

# PLANNING NEWS



New York Planning Federation

279 River Street, Suite 302, Troy, NY 12180

Winter 2005

## Case Law Update

by David R. Everett, Esq. & James A Boglioli, Esq.

In 2004, the Court of Appeals, the highest court in New York State, decided a number of land use and environmental cases. The more interesting and important of these are summarized below.

### Area Variances

In *Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y. 2d 608 (2004), Mr. Pecoraro entered into a contract to purchase a substandard lot contingent on receiving an area variance. After a public hearing with substantial community opposition the board denied the variance, concluding that it was substantial, requiring a 33.3% deficiency in lot area and a 27.3% deficiency in width area, and that granting the variance would adversely affect the character of the neighborhood.

Mr. Pecoraro challenged the denial in court. The Court overturned the denial, holding that the board had improperly denied the variance based on "generalized community opposition." On appeal, the Court of Appeals held that the lower court improperly substituted its judgment for that of the board in concluding that the decision was based on generalized community opposition. The Court concluded that the board's determination that the area variance would have a negative impact on the character of the neighborhood was supported by documentary evidence. Specifically, within the 200-foot radius of the property, other lots were overwhelmingly conforming to, or larger than, the zoning requirements. In addition, the Court noted that the board was permitted to find that granting a variance for a substandard lot could create a precedent in which property owners could illegally subdivide conforming lots and seek area variances for substandard lots.

In another area variance case, *Real Holding Corp. V. Lehigh*, 2 N.Y. 3d 297 (2004), the petitioner brought a lawsuit seeking to annul the zoning board's decision that it could not grant a variance from special use permit requirements. Specifically, the zoning code possessed distance standards specifying how many feet had to separate a gas station from both residentially zoned areas and other stations. The Court of Appeals held that the zoning board had authority to grant an area variance from any requirement in the zoning code, including requirements for issuance of special use permits.

### Cell Towers

In *Chamber v. Old Stone Hill Road Associates, et al.*, 1 N.Y.3d 424 (2004), a group of homeowners sought to prevent the construction of a telecommunications tower. Neighbors brought a suit against a wireless communications carrier to enforce a deed restriction which limited the use of the tower site to single-family homes. The cellular company had received a special permit from the town to construct the tower. While the lawsuit was pending, the tower was erected. The Court of Appeals, in upholding the lower courts, directed the cellular company to remove the tower from the site. In so doing, the Court held that the private enforcement of the deed restrictions did not offend the public policy against prohibiting wireless services, as embodied in the Federal Telecommunications Act. Additionally, the Court noted that the town's issuance of a special permit to construct the tower did not preclude the private enforcement of the deed restrictions.

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 (518) 270 9855 / 270 9857 (fax)  
 e-mail: nypf@nypf.org

*The New York Planning Federation also maintains a toll-free number for members. Call (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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**D**id you know that the Planning Federation offers training, advice, research and direct assistance with planning, zoning, land use and development? Our goal is to offer strategic, practical and affordable assistance to complement the work of community leaders, local staff and consultants. Programs include:

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We can also audit your comprehensive plan, zoning ordinance or other local regulations and land use management tools, facilitate meetings and provide research on specific community issues. Please call Katherine Daniels at 800-366-NYPF for detailed information and costs regarding any of these programs. ♦

# Vermont Town Adopts Big Box Ordinance

*The following article is reprinted with permission from The Hometown Advantage Bulletin, a free e-mail newsletter published by the Institute for Local Self-Reliance. To read back issues or join the mailing list, visit [www.newrules.org/retail](http://www.newrules.org/retail).*

In late January, the Select Board in Bennington, Vermont voted unanimously to ban stores over 75,000 square feet and to require retail development projects larger than 30,000 square feet to pass a community impact review.

Town officials said the measure was needed to ensure adequate review of the economic and community impacts of large-scale retail development, protect the viability of Bennington's existing commercial areas, and maintain competition by preventing a single retailer from dominating the local market.

The Select Board began discussing a big box ordinance last summer when Wal-Mart expressed interest in building a 150,000 square foot supercenter in this town of 9,200 people. Located in the southwest corner of Vermont, Bennington already has a 50,000 square foot Wal-Mart which would have been vacated had the supercenter, slated for a site about a mile away, been approved.

Citizens turned out in large numbers to voice opposition to the Wal-Mart proposal at a public hearing and at a community forum sponsored by the Bennington County Regional Commission and the Vermont Smart Growth Collaborative.

Soon afterwards, the Select Board enacted a temporary moratorium on construction of big box stores, effectively blocking Wal-Mart's plans, and began working on a big box ordinance. The new ordinance limits stores to no more than 75,000 square feet in one commercial district and 50,000 square feet in the rest of the town.

