NEW YORK STATE OF OPPORTUNITY. | Division of Local Government Services

County Referral

A Division of the New York Department of State

1

Purpose

" ... to bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction."

General Municipal Law
GMU §§ l, m & n

2

Municipal benefits

County planning agency may:

- Provide professional assistance to local boards
- Identify potential inter-municipal impacts
- Ensure proper legal procedures are followed better preserving local board decisions
- Recommend needed, but possibly controversial modifications or disapprovals

3

County planning agency

County legislative body determines "county planning agency" for purposes of

General Municipal Law 239-m & 239-n review

Examples include:

- County planning board, department, director or commissioner
- Others as designated by county legislative body

4

Public body

- May not conduct business without quorum present
  - At least a majority of the full membership of the board, including any absences or vacancies
    - New York General Construction: Article 2 §41 Quorum and Majority
- Subject to Open Meetings Law
  - Access
  - Notice to the public & media

NYS Public Officers Law
Article 7 §100-111

- Make agenda and/or documents available prior to meeting
  - online if practicable

5

Limitations on members

- If also a member of a local referring body
  - May NOT vote or participate in county deliberations on referrals from the local board on which they serve
  - General Municipal Law §239-c

6

7

Subject to GML §239-m referral

- Comprehensive plan
- Zoning adoption or amendment
- Use & area variances
- Special use permits
- Site plans
- Other authorizations under zoning
  - County's option to require subdivision referral under GML §239-n

Referring body:
- Planning board
- ZBA
- Governing board

A Division of the New York Department of State

Division of Local Government Services

7

8

Refer if within 500 feet:

- Municipal boundary
- Boundary of state or county park or recreation area
- R-O-W of state or county road
- R-O-W of county-owned stream or drainage channel
- Boundary of state or county land on which a public building is located
- Boundary of a farm operation that is in a state agricultural district

Areas shaded require county review

A Division of the New York Department of State

Division of Local Government Services

8

9

Inter-municipal referral requirement

If application property is within 500 feet of an adjacent municipality

- Special Use Permit
- Use Variance
- Site Plan
- Subdivision
- Send notice by mail or electronic transmission to clerk of adjacent municipality at least ten days prior to any hearing

General Municipal Law §239-nn

A Division of the New York Department of State

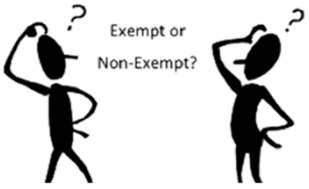
Division of Local Government Services

9

10

Referral exceptions

- Zoning Board of Appeals: Interpretations
- Area variances relative to Farm operation in a State Agricultural District
- Items exempted by agreement between county planning agency & referring body



A Division of the New York Department of State

Division of Local Government Services

10

11

Referral agreements

County & referring body may enter into written agreement to exempt certain actions from county review

Examples:
- Special use permits for accessory structures on residential lots
- Dimensional (area) variances for fences
- Site plan review for a change in tenant where modification of building footprint is less than 10%
- Lot line adjustments

A Division of the New York Department of State

Division of Local Government Services

11

12

Full statement includes

- Locally required submission materials:
  - Application on a proposed action
  - All other materials required by & submitted to referring body
  - Municipality sponsored action materials.
    - Example: text of zoning being amended or adopted
- Agricultural information:
  - Agricultural Data Statement
- Environmental information:
  - SEQRA* Environmental Assessment Form (EAF) Part 1

A Division of the New York Department of State

Division of Local Government Services

12

13

Full Statement: additional materials

County planning agency & referring body may draw up an agreement to increase submission standards of full statement

Examples:
- County referral form
- Zoning district in which property is located
- Copy of local comment or review

If no agreement, the county can write recommended submission standards

13

14

Agricultural Data Statement

- NYS Agriculture & Markets Law
  - Article 25 AA, Section 305-a
  - Town Law 283a
  - Village Law §7-739
- Trigger: Subdivision, site plan, special use permit, use variance
- Include map showing project & farm operation(s)
- For review board to evaluate potential impacts.

14

15

SEQRA- State Environmental Quality Review Act

"Full statement" must include:
- Part I environmental assessment form (EAF)
  - Short: Unlisted (and Type 2, if EAF required locally)
  - Full (long): Type I & Unlisted
- Any other materials required by referring body in making a determination of significance
- Determination of significance not required
- Matter of Batavia First v Town of Batavia, 2006

15

16

Receipt of full statement

- Clock ticking:
  - 30 day review period begins upon receipt of a "full statement
- "Received" by county in accordance with county planning agency rules & regulations in respect to person, place and period of time for submission
- If no county rules apply: "receipt" occurs on day county planning board clerk receives referral by hand or date postmarked

