



# Introduction to Planning, Zoning and Land Use



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# Presentation Roadmap

General Overview of Planning and Zoning Concepts, Including:

- Comprehensive Plan
- Zoning Districts / Zoning / Rezoning / “Spot Zoning”
- Buzz Words – “Grandfathering,” “Precedent,” Etc.
- Planning Board – Subdivisions, Site Plans
- Zoning Board of Appeals - Variances – Use / Area
- Miscellaneous - County Approval, Enforcement, Etc.
- A brief word on SEQR

# The Comprehensive Plan

## Foundation of planning and zoning for a municipality

Zoning Laws shall be consistent with the “comprehensive plan.”

- **Evidences a reasonable basis for Zoning Laws**



- Adoption of a formal written “Comprehensive Plan” does not appear to be specifically mandated.
- Where no formal plan, the “comprehensive plan” may be defined/deduced more generally, based upon the entirety of a community’s laws/actions/circumstances
  - Perhaps less clear and difficult to discern
  - Perhaps Courts may interpret differently than intended, especially for Amendments
    - Does the law aim to support the health, safety, or welfare of the community – if so, likely to be held a “well-considered” or “comprehensive plan.”
  - Legislative Findings esp. important here.
- **What does a Comp. Plan look like? (e.g., Town Law S. 272-a)**
  - Ideally, Written and Formal
  - But, May Be Informal, Deduced

# The Comprehensive Plan (cont.)

## What does a Written Comp. Plan look like?

- Goals/Objectives/Principles/Policies;  
Maps; Reports/Studies;  
Statistic/Trends/Inventories;  
Implementation Plans, Etc.



## Creating and Amending a Comprehensive Plan

- Specific process required, including one or more public hearings, environmental review, etc.
- Much involvement – Town officials and staff, community via hearings and committees, consultants such as engineers and attorneys

## Possible Topics Covered

- Zoning/Mapping – Residential for Homes, Commercial for Business, Agricultural for Farmlands, Etc.
- Present and Future State of Commercial/Industrial Facilities
- Population, Demographics
- Open Space Requirements
- Preservation of Historic Resources
- Preservation of Natural Resources
- Parks / Recreation Needs
- Solar Farms, Wind Energy
- Utilities such as Sewer and Water
- Transportation / Traffic Planning
- Economic Development and Strategies
- Housing Needs
- Etc.

# The Comprehensive Plan (cont.)

## Benefits of a Well-Considered Formal Written Comp. Plan



- Avoid Ambiguity– Have a Written Plan
- Valuable Resource
  - Past/Present/Future
    - Residents, Current/Future Officials
  - Can and should be added to, changed, updated – Living Document



# Conventional Zoning / Rezoning

## Two Major Elements:

- 1) Defining Zoning Districts in a **Zoning Code**, and
- 2) Applying Zoning Districts onto a **Zoning Map**

- **Zoning Code Comprised of (for each District):**

- Uses (How the lands in a specific District may be used)

- 1. Permitted
- 2. Specially Permitted
  - “As of right”
  - Additional Conditions
  - Permit may be indefinite or limited.
- 3. [Not Permitted]

- Dimensional/Area Provisions:

- Density, Setbacks, Etc.

- [ Example] **Residential R1 District**

- Use Provisions:

- Permitted Uses:

- Single Family Homes
- Accessory Uses Subordinate to the Primary Use, such as Garages
- Green Recreational Facilities, such as Soccer Fields, Baseball Diamonds

- Specially Permitted Uses

- Gas Station, if the following conditions are satisfied:
  - Sufficient Ingress/Egress/Traffic (Favorable Traffic Study)
  - Oil Separator
  - Triple Front, Side and Rear Setbacks

- Dimensional Requirements

- Minimum Lot Size = 1 Acre
- Undeveloped “Green Space” = 50% of Lot
- Maximum Height = 50 Feet
- Front and Rear Setbacks = 50 feet
- Side Setbacks = 30 feet