Proposals for stores over 30,000 square feet must submit to a community impact review conducted by an inde-

pendent consultant chosen by the city. The cost of the review is to be paid by the developer.

The review will weigh the number of jobs created by the store versus jobs lost at existing businesses, the store's impact on the cost of public services, and any tax revenue losses resulting from a decline in the economic viability of the downtown or other established commercial areas.

The analysis will also estimate how much revenue generated by the project will be retained and redirected back into the local economy. Locally owned stores are likely to fare better on this measure than national chains, because they generally devote a larger percentage of their revenue to local wages and buy more goods and services from nearby businesses.

Under the ordinance, city officials may approve stores only if the review determines that they will not have an undue adverse impact on local wages, housing costs or the ability of the city to provide services. ♦

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### SEQRA

*In Matter of City Council of the City of Watervliet v. Town Board of the Town of Colonie*, \_\_\_ N.Y. 3d \_\_\_ (December 2, 2004), a developer owned 37 acres in the Town of Colonie, adjacent to the City of Watervliet and proposed to rezone the parcel to permit a senior citizen assisted-living development. The developer sought to have the property annexed by Watervliet to facilitate the project, but did not have a specific development plan. The municipalities held a joint public hearing, after which Watervliet approved the annexation and Colonie rejected it. Watervliet filed an action based on the conflicting resolutions. Colonie concluded that the review of potential environmental impacts under SEQRA was necessary to fully assess whether the annexation was in the public interest. The Court concluded that SEQRA requirements apply to all annexations, but the extent of environmental assessment is dependent on the specific development plans, if any, proposed in connection with the annexation. In this case, the Court held that because a specific development plan did not exist, the SEQRA review should be based on the annexation itself and its environmental impacts. The Court determined that a SEQRA review must be completed before either municipality acts to reject or accept the resolution.

### Miscellaneous

*In Headriver v. Town Board of the Town of Riverhead* 2 N.Y.3e 766 (2004), an applicant sued the Town Board challenging the denial of its application for a special permit to develop a retail center. During the application process, the county planning commission recommended that the special use permit be denied. To override the commission's recommendation, General Municipal Law §239-m requires that a super-majority vote be obtained at the Town Board. After a public hearing, the Town Board voted 3-2 to grant the special permit. Because a super-majority vote was not obtained, the permit was denied. The Court held that because the Town Board could not override the County's recommendation, it was compelled to disapprove the project. ♦

*The authors are attorneys with the Albany, NY firm of Whiteman Osterman and Hanna LLP.*

# Campaign for Affordable Housing Formed

A national partnership between corporate leaders, business groups, housing sponsors and the media, The Campaign for Affordable Housing will represent the interests of all sectors of the housing community. The new campaign will not push any specific policy proposals, only the message that affordable housing is an asset to communities and that citizens who understand its value must take action to make it a reality.

The Campaign will become a resource center and clearinghouse for affordable housing advocates; support locally sponsored grassroots efforts; create a more receptive climate; provide materials and advice; conduct research; conduct a national advertising campaign about affordable housing and its benefits.

For more information on The Campaign for Affordable Housing, visit [www.tcuh.org](http://www.tcuh.org). ♦

# NYPF Welcomes New Members

### Municipalities

Town of Busti

### Individuals

Jennifer Fais

Matt Plunkett

### Firms

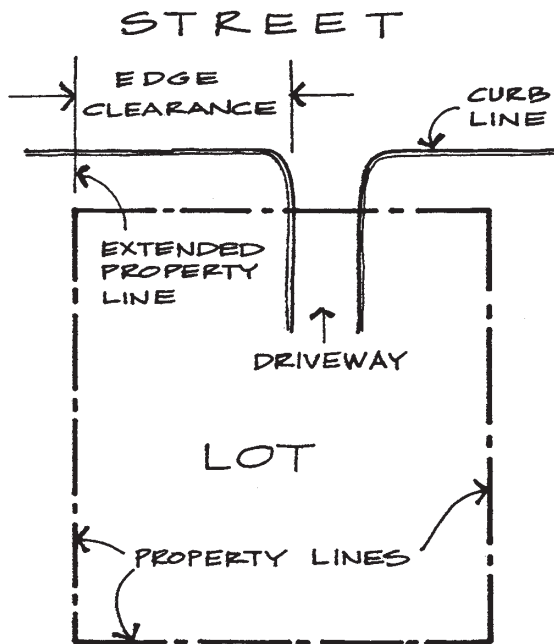
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## Book Review:

# ***The Latest Illustrated Book of Development Definitions.***

This 2004 book is the third edition of a handy and valuable “why-didn’t-we-think-of-that” publication that first appeared in 1981.