16

17

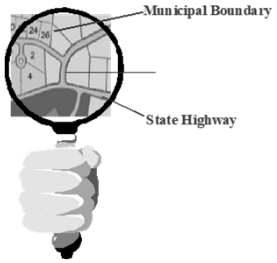
Referral timeline

- Special Use Permits & Site Plan:
  - Full statement must be sent to the county planning agency at least 10 days prior to public hearing
- Site Plan:
  - If no public hearing is needed locally, referral must be sent before final action can be taken
- Subdivisions:
  - Referral only required where authorized by the county legislative body
- Variances:
  - Referral must be sent at least 5 days prior to public hearing

17

18

Examples of review areas:

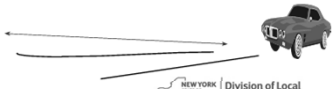


- Compatibility of land uses
- Traffic impacts
- Community character
- Drainage
- Development policies & comprehensive plans

18

Example: Corridor redevelopment

- Location
- Number
- Access points
- Topography
- Drainage
- Community character
- Signage



19

Potential items for comment

County Planning Agencies may also offer helpful advice

- Impact on traffic
- Impact on county or state institutions
- Protection of community character
- Impact on community appearance
- Impact on drainage & community facilities
- Consideration of official development policies
- Effect on public convenience, governmental efficiency, community environment

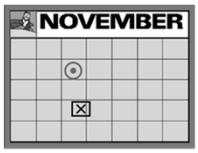
20

Review period

- Referring body cannot act until the earlier of following occurs:
- Referring body receives report of county planning agency;

OR

- Thirty days have passed after county's receipt of full statement



Period can be longer if agreed to by county and referring body

21

Timing of Final Approval

- May a referring body condition its final approval on the county's positive recommendation?
- A referring body may not take an early vote on an action and condition it on the county planning agency's subsequent positive recommendation

No

22

Two-day rule

- After thirty days, the referring body may act by a simple majority vote if they have not received a county report
- Two-day exception requires consideration even after 30 days have passed, but at least 2 days before meeting where decision is made

23

Recommendations

- County options:
  - Approval
  - Modification
  - Disapproval
  - No significant county-wide or inter-community impact
- County must include reasons for recommendation

24

25

Supermajority vote

- If county planning board recommends disapproval of application, or approval with modification

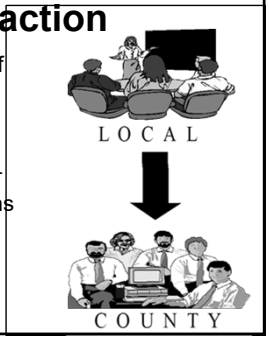
- Referring body may only act contrary to that recommendation by a majority plus one vote

25

26

Report of final local action

- Referring body must file a report of final action with county planning agency
- If referring body acts contrary to recommendation of modification or disapproval, it must include reasons in report



26

27

Changes after referral

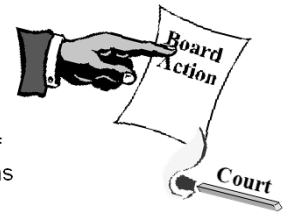
- Example:
  - New access point proposed on site plan
  - If changes are substantial, it should be referred again to county planning agency

27

28

Consequences of non-referral

- Failure to refer an action subject to §239-m or §239-n review may invalidate municipal action
- For adoption or amendment of zoning, the statute of limitations to challenge is 6 years



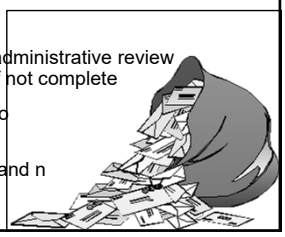
DOS Legal Memorandum: https://www.dos.ny.gov/cnsl/lu12.htm
"***Statute Of Limitations In The Case Of A Failure To Refer***"

28

29

Encouraging referrals

- Provide forms or guidance documents to local boards
- Provide checklists of items to be sent
- Provide clear deadlines
- Upon receipt of application, perform administrative review & immediately notify referring board if not complete
- Consider holding "special meetings" to accommodate urgent local matters
- Distribute copies of GML §§239 l, m, and n



29

30

New York State Department of State

Division of Local Government Services

518-473-3355

localgov@dos.ny.gov

www.dos.ny.gov

30

GENERAL MUNICIPAL LAW

§ 239-b. Definitions. As used in this article and unless otherwise provided:

1. "Municipal legislative body" means the town board of a town, the board of trustees of a village; the board of aldermen, common council, council or commission of a city; and other elective governing board or body now or hereafter vested by state statute, charter or other law with jurisdiction to initiate and adopt local laws or ordinances.

2. "County legislative body" means the board of supervisors of a county, the county legislature, the county board of representatives, or other body vested by its charter or other law with jurisdiction to enact local laws or resolutions.

3. "Municipality" means a city, village, or that portion of a town located outside the limits of any city or village.

4. "County planning board" means a county planning board established pursuant to section two hundred thirty-nine-c of this article.

5. "Special board" means a board consisting of one or more members of the county planning board and such other members as are appointed by the county legislative body to prepare a proposed county comprehensive plan or an amendment thereto.

6. “County comprehensive plan" means the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the county, as may be prepared pursuant to section two hundred thirty-nine-d of this article.

7. "Region" means an area which encompasses a regional planning council.

8. "Regional planning council" means a council established pursuant to section 239-h of this article.

9. "Regional comprehensive plan" means the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the region, as may be prepared pursuant to §239-i of this article.

§ 239-c. County planning boards.

1. Legislative findings and intent. The legislature hereby finds and determines that:

(a) significant decisions and actions affecting the immediate and long-range protection, enhancement, growth and development of the state and its communities are made by county planning boards.
(b) county planning boards serve as an important resource to the state and its localities, helping to establish productive linkages between communities as well as with state and federal agencies.
(c) through comprehensive planning and special studies, county planning boards focus on opportunities and issues best handled at a county-wide scale.
(d) the development of a county comprehensive plan can foster cooperation among governmental agencies in the planning and implementation of capital projects. Similarly, county comprehensive plans can promote inter-municipal cooperation in the provision of public services.

(e) citizen participation is essential to the design and implementation of a county comprehensive plan.
(f) the great diversity of resources and conditions that exist within and among counties requires consideration of such factors by county planning boards.
(g) it is the intent of the legislature therefore, to provide a permissive and flexible framework within which county planning boards can perform their power and duties.

1-a. Alternate members of county planning boards.

(a) A county legislative body may, by local law or as a part of the local law creating the county planning board, establish alternate planning board member positions for purposes of substituting for a member in the event such member is unable to participate because of a conflict of interest. Alternate members of the county planning board shall be appointed by resolution of the county legislative body, for terms established by such legislative body.
(b) The chairperson of the planning board may designate an alternate member to substitute for a member when such member is unable to participate because of a conflict of interest on an application or matter before the board. When so designated, the alternate member shall possess all the powers and responsibilities of such member of the board. Such designation shall be entered into the minutes of the initial planning board meeting at which the substitution is made.
(c) All provisions of this section relating to county planning board member training and continuing education, attendance, conflict of interest, compensation, eligibility, vacancy in office, removal, and service on other boards, shall also apply to alternate members.

2. Establishment of county planning board.

(a) Creation. In the absence of a county administrative code or county charter which may otherwise provide for the creation of a county planning board, the county legislative body alone, or in collaboration with the legislative bodies of the municipalities in such county may establish a county planning board.
(b) Membership. Members and officers of such board shall be selected in a number and manner determined by the county legislative body. In making such appointments, the county legislative body shall include members from a broad cross section of interests within the county. Consideration should also be given to securing representation by population size, geographic location and type of municipality**. The terms of membership as well as the filling of vacancies on such board shall be determined by the county legislative body. The county legislative body may provide for the appointment of individuals to serve as ex-officio members of the county planning board.** Said ex-officio members or their designees may participate in the deliberations of the county planning board, but shall not have voting privileges.
(c) Membership of elected or appointed officials. No person shall be precluded from serving as a member of a county planning board, as appointed by the county legislative body pursuant to this section, because such member is an elected or appointed official of the county or a municipality. A member of a county planning board shall excuse himself or herself from any deliberation or vote relating to a matter or proposal before such county planning board which is or has been the subject of a proposal, application or vote before the municipal board of which he or she is a member.
(d) Training and attendance requirements.

(i) Each member of a county planning board shall complete, at a minimum, four hours of training each year designed to enable such members to more effectively carry out their duties. Training received by a member in excess of four hours in any one year may be carried over by the member into succeeding years in order to meet the requirements of this paragraph. Such training shall be approved by the county and may include, but not be

limited to, training provided by a regional or county planning office or commission, county planning federation, state agency, statewide municipal association, college or other similar entity. Training may be provided in a variety of formats, including but not limited to, electronic media, video, distance learning and traditional classroom training.
(ii) To be eligible for reappointment to such board, such member shall have completed the training promoted by the county pursuant to this paragraph.
(iii) The training required by this paragraph may be waived or modified by the county when, in the judgment of the governing board, it is in the best interest of the county to do so.
(iv) No decision of a county planning board shall be voided or declared invalid because of a failure to comply with this paragraph.

(e) Member reimbursement. The members of such county planning board shall receive no salary or compensation for their services as members of such board but may be reimbursed for authorized, actual and necessary travel and expenditures.
(f) Removal of members. The county legislative body may remove any member of such planning board for cause, and may provide by resolution for removal of any planning board member for non-compliance with minimum requirements relating to meeting attendance and training as established by the county legislative body by resolution.
(g) By-laws. The county planning board shall adopt by-laws governing its operation which shall be approved by the county legislative body and shall keep a record of its resolutions, transactions, findings and determinations, which record shall be a public record.
(h) Appropriation; expenses. The county legislative body and municipal legislative bodies may, in their discretion, appropriate and raise by taxation, money for the expenses of such county planning board. Such bodies shall not be charged for any expense incurred by such board except pursuant to such appropriation. The county planning board shall have the power and authority to employ staff, consultants and other experts and to pