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ZONING AND LAND USE PLANNING

Planning Agencies' Oversight Of Local Land Use Decisions

New York is a “home rule” state, which means that zoning and other land use decisions typically are made at the village, town, or city level, as the case may be.

Section 239-m of the General Municipal Law (GML), however, requires a referral to, and a subsequent recommendation by, the local county planning commission for certain local land use actions that might affect the interests of other jurisdictions. A local board’s failure to make a required referral can have devastating consequences, including its decision being deemed void and unenforceable.

This column discusses the key elements of GML §239-m, the way it works in practice in various New York counties, and how courts have addressed the law.

GML §239-m

GML §239-m(2) provides that any village, town, or city that is located in a county that has a county planning agency

or, in the absence of a county planning agency, that is located in the jurisdiction of a regional planning council, must refer specified proposed actions to the planning agency or council before finalizing those actions.

The proposed actions subject to the referral requirement, as provided by GML §239-m (3)(a), are:

- Adoption or amendment of a comprehensive plan;
- Adoption or amendment of a zoning ordinance or local law;
- Issuance of special use permits;
- Approval of site plans;
- Granting of use or area variances; and
- Other authorizations that a referring body may issue under the provisions of any zoning ordinance or local law.

Importantly, under GML §239-m(3)(b), referrals of these proposed actions only are required if they apply to real property within 500 feet of any of the following:

- The boundary of any village, town, or city;
- The boundary of any existing or proposed county or state park or other recreation area;
- The right-of-way of any existing or proposed county or state parkway,

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thruway, expressway, road, or highway;

- The existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines;
- The existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or
- The boundary of a farm operation located in an agricultural district (except with respect to the granting of area variances).

A GML §239-m referral is intended to ensure that county concerns are taken into consideration in the local planning process. Put differently, the referral process allows for a regional perspective to be brought into the decision making process in an effort to encourage coordinated and quality zoning, site plan, and subdivision development throughout the county. Thus, GML §239-m(3)(c) permits a county planning agency or regional planning council and the referring body of a village, town, or city to enter into an agreement that provides that certain proposed actions are of local, rather than inter-community or county-wide concern, and are not subject to referral.

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The county planning agency or regional planning council to which a referral is made has 30 days (subject to being extended by agreement) to report its recommendations to the referring body. The clock starts running after the planning agency or council has received a full statement of the proposed action; that includes, for example, a completed environmental assessment form and other materials required by the referring body to make its determination of significance pursuant to the New York State Environmental Quality Review Act (SEQRA).

The planning agency or council's report must be accompanied by a statement of the reasons for its recommendations. If the planning agency or council fails to report within this period, the referring body may take final action on the proposed action without receiving a report.

Once the planning agency or council has reviewed the proposed action, it may recommend approval, modification, or disapproval of the proposed action, or it may report that the proposed action has no significant countywide or inter-community impact.

GML Section 239-l(2) explains that there are a variety of inter-community and county-wide factors for the planning agency or council to consider when reviewing a proposed action that has been referred to it. These are:

- The compatibility of various land uses with one another;
- The traffic generating characteristics of various land uses in relation to the effect of such traffic on other land uses and to the adequacy of existing and proposed thoroughfare facilities;
- The impact of proposed land uses on existing and proposed county or state institutional or other uses;

- The protection of community character as it relates to predominant land uses, population density, and the relation between residential and nonresidential areas;
- Drainage;
- The community facilities;
- The 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.

Section 239-m of the General Municipal Law requires a referral to, and a subsequent recommendation by, the local county planning commission for certain local land use actions that might affect the interests of other jurisdictions. A local board's failure to make a required referral can have devastating consequences.

If the planning agency or council recommends modification or disapproval of a proposed action, the referring body may not act contrary to the recommendation except if a supermajority of the referring body—that is, a majority plus one of all of its members—votes to do so.

Adoption in Practice

Counties apply and explain GML §239-m in various ways. Greene County, in upstate New York, has prepared a 43-page guide (including seven appendices) to the GML §239-m referral and review process in the county, *available at* <http://greenegovernment.com/wp-content/uploads/2013/10/239-Referral-Guide-20101.pdf>. The guide describes in great detail the procedures for the county planning board's review of municipal zoning and planning actions as required by GML §239-m.

The Greene County guide specifies the procedures to initiate and complete the review process, noting that the planning board's referral form must be attached to an application; that it must be filled out and signed to indicate that the referral is official and not just normal correspondence; and that the referral must be received from the municipality – not from the applicant seeking a permit or other relief.

