be taken on the basis of availability. Tax exempt form must accompany the reservation.
- Cancellations must be received by Wednesday, September 8, 2010 to avoid forfeiture of deposit.
- Final payment arrangements for your stay will be required upon arrival in the form of cash, credit card or voucher.
- Check-in time is 4:00 PM and Checkout time is 11:00 AM.

Name _____ Roommate _____
 Company/Affiliation _____
 Email: _____
 Street _____ City/State/Zip _____
 Telephone # _____ Fax # _____
 Email _____

Check \$ _____
 CC# _____ Exp _____
I have read and agree with the Reservation Policies.
 X _____

Send to: High Peaks Resort
 2384 Saranac Avenue Lake Placid, NY 12946
 Telephone 518-523-4411 Fax 518-523-1120

Confirmation of your Reservation will be faxed or mailed using the information provided on this form.
 Package Total \$ _____
 Conf# _____ Agent _____ Date _____

EXEMPTION CERTIFICATE - TAX ON OCCUPANCY OF HOTEL ROOMS
 STATE OF NEW YORK-Operators of hotels, etc. should not accept this certificate unless the officer or employee presenting it shows satisfactory credentials.
 TO BE RETAINED BY VENDOR AS EVIDENCE OF EXEMPT OCCUPANCY.

Vendor: High Peaks Resort, Lake Placid, New York 12946 **Date:** _____
 This is to certify that I am an employee of the State of New York or one of its political subdivisions; that the services or materials purchased on the date set forth below will be paid for by the State or a political subdivision; and that such charges are incurred in the performance of my official duties.
Dates of Occupancy: _____ **Signature:** _____

New York Planning Federation Publications

Send request with a list of the books you want or call (800) 366-NYPF to order
Checks or vouchers accepted. Prepayment not required. (M) indicates member (NM) non-member.

■ **All You Ever Wanted to Know About Zoning**, 4th ed. (2005). Sheldon Damsky and James Coon. The latest version of our most popular book includes key legislation and case law through the 2004 legislative session. \$50.00 (M), \$60.00 (NM) + \$3.00 s/h. Bulk rates available for 5+ copies.

■ **A Practical Guide to Comprehensive Planning** David Church and Cori Traub, 1996, updated 2002 (82 pages). An overview of the importance of planning and the steps involved in preparing a comprehensive plan. Includes case studies. \$18.00 (M), \$20.00 (NM) + \$3.00 s/h. Bulk rates available for 5+ copies.

■ **The Short Course: A Basic Guide for Planning Boards and Zoning Boards of Appeal in NYS** by Harry J. Willis, David Church and James W. Hotaling. Updated in 2007 (71 pages). A review of the full range of knowledge and skills needed by planning or zoning officials. Recipient of the Public Education Award by the American Planning Association Upstate New York Chapter. \$18.00 (M), \$20.00 (NM) + \$3.00 s/h. Bulk rates available for 5+ copies.

■ **Rural Development Guidelines, Hamlet Design Guidelines, Building Form Guidelines** 3-volume set by Joel Russell, Anne Tate w/ the Dutchess Co. Dept. of Planning, et. al, 1994. Helpful principles and numerous illustrations demonstrate better design for development. Entire set \$15.00 + \$3.00 s/h. Single volumes \$6.00 + \$1.50 s/h.

■ **Land Use Training and Certification School**. Hard copy version (with CD) of the nine on-line training courses developed by Pace University Land Use Law Center. Recommended to fulfill the annual four-hour training requirements. \$50.00 + \$5.00 s/h. May also be downloaded at no charge from www.nypf.org.

■ **Municipal Official's Guide to Diesel Idling Reduction in NYS**. By Katherine H. Daniels, AICP, 2006 (45 pages). Published jointly by NYPF, US EPA and NYSERDA. Free with \$3.00 s/h.

■ **Municipal Official's Guide to Forestry in NYS** by Katherine H. Daniels, AICP. Published jointly by NYPF, NYS DEC and the Empire State Forest Products Assn. Free with \$3.00 s/h.

■ **Adult Entertainment Tech Memo** A 12-page brochure prepared by Lydia Marola, Esq. attorney for the Village of Scotia, and Rebecca Lubin, AICP. Free to member, \$5.00 NM. Free download at www.nypf.org.

■ **Model Cell Tower Ordinance** by NYPF staff. A short article and model ordinance. Free to members, \$5.00 NM. Free download at www.nypf.org.