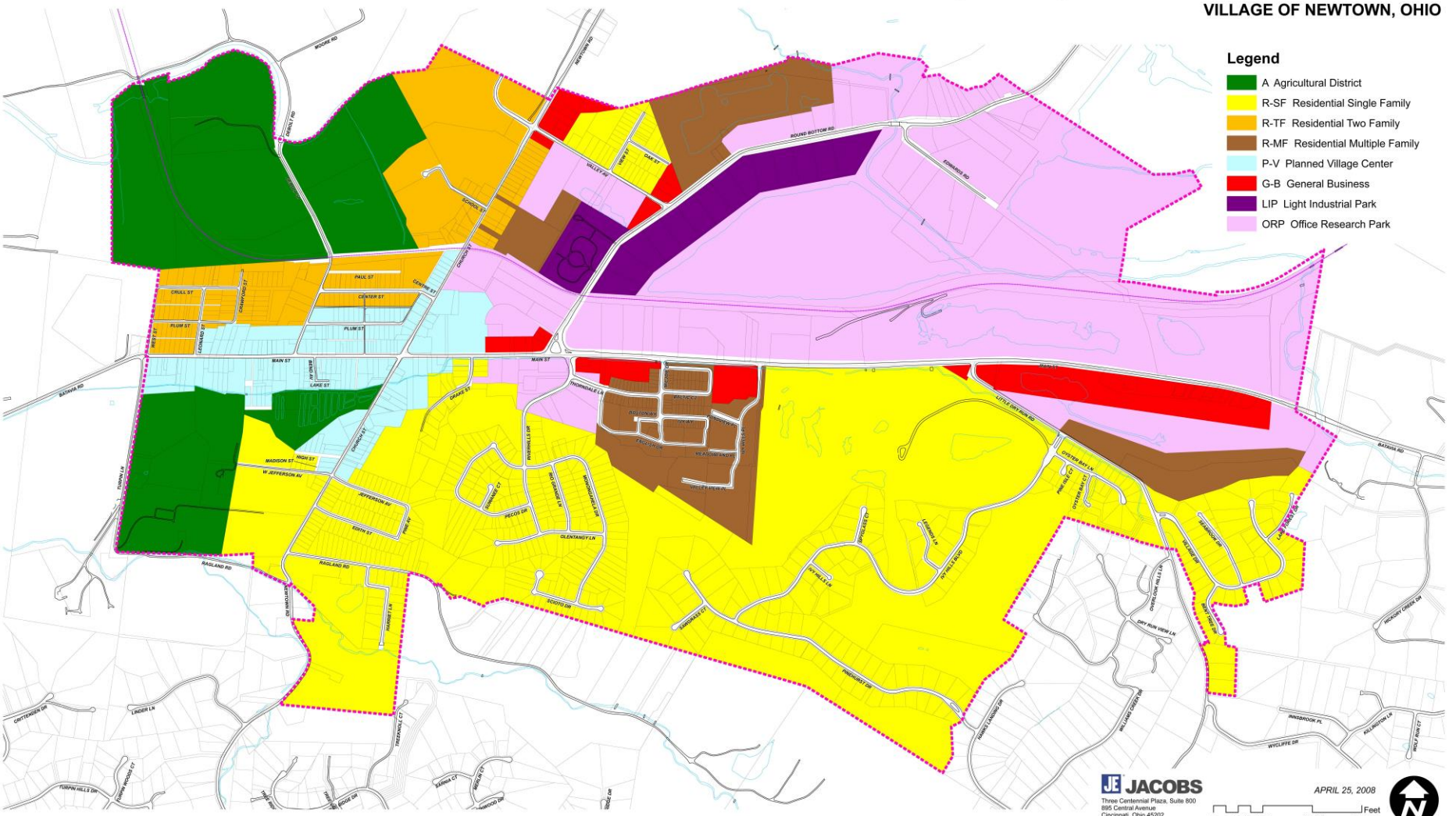
# Zoning / Rezoning – The Official Zoning Map

## OFFICIAL ZONING MAP

VILLAGE OF NEWTOWN, OHIO

### Legend

- A Agricultural District
- R-SF Residential Single Family
- R-TF Residential Two Family
- R-MF Residential Multiple Family
- P-V Planned Village Center
- G-B General Business
- LIP Light Industrial Park
- ORP Office Research Park



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APRIL 25, 2008

0 250 500 1,000 1,500 Feet



# Zoning / Rezoning – What is “Spot Zoning?”

Spot Zoning = Zoning “for the benefit of an individual owner rather than pursuant to a Comprehensive Plan for the general welfare of the community.”