Moreover, the guide explains when a referral must be received (i.e., 12 days before the planning board's meeting to be placed on the monthly agenda). It also cites over a dozen policies that serve as the basis for the planning board's post-review decision on a referral. These range from channeling development whenever possible to centers where infrastructure can support growth, where public transportation can be provided efficiently, and where redevelopment can enhance economic vitality to encouraging housing types that are affordable to renters and homebuyers.

The Greene County guide notes that, following its review, the planning board may determine that:

- The action is of local concern and that there are no significant regional or intermunicipal concerns;
- The action is of local concern but, in reviewing the project, the planning board has non-binding comments that are technical in nature;
- The action is approved;
- The action requires that certain conditions be met or modifications

made before the project can be approved; or

- The action is not approved.

As the guide notes, if the planning board issues an approval with modifications or disapproval, the referring body must abide by the recommendation unless it overrides the modifications or disapproval with a majority plus one vote of the referring body's full board.

The guide also points out that the referral process is complete when a "Notice of Final Action" prepared by the referring body is filed with the county's planning board, and that a referring body that acts contrary to a recommendation of modification or disapproval of a proposed action must set forth the reasons for the contrary action in the Notice of Final Action.

Cattaraugus County, which also is upstate, has a similarly detailed explanation of the GML §239-m referral and review process, available at <https://www.cattco.org/planning/zoning-referrals>. The county's website explains the actions that should be referred, the referral procedures, how referrals affect local decision-making, and the time schedule for referrals, among other things.

Long Island

Not all counties statewide precisely track GML §239-m without any variation. For example, the administrative code of Long Island's Suffolk County requires review and recommendation over a slightly expanded scope of county zoning actions within the county as compared to GML §239-m.

In particular, Section 14-14 requires that towns and villages refer to the Suffolk County Planning Commission any zoning regulation or amendment that would change the district classification of, or

regulations applying to, real property lying within one mile of a nuclear power plant or airport or within 500 feet from:

- The boundary of any village or town;
- The boundary of any existing or proposed county, state, or federal park or other recreation area;
- The right-of-way of any existing or proposed county or state parkway, thruway, expressway, road, or highway;
- The existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines
- The existing or proposed boundary of any other county, state, or federally owned land held or to be held for governmental use;
- The Atlantic Ocean, Long Island Sound, any bay in Suffolk County, or an estuary of any of the foregoing bodies of water; or
- The boundary of a farm operation located in an agricultural district.

Following the referral of a zoning action to the Suffolk County Planning Commission, the commission has 45 days after receipt of a full statement on the proposed action to issue its report.

Long Island's Nassau County is unique among all other counties in the state in that its jurisdiction over land use matters extends beyond the review and recommendation process of GML §239-m. Significantly, Section 1610(b)(1) of the county charter confers subdivision review and approval power on the Nassau County Planning Commission for properties located within the *unincorporated* areas of the three towns in Nassau County (that is, areas outside of villages and cities) and for areas within villages and cities that are within 300 feet (rather than 500 feet) of a municipal boundary, in a stated effort "to further the health, safety and general welfare of the residents of Nassau

County and to promote the coordinated, sustainable and efficient development of the [c]ounty." See Nassau County Charter, available at <https://www.nassaucountyny.gov/DocumentCenter/View/22437/County-Charter-as-of-January-2nd-2020?bidId=-->.

Conclusion

It cannot be overemphasized that a local government's failure to refer a proposed zoning or land use planning action to the relevant county commission as required by the law can lead to its approval of the proposed action being voided by the courts. In 2000, for example, the Appellate Division, Second Department, ruled that a village's comprehensive master plan was void and unenforceable because the village failed to comply with GML §239-m. See *Matter of LCS Realty Co., Inc.*, 273 A.D.2d 474 (2d Dept. 2000).

More recently, in *Matter of Calverton Manor, LLC*, 160 A.D.3d 842 (2d Dept. 2018),

the Second Department ruled that a transfer of development rights law enacted by a Long Island town was void and unenforceable for the same reason. The Second Department concluded that the town board's failure to comply with the referral requirements of GML §239-m constituted a "jurisdictional defect."

As these decisions make clear, local officials as well as counsel for developers and other property owners must fully understand the requirements of GML §239-m and how to comply with the law in order to limit the risk that a zoning or other land use decision is invalidated.