With 1,955 definitions ranging from the obscure (“aggressive soils,” “eutrophic lakes”) to the timely (“casino hotels,” “right-to-farm”), the book provides a useful tool to municipal boards. What enhances its value, however, are the more than 100 illustrations which further help clarify the confusing array of -- for example -- sign types, building styles and traffic calming options available to help planning and zoning boards with their decision-making.



## EDGE CLEARANCE

*The book is filled with helpful illustrations.*

This third edition also includes nearly 800 expanded commentaries and annotations which the authors suggest “can be useful as a guide to the reader, as well as in local

ordinances.” They add, “A brief note could be inserted at the beginning of the ordinance that the commentaries are descriptive and explanatory only,” rather than part of the actual ordinance being adopted.

A good example of the use of commentaries is in the definition of “Overlay Zone:” *A zoning district that encompasses one or more underlying zones and that imposes additional requirements beyond those required for the underlying zone.*”

The accompanying comment fleshes out the definition by explaining: *“Overlay zones deal with special situations that are not appropriate to a specific zoning district or that apply to several districts. For example, in all business zones, an overlay provision might require impact fees to provide for traffic improvements. A historic district overlay may cover parts of several zones. An overlay provision covering an entire municipality or specific zoning districts might require that all properties over a certain acreage proposed for higher-density development also provide a percentage of lower-income housing.”*

For additional references the authors cite a publication of the American Planning Association’s Planning Advisory Service, Report #318, 1976, “The Administration of Flexible Zoning Techniques.” The end result is a comprehensive and thorough discussion of the matter.

With generous assistance from the APA and a number of other national experts and sites, “*The Latest Illustrated Book of Development Definitions*” is certain to help boost the confidence and skill levels of planning and zoning board members.

The authors do provide one caveat; because neither is an attorney, they urge their readers “to consult with their local counsel regarding the ways in which state enabling acts and/or court decisions affect the application of specific definitions in a particular jurisdiction.”

“*The Latest Illustrated Book of Development Definitions*,” Harvey S. Moskowitz and Carl G. Lindbloom. Center for Urban Policy Research, Rutgers University. 464-pages, paper, 2004. \$50.00 includes shipping. Call 732 932 3133, ext. 555 or visit them at [cuprbook@rci.rutgers.edu](mailto:cuprbook@rci.rutgers.edu). ♦

# A Clean Wind in Dutchess County

The Dutchess County Town of Pleasant Valley (pop. 10,000) made national news last fall, when Keith Kloor, writing for *Audubon* magazine (September-October 2004), cited the Town's June, 2004 decision to purchase 100% of its electricity from wind turbines.

Supervisor John McNair says it was a phone call from Community Energy, a firm representing wind farms across the Northeast, that got him thinking about making the switch to renewable energy. He brought the matter to his board and they adopted it by resolution. A wind farm located near Syracuse now supplies power to Pleasant Valley's town hall, highway garage, historic buildings, recreation field, street lights and even its Christmas decorations.

"I expected to get some complaints from the community," McNair admits, "but we didn't get any complaints from anyone. In fact, we even got a couple of 'attaboys!'"

The "savings," says McNair, come in the form of protecting the environment. In fact, the decision to go to wind energy is costing the Town about 15% more (which translates to an annual cost of approximately \$2.00 per household). "We may be paying a little extra, but we're reducing our dependence on fossil fuel. We think it's well worth it for the future."

In the *Audubon* article, Kloor notes that Pleasant Valley's decision to use wind power for electricity not only creates "zero pollution," but also relieves the atmosphere of "the annual equivalent of 356,000 pounds of carbon dioxide, a main global warming gas."

"It's called 'Pleasant Valley' for a reason," Supervisor McNair says. "This is an area with a lot of outdoorsmen and others who appreciate the need for a cleaner environment. I think that as more communities get involved we'll all reap the benefits of better health by breathing cleaner air." ♦

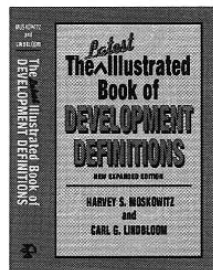
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## THE ^ ILLUSTRATED BOOK OF DEVELOPMENT DEFINITIONS

by Harvey S. Moskowitz and Carl G. Lindbloom



The third edition of this essential planning resource greatly expands the number of definitions, commentaries, and illustrations over previous editions. It contains 1,955 definitions, or 172 more than the 1993 edition; 787 commentaries, or 195 more than previously; and 103 illustrations, an increase of 27 over the 1993 book. Many definitions and commentaries have been revised. In addition to changes in design concepts that have occurred since the original 1981 edition, changes affecting land use have taken place in retailing, industrial development, religion, and warehousing. Massive new retail establishments, supersized warehouses, mega-churches, and mixed-use developments, actually mini-cities, have appeared on the scene. The latest edition identifies and defines these and other current uses.