- **At first glance, many rezoning requests appear to benefit a particular owner . . . See Example...**
- Example: Owner wishes to rezone Residentially zoned lands to Commercial to build a restaurant.
  - Obvious benefit to owner = Profit.
  - However, whether the owner benefits is not the test – the test is whether, consistent w/ Comp. Plan, community will benefit.
  - Simply because an individual owner of land benefits greatly (and more than the community at large) from a zoning change, doesn't necessarily make the zoning change illegal spot zoning.
  - Example - Presume Comprehensive Plan provides that:
    - More restaurants are needed in Town;
    - The Town should seek to expand Commercial areas;
    - The Town should encourage development that would attract more individuals/owners;
    - The Town seeks to encourage economic development and thus support business.

- In this case, the Zoning would be legal, despite the fact that the owner will benefit:
  - This is because the restaurant will also benefit the entire community as a whole, as per the Comp. Plan.
- In sum, to protect against Spot Zoning:
  - Ensure the zoning/rezoning is consistent with the Comp. Plan and (thus) beneficial to the community at large.



# Zoning / Rezoning – Pre-Existing Nonconforming Uses (i.e., “grandfathered” uses)

A use which was previously conforming (i.e., in compliance with the Zoning Code - either because it was specifically permitted or because no Zoning Code to prohibit), but is no longer conforming, despite no change in the use.

- Constitutionally Protected (5<sup>th</sup> A.) - Unduly limiting such a use could be considered an illegal Constitutional taking.
- Generally OK to limit expansion of the use.
- In some circumstances (de minimis), may immediately prohibit use upon Code Change.
- Otherwise, permit use indefinitely, or
- In some cases, use of “Amortization” to phase out.



# “Precedent” and Equal Protection

## Filipowski v. Village of Greenwood Lake

### The Facts:

- 9.2 Acre R Parcel in Village of Greenwood Lake
- Proposed subdivision into three Lots + Development of Lots
- Parcel contained steep slopes > 25%
  - Village’s Steep Slope Law – No Development on slopes in excess of 25%
- Landowner applies for two Variances:
  - Minimum Lot Size
  - Steep Slope Law
- ZBA denies both Variances
  - Landowner sues – Equal Protection Violation!



### What is Equal Protection?

- Equal Protection Clause of the 14<sup>th</sup> Amendment –
  - “No state shall . . . deny to any person within its jurisdiction the equal protection of the law.”
  - i.e., I am being treated differently than everyone else.
    - . . . Precedent . . .
- Unwieldy Standards . . . “Class of One” vs. “Selective Enforcement”
  - Generally, require “Similarly Situated” and treated less favorably (Fact based)!
  - Class of One: Unequal Treatment with No Rational Basis
  - Selective Enforcement: Unequal Treatment based upon impermissible considerations (e.g., race, malicious intent, bad faith).

### Court on “Similarity” for a “Class of One” Claim:

- “An extremely high degree of similarity is required.”
- Essentially “identical” in all respects.

### \*\*\* Vs. Lesser Standard for “Similarity” (Typically for “Selective Enforcement” Claims) \*\*\*

- “A prudent person, looking objectively at the incidents, would think them roughly equivalent.”

# “Precedent” and Equal Protection

## Filipowski v. Village of Greenwood Lake (cont.)

- **Alleged Similarities:**

- Plaintiff identifies 10 Similarly Situated Comparators:
- All were either granted permits or variances to build despite having steep slopes greater than 25%

- **Court:**

- “. . . Plaintiffs failed to allege other facts sufficient to plausibly suggest the requisite extremely high degree of similarity” for a Class of One claim.

