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Regional Planning

Failure to Comply Can Doom Local Land Use Decisions

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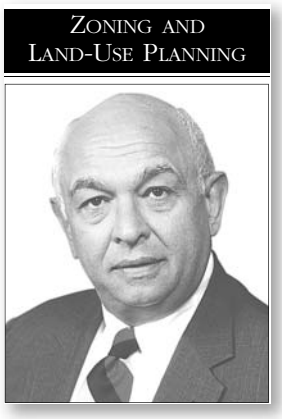
An often over-looked provision of law that is jurisdictional to certain zoning changes, certain special permit applications, and certain other land use applications is Section 239-m of the General Municipal Law. This section of the General Municipal Law (not the Village Law or Town Law) requires that a town or a village in a county that has a county planning agency[1] "shall, before taking final action on proposed actions included in subdivision three of this section, refer the same to such county planning agency." The following proposed actions—so long as they meet the "500 foot" rule—are subject to this referral requirement: (1) adoption or amendment of a comprehensive plan; (2) adoption or amendment of a zoning ordinance or local law; (3) issuance of special use permits; (4) approval of site plans; (5) granting of use or area variances; (6) any other authorization that the referring body may issue under the provisions of any zoning ordinance or local law.

The "500 foot" rule limits the application of Section 239-m to real property within 500



feet of the following: (1) the boundary of any city, village, or town; (2) the boundary of any existing or proposed county or state park or other recreation area; (3) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road, or highway; (4) 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; (5) the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or (6) the boundary of certain farms.

In these circumstances, a county planning agency must be supplied with a "full statement of such proposed action," which the statute defines to mean all materials required by and submitted to the referring body as an application on the proposed action, including a completed environmental assessment form and all other materials required by such referring body to make its determination of significance pursuant to the State Environmental Quality Review Act.[2] When the proposed action referred is the adoption or amendment of a zoning ordinance or local law, "full statement" also includes the complete text of the proposed ordinance or local law as well as all existing provisions to be affected thereby, if any, if not already in the possession of the county planning agency.[3]

After receiving a "full statement," a county planning agency has 30 days[4] within which to review the proposal for intercommunity or countywide considerations and to recommend approval, modification, or disapproval of the proposed action (accompanied by a statement of the reasons for such recommendations), or report that the proposed action has no significant county-wide or inter-community impact.[5] If a planning agency fails to report within such period, the referring body may take final action on the proposed action without such report. However, if a planning agency timely recommends modification or disapproval of a proposed action, or submits such a report late, but two or more days prior to final action by the referring body, the referring body is not permitted to act contrary to such recommendation except by a vote of a majority plus one of all the members thereof, and must explain its reasons for so acting.

In summary, Section 239-m is a comprehensive statute that allows regional

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planning in certain circumstances. It is far from a traditional regional planning statute but it does have the threshold, intent, and potential to become a significant regional planning mechanism. Indeed, the courts have taken a very stern view of the importance of complying with the statute, holding that non-compliance is jurisdictionally defective and the action taken thereunder "void."

Violations Are Void

For example, in *Ferrari v. Town of Penfield Planning Bd.*,[6] owners of land adjacent to, or across from, a 12 acre parcel of property in the Town of Penfield, in Monroe County, commenced an article 78 proceeding seeking to annul the town's planning board's issuance of a negative declaration of environmental significance and its resolution granting subdivision plat and site plan approval for development of a professional office complex on the site. The property owners argued, among other things, that the town planning board's approval of the application was procedurally defective because it had failed to refer the revised plans to the Monroe County Planning Board. The petition was dismissed, and the property owners appealed.

The Appellate Division, Fourth Department, reversed, finding that the town planning board had not referred the revised subdivision plans that it was considering to the county planning board. The appellate court noted that the town planning board had considered the revised plans to be so substantially different from the original layout that it convened another public hearing regarding the revised plans. In these circumstances, the Fourth Department ruled, the revised plans should have been referred to the county planning board pursuant to Section 239-m. Because that reference had not been made, the town planning board's determination was void and had to be annulled, the Fourth Department concluded.

Comprehensive Plan

The Second Department reached a similar result in *LCS Realty Co., Inc. v. Incorporated Village of Roslyn*.[7] This case arose after the Long Island village of Roslyn adopted a comprehensive master plan and related local laws, which rezoned an area of the village from commercial to residential. The statutory changes were challenged in an article 78 proceeding.

After Supreme Court, Nassau County, dismissed the proceeding, the petitioners appealed to the Second Department. The appellate court reversed. It noted that there had been a referral by the village to the Nassau County Planning Commission ("NCPC"), but found that the commission had not had for the requisite 30 days "all of the materials" that the village needed to pass a new zoning resolution, including the final version and complete text of the proposed new zoning law and the final generic environmental impact statement ("FEIS").

Unlike in *Ferrari*, the village here did not hold additional public hearings reflecting changes between the draft EIS and the FEIS. However, the Second Department ruled, the village should have held such hearings, and was under a statutory obligation to provide those materials to the NCPC for the 30-day review period. It concluded that the village had not complied with Section 239-m and, as a consequence, the comprehensive master plan and related local laws were void.

In the most recent decision involving this issue by Supreme Court, Suffolk County, *Matter of Yaphank Realty Corp. v. LaValle*,[8] Justice Ralph F. Costello determined that a large land rezoning by the Town of Brookhaven of 795 parcels was void pursuant to Section 239-m . Justice Costello found that the Suffolk County Planning Commission did not have before it all the data that the Brookhaven Town Board had before it in connection with the proposed rezoning. Accordingly, the court voided the action in toto on all parcels.

Conclusion

A number of counties in New York have countywide planning agencies. In Long Island, both Nassau and Suffolk counties have planning commissions that have been given strong powers—but not veto powers—by the state Legislature. Court decisions enforcing Section 239-m, and voiding actions taken in contravention of the statute, have the effect of strongly supporting regional planning, and countywide planning agencies.

Of course, it seems that perhaps more regional planning on major projects could be achieved by modifications of the powers of these planning boards. That, of course, would require legislative action and would most likely be heavily fought by local municipalities who treasure the unfettered use of their power to zone within their borders. Under such circumstances, the Legislature may have to strike a new balance increasing the power to the regional agencies while not stripping the power from the local towns and villages.

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1. The statute also applies to regional planning councils.

2. See Environmental Conservation Law article 8.

3. Referring bodies and county planning agencies also may agree as to what constitutes a "full statement" for any or all of the proposed actions that the referring body is authorized to act on.

4. The statute permits a county planning agency and referring body to agree to a longer period for planning agency review.

5. A report and statement of reasons must be in writing. *Voelckers v. Guelli*, 58 N.Y.2d 170 (1983).

6. 181 A.D.2d 149 (4th Dept. 1992).

7. 273 A.D.2d 474 (2d Dept. 2000).

8. No. 28639-03 (Sup. Ct. Suffolk Co. Aug. 23, 2006). The writer was counsel for the prevailing plaintiff in this case, which is presently on appeal.