

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

VOLUME 264—NO. 102

An ALM Publication

WEDNESDAY, NOVEMBER 25, 2020

LAND USE AND PLANNING

Incentive Zoning Can Help Alleviate Municipal Budget Woes

By
**Anthony S.
Guardino**



Given the widespread budgetary concerns facing local governments across the state brought on by the COVID-19 pandemic, many of them are finding it increasingly difficult to fulfill their obligations to deliver basic public services. Incentive zoning offers a way for these municipalities to get private developers to meet those commitments. Simply put, towns, villages, and cities can grant zoning bonuses or incentives to developers in exchange for the developers providing community amenities, infrastructure, or other public benefits.

New York Law

Section 261-b of New York's Town Law, Section 7-703 of the Village Law, and Section 81-d of the General City Law all provide a framework for local governments to adopt their own incentive zoning (also sometimes referred to as "bonus zoning") rules.

These state laws set forth important definitions, describe the authority of

local governments to adopt a system of zoning incentives and the purposes for which they may do so, and explain how they may implement such a system.

The Town Law, for example, defines "incentive zoning" to mean the system by which specific incentives or bonuses are granted on condition that specific physical, social, or cultural benefits or amenities inure to the community.

Section 261-b of the Town Law also provides that the term "incentives or bonuses" means adjustments to the permissible population density, area, height, open space, use, or other provisions of a zoning ordinance or local law for a specific purpose authorized by the town board.

The community benefits or amenities that developers provide in exchange for those incentives or bonuses are identified as "open space, housing for persons of low or moderate income, parks, elder care, day care or other specific physical, social or cultural amenities, or cash in lieu thereof" for the benefit of community residents.

In addition to existing powers and authorities to regulate by planning or zoning, including authorization to

provide for the granting of incentives or bonuses pursuant to other law, the Town Law empowers town boards to provide for a system of zoning incentives or bonuses as they deem "necessary and appropriate" to advance their town's "specific physical, cultural and social policies" in accordance with their town's comprehensive plan and in coordination with other community planning mechanisms or land use techniques.

The Town Law also imposes various conditions on town boards in connection with their implementation of a zoning incentive system. These include the following:

- In providing for a system of zoning incentives or bonuses, a town board must follow the procedure for adopting and amending its zoning ordinance or local law, including all provisions for notice and public hearing applicable for changes or amendments to a zoning ordinance or local law.
- Each zoning district in which incentives or bonuses may be awarded must be designated in the town zoning ordinance or local law and incorporated in any map

ANTHONY S. GUARDINO is a partner with Farrell Fritz, practicing in the areas of land use, zoning, and environmental law. He can be reached at aguardino@farrellfritz.com.

adopted in connection with that zoning ordinance or local law (or amendment).

- Each zoning district in which incentives or bonuses may be authorized must have been found by the town board, after evaluating the effects of any potential incentives that are possible by virtue of the provision of community amenities, to contain adequate resources, environmental quality, and public facilities, including adequate transportation, water supply, waste disposal, and fire protection. In designating such districts, the town board must determine that there will be no significant environmentally damaging consequences and that such incentives or bonuses are compatible with the development otherwise permitted.

- The town board must prepare a generic environmental impact statement pursuant to the New York State Environmental Conservation Law and regulations adopted by the New York State Department of Environmental Conservation for any zoning district in which the granting of incentives or bonuses has a significant effect on the environment before any such district is designated, and the statement must be supplemented from time to time by the town board if there are material changes in circumstances that may result in significant adverse impacts.

Importantly, Section 261-b also requires that town boards set forth the procedure by which incentives may be provided to specific lands, including an explanation of:

- The incentives or bonuses that may be granted by the town to an applicant;
- The community benefits or amenities that may be accepted from an applicant by the town;
- The criteria for approval, including methods required for determining the adequacy of community amenities to be accepted from an applicant in exchange for the particular bonus or incentive to be granted to the applicant by the town; and

The value that incentive zoning can bring to New York's towns, villages, and cities—including through construction of what the court itself referred to in that decision as “uneconomic projects such as low-cost housing, slum rehabilitation or public facilities”—may never have been so important and so needed as it is today.

- The procedure for obtaining bonuses, including applications and the review process, and the imposition of terms and conditions attached to any approval.