The book provides definitions that can be used directly, or with only slight modifications, in zoning, subdivision, or land development ordinances. Commentaries and annotations suggest how the definition is designed to be used in development regulations and offer discussion pertinent to the definition. Although the commentaries are used primarily as a guide to the reader, the authors suggest that commentaries can be useful in local ordinances as well. The commentaries in this new edition further refine practical applications, point out possible problems, and provide practical ways to avoid them.

**Paper, 2004, 496 pp. ISBN 0-88285-177-2 \$49.95 + \$5 shipping**  
**— Special for NYPF PLANNING NEWS Readers: \$50 total, shipping included —**

**HARVEY S. MOSKOWITZ**, PP, FAICP, is a planning consultant and a former member and past president of the New Jersey Board of Professional Planners. He has a Ph.D. in urban planning and policy development from Rutgers University and an M.P.A. from New York University. Moskowitz was formerly on the board of directors of the American Planning Association and the New Jersey Site Improvement Advisory Board.

**CARL G. LINDBLOOM**, PP, AICP, is a planning and urban design consultant. He is a licensed professional planner in New Jersey and a former member of his local planning board. Early in his career he worked as an architect/planner in England for the London County Council and later with the Greater London Council. Lindbloom has an undergraduate degree in architecture and a graduate degree in city design from Miami University, Oxford, Ohio.

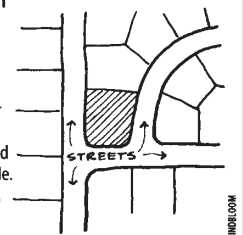
### Sample definition:

#### PENINSULA LOT

A lot surrounded on three sides by roads.

#### Comment:

Peninsula lots for residential use should be avoided whenever possible. They lack privacy, and since they "front" on three streets, front yard setbacks are required on three sides. Accessory structures (sheds, swimming pools, and so on) are prohibited in any of the front yards unless allowed by variance. In addition, the lot is subjected to traffic from three roads and abuts two intersections.



PENINSULA LOT

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# Conference 2005 Features CEO Track

It may be February, but we're already thinking October! NYPF's annual conference will be back in Saratoga Springs this year, from October 9th-12th, at the Prime (formerly Sheraton) Hotel.

Along with more than 30 sessions and speakers covering everything from Main Street issues to stormwater management, the 2005 conference will have an exciting added component. Because we heard from a number of you that more courses were needed for Code Enforcement Officers, this year we will add an entire two-day track of in-service sessions for CEOs. The plan is to provide at least half of the 24 annually required credits. Much more information will be available in coming issues of *Planning News*, as well as at [www.nypf.org](http://www.nypf.org).

In the meantime, if there are any courses or speakers you would like to see featured during this year's program, please let us know by contacting Lael Locke at 518 270 9855 or [llocke@nypf.org](mailto:llocke@nypf.org).

## NYPF Welcomes New Board Members

Two new members recently joined the Planning Federation's Board of Directors, representing the Southern Tier and Finger Lakes regions, respectively. We welcome them both to the Federation.

*Fred Wilcox* is Vice President of Demographic Development for Claritas, Inc., where he has been employed for 30 years. He has extensive experience with demographic and cartographic information, including the development of nationwide small area estimates and projections. Fred is Chair of the Town of Ithaca Planning

Board and the Tompkins County Planning Advisory Board. He is also a member of other local boards and committees dealing with land use planning.

*Graham Smith*, who lives in Canandaigua, is Vice President of Operations for Lupton Associates, where he is responsible for the firm's accounting and financial operations. He joined the firm in 1978. A licensed CPA, Graham is a member of several professional organizations, holds a pilot's license and is treasurer of his church. Married with two children and four grandchildren, he enjoys golf, gardening and boating. ♦

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by Harry J. Willis, David Church, and James W. Hotaling  
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3 vol. set by Joel Russell, Anne Tate w/ Dutchess Co. Dept. of Planning, et.al., 1994 (illus.) "principles for better design in development." \$6.00/ single volumes + \$1.50 s/h or \$15.00/ 3-vol. set + \$3 s/h.

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### ✓ **Adult Entertainment Tech Memo.** A 12-page

brochure prepared by Lydia R. Marola, Attorney for the Village of Scotia, and Rebecca Lubin, AICP. Free to members. \$5.00 non-member

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