- Did not show similarities regarding:



- Structures built
- Zoning of the Lot
- Bulk Area Requirements
- Where building occurred in relation to the location of actual Steep Slopes on the Lot(s)
- Whether other variances were needed
- Whether lots were vacant or not, etc.
- P’s Property is 9.2 Acres, where 9 of the 10 comparators’ properties are less than 1 Acre.

- Court dismisses “Class of One” EP Claim because P failed to show requisite similarity with alleged comparators.

- **What if this were assessed via the less demanding standard (e.g., a “Selective Enforcement” Claim)?**

- Would a reasonably “prudent person, looking objectively at the incidents” consider them “roughly equivalent?”
- Were they similarly situated “in all material respects?” (Ensure the record is clear in identifying material/distinguishing facts which were the basis for the decision.)

# Community Opposition

## Matter of Bagga v. Stanco

### Background:

- Property owner applied to Oyster Bay Planning Board for Site Plan Modification
- Site plan originally approved - first floor retail space and second storage space
- Modified site plan called for the second floor to be 11 residential apartment units instead of storage
- Notably the building was within the “Neighborhood Business District” which specifically permitted residential apartments to be located above retail space.



### The PB's consulting Engineer made the following findings with respect to the modified site plan:

- Addition of 11 apartments would add **one** more vehicular trip during peak traffic hours
- 73 off-street parking spaces would be provided –exceeds 67 parking spaces required by Town Code; and
- Parking area would have two access driveways with adequate sight distance.

# Community Opposition (cont.)

## Matter of Bagga v. Stanco

### Planning Board Denial:

- After two public hearings at the Town PB where the **community opposed the modified site plan** because it would attract “undesirable tenants,” the Town PB denied the application.
  - The PB cited concern *over access to the property, excessive traffic and lack of parking.*
- The property owner sued to overturn the PB’s denial.



### Court Findings and Decision:

- The Appellate Court overturned the PB’s denial for the following reasons:
  - Oyster Bay PB’s decision was irrational because the *record contradicted the basis for its denial.*
    - Town Engineer’s report evidenced sufficient access, sufficient parking and an insubstantial one additional trip during peak traffic hours.
- The PB’s determination was wholly and improperly based upon **generalized community opposition.**
  - *Note - Although the PB is encouraged to consider community (factual) input, **community opposition cannot be the basis for a PB’s determination.***

# Planning Board

## Formation:

- Created by the Legislative Board;
- 5 to 7 Members;



## Typical and Core Functions Include:

- Subdivision Review
- Site Plan Review
- Special Use Permits (common, not always)
- Rendering of Advisory Opinions

# Planning Board

**Subdivision** – The division of a parcel of land into 2 or more parcels of land (“lots”). May also include modifying lot lines.

## Issues/Factors to Consider re Decision (TL 277):

PB to require: “. . . **safe[ty]** for building purposes without danger to health or peril from fire, flood, drainage or other menace to neighboring properties or the **public health, safety and welfare.**”

- Suitable Streets;
  - Including emergency access
  - Accommodate traffic/ingress/egress
- Utilities (water, sewer, gas, electric) (Bonding);
- Grading / Drainage;
- Zoning Compliance (Size of Lots / Density)
- Impact on Other Lots/Neighboring Lands;
- Suitable Parklands / Recreational Facilities
- Density / Character of Development
  - Other (Easements, Lot Configuration, Phasing, Construction Schedule, Impact on Natural Resources, Etc.)



## Major vs. Minor (Defined by Local Legislation)

- Whether a municipality defines a Subdivision Application as Major or Minor may depend on the following factors:
  - Size of parcel to be divided;
  - # of lots proposed;
  - Construction of new streets to be dedicated;
- Procedure may be customized (No Preliminary . . .)

# Planning Board

## Major Subdivision:

- Multi-step process typically addressing more complex subdivision.
- Example:
  - Typically provides for submission of a **Preliminary Plat** (sometimes **Sketch**):
  - Preliminary Plat = Layout and approximate dimensions.
    - Public Hearing on Preliminary Plat.
    - Preliminary Plat Approval – Approve, Deny or Approve with Modifications.
  - Followed by **Final Plat** at a later time.
  - Final Plat = Provides more definitive dimensions, as well as modifications required by PB after Preliminary Plat review.

## Major Subdivision, cont.:

- Where Final Plat is in substantial agreement with approved Preliminary Plat, PB shall act on it within 62 days.
- Where Final Plat is **not** in substantial agreement with approved Preliminary Plat, PB shall hold another Public Hearing within 62 days. Then decision within 62 days thereafter.

## Minor Subdivision:

- Often a one step process for addressing more simple subdivisions (i.e, divide one lot into two).
- Often a single plat required (i.e., no Preliminary Plat → straight to Final Plat).

**Danger – Default Approval!**



# Planning Board – the Site Plan

**Site Plan** - A “rendering, drawing or sketch” depicting the arrangement, layout and design of a single parcel.

**Local Legislation Defines what is Subject to Site Plan Review . . . Often relates to action which requires issuance of building permit for construction.**

- Not all situations may be subject to Site Plan review.
  - For ex., a lot proposed for the construction of one single family home is not subject to Site Plan review in many municipalities.
  - Accessory structures of often exempt from Site Plan review.



## Types of Issues Considered:

- Parking,
- Access,
- Screening,
- Signs,
- Landscaping
- Architectural features,
- Location and Dimensions of Buildings,
- Adjacent Land Uses
- Physical features of land being developed (slopes, trees, etc.),
- Additional Elements Specified by Local Legislation (e.g., lighting)
- Etc.

# Planning Board – Additional Duties

**Various additional duties may be delegated to the PB, such as:.**

- Special Use Permits
- Sign Permits,
- Etc.

## **The Planning Board’s Advisory Role**

- Provide an advisory report to the Town Board on any matter referred to the PB by the legislative Board.
- Comprehensive Plan review and recommendations.
- Other Advisory Matters:
  - Investigations, maps, reports and recommendations relating to “planning and development of the Town,” as long as within the Budget, i.e.: traffic issues, adequacy of housing, etc.



# Zoning Board of Appeals

## Formation:

- Appointed by Legislative Board
- Required if Local Zoning;
- Typically 3 to 5 Members;



## Typical and Core Functions Include:

- Use Variances
- Area Variances
- “Interpretations”

# Zoning Board of Appeals

**Variance**– Allows use of land which is not otherwise allowed pursuant to applicable zoning regulations (e.g., an exception to local zoning).

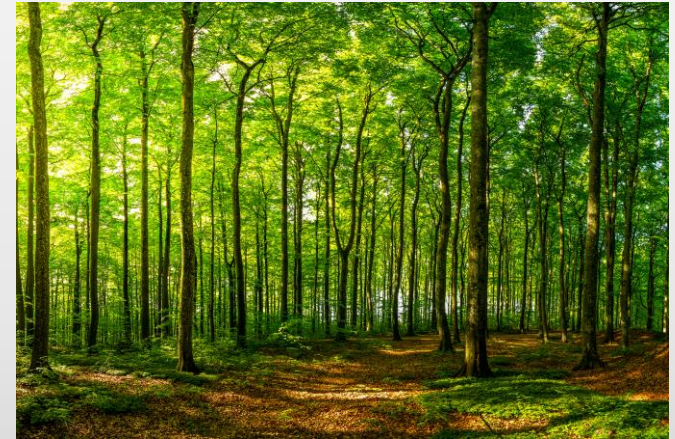


Applicant acknowledges that proposal does **not** fit within the zoning law and argues that based upon the specific circumstances, is entitled to an exception.

## **One Size Does Not Fit All**

- Legislative Body, the Town Board, can craft and implement zoning regulations which generally work well for most applications,
- However, one size does not necessarily fit all.
- Therefore, there are situations where exceptions to those zoning regulations may be appropriate – this is not *breaking* the law, in fact, *variances* are *allowed* per NY State Law.

# Zoning Board of Appeals - Variances



## Example:

- Front setback for a SFH on a residential lot is 50 feet.
- Typically, this setback makes sense. Why? → Home directly fronting street might not look visually appealing, would reduce privacy in the home, could impair transit/sidewalks, could impair view when trying to see around a corner, etc.
- Because of unique aspects of this specific lot (i.e., there are steep slopes at the rear of it, as well as mature trees, wetlands, etc.), the home can only reasonably be built 25 feet from the front of the parcel unless the slopes are flattened and trees are cleared.
- Therefore, the applicant seeks a variance to reduce the setback from 50 feet to 25 feet.

# Zoning Board of Appeals

**Area Variance**– Exception to Area/Dimensional requirements (e.g., side setbacks, height restrictions, maximum building size, open space %, etc.).

Note: The standards here are (purposefully) much less difficult to meet than for a Use Variance.

Applicant must show that the benefit to the Applicant will outweigh any detriment to the community, considering certain factors (area variance balancing test).



## **Area Variance Factors:**

- 1. Undesirable Change to Character of Neighborhood / Detriment to Nearby Properties,
- 2. Viable Alternatives,
- 3. Whether Request is Substantial,
- 4. Whether there could be a Negative Physical or Environmental Effect, and
- 5. Whether Challenge is Self-Created.
  - “. . . shall not necessarily preclude the granting of the area variance.”

# Zoning Board of Appeals

**Use Variance**– Permission to use land in a manner which is not permitted (e.g., commercial use (a retail store) in a residential district).

The standards which must be met to grant a Use Variance are much more difficult to satisfy than the standards for an Area Variance. This is intentional.

## **Use Variance Requirements:**

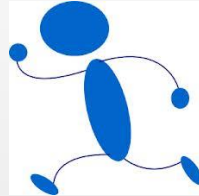
The Applicant must show an “Unnecessary Hardship” as follows:

- 1. Cannot recognize a reasonable return,
  - Does the use allowed allow for a reasonable return?
  - If not, dollars and cents proof.
- 2. The hardship is unique
  - It is not commonly shared by others in the district/neighborhood
- 3. No alteration to the essential character of the neighborhood, and
- 4. Hardship has not been self-created.
  - e.g., Purchasing a lot in a residential district and then immediately applying to use that lot for a non-permitted commercial use.

# Zoning Board of Appeals

**Variations generally “run with the land.”**

i.e., tied to land, not owner.



One may **Appeal** to ZBA b/c zoning law has been misapplied according to the applicant (sometimes called “*Interpretation*”)

i.e., Applicant is denied a building permit for a building because code enforcement officer believes it is a motel, which is not allowed in a residential district.

Applicant believes the building, 4 attached units for rent, is not a motel and that CEO is incorrect.

Applicant may appeal CEO’s determination, arguing the building is not a motel, is allowed in R district and building permit should be issued.





# Miscellaneous Odds and Ends

**Code Enforcement** is a critical component of a Town's Planning and Zoning.



**SEQR / Environmental Review** permeates Planning and Zoning.

**County Approval** will often be required when making Planning and Zoning decisions . . .

- Generally, where subject property is **within 500 feet of**:
  - Adjacent city, village or town; State or County park; County or State Road; Etc.
- **And**, if action involves (GML 239-m):
  - Adoption/Amendment of Comp. Plan
  - Adoption/Amending of Zoning Ordinance or Law
  - SUP
  - Site Plan
  - Use or Area Variances
  - Other approvals which are issued via a Zoning Law.
  - Subdivision (GML 239-n)



**Supermajority/  
“Extraordinary”  
Vote Required if  
Contrary to County  
Recommendation!**

# Miscellaneous Odds and Ends – “SEQR”

## What is “SEQR?”

New York State regulations more formally known as the “State Environmental Quality Review Act.”

Requires governmental agencies to assess the potential adverse **environmental** impacts of an action against the social and economic benefits of the action.

# Miscellaneous Odds and Ends – “SEQR”

## The Environmental Assessment Form (“EAF”)

Part 1 – Identifies and organizes info relevant to the environmental review.

Part 2 - Assessment. Used to identify the categories / magnitude of a range of potential impacts.

Part 3 – Reasoned Elaboration and Determination. Used to examine significance of moderate/large potential impacts.

### Note on Part 1 of the EAF

Submitted by Applicant – Contains Information required to complete SEQR.

Generally, should require for a complete application.