It is worth noting that Section 261-b also provides that if a town board determines that a suitable community benefit or amenity is not immediately feasible or is otherwise not practical, the board instead may require a payment to the town of a sum to be determined by the board. Moreover, if cash is accepted in lieu of a suitable community benefit or amenity, the board must deposit the funds in a trust account and may use those funds

only for specific community benefits authorized by the board.

Local Enactments

Numerous jurisdictions across the state have enacted their own incentive zoning laws. For example, the town of Pittsford has an incentive zoning article in its town code, *see* <https://ecode360.com/6437421>, that empowers the town board “to grant incentives to the private sector engaged in the land development process” to advance the town’s specific policies in accordance with its comprehensive plan and in coordination with other community planning mechanisms or land use techniques.

The town’s stated objectives range from protecting “highly valued ecological resources and environmentally sensitive areas” and “active farm operations” to preserving “greenways and important open spaces,” providing a “sound mix of housing types,” and securing “important public works improvements which would not otherwise be provided,” such as extending sidewalks, connecting residential areas with schools, and providing stormwater detention and treatment basins in excess of that necessitated by immediate project demand.

Under Pittsford’s law, the town board, among other things, may grant increases in residential unit density (in so-called “Comprehensive Plan Preservation Areas”), development of current residential unit density over a full parcel, changes in lot area and dimensional requirements, changes of use, and reduction of certain road construction standards.

The town of Sweden has a similar incentive zoning article in its town code, *see* <https://ecode360.com/10495218>. Among other things, it permits the town board to accept the following community benefits or amenities—typically on site or off site—in exchange for an incentive:

- Agricultural conservation, open space, scenic, ecological, historic, or other permanent conservation easements;
- Donations of land in fee simple for conservation and other community benefit purposes;
- Construction of recreation amenities serving a town-wide need and accessible to the general public;
- Construction or improvement to public works above and beyond that required to mitigate proposed impacts in accordance with the State Environmental Quality Review Act (SEQRA) and the town code;
- Preservation and improvements of historical or cultural sites or structures;
- Other facilities or benefits to the residents of the community, as determined by the town board; and
- Donations of funds in place of other amenities.

As just one further example, the Long Island village of Mineola also has local legislation authorizing incentive zoning. *See* Village of Mineola Code, Section 550-5(I), Development incentive bonuses, *available at* <https://ecode360.com/15353483>.

Case Law

In the several decades since incentive zoning became formally embedded in New York statutory law, few courts

have opined on its validity. Those that have done so, however, typically have rejected substantive challenges to these laws.

For example, *Finger Lakes Preservation Ass'n v. Town Board of Italy*, 25 Misc.3d 1115 (Sup. Ct. Yates Co. 2009), involved a challenge to the town of Italy's decision to use incentive zoning in the formulation of land use policies for wind farms. The court found that use to be "novel," and noted the town's contentions that because wind farms would have substantial adverse impacts on the town, including noise,

Simply put, towns, villages, and cities can grant zoning bonuses or incentives to developers in exchange for the developers providing community amenities, infrastructure, or other public benefits.

shadow flicker, and visual aesthetic degradation, some of which could not be fully or adequately mitigated, the town should be able to seek benefits from wind developers in exchange for allowing the siting of these farms in the town.

The court dismissed the petition challenging the town's actions, on the merits. The court concluded that the town had not violated SEQRA and that its decisions had not been "arbitrary, capricious or unsupported by substantial evidence."

More recently, *Matter of Brighton Grassroots, LLC v. Town of Brighton*, 179 A.D.3d 1500 (4th Dep't 2020), involved a challenge to the town of Brighton's decision to approve an incentive zoning application for a

grocery store. The Appellate Division, Fourth Department, decided that the provisions of the town's incentive zoning code were consistent with state law – that is, Town Law Section 261-b.

Conclusion

More than three decades ago, the New York Court of Appeals explained that incentive zoning "is based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive." *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121 (1988). The value that incentive zoning can bring to New York's towns, villages, and cities—including through construction of what the court itself referred to in that decision as "uneconomic projects such as low-cost housing, slum rehabilitation or public facilities"—may never have been so important and so needed as it is today.

Even as proposed legislation seeks to expand its use, *see, e.g.*, New York Assembly Bill No. 5811, *available at* <https://www.nysenate.gov/legislation/bills/2019/a5811> (would authorize cities, towns, and villages to offer incentives to developers to establish mixed-use age integrated communities), municipalities are turning to incentive zoning as a means to shift the cost of public services and amenities to private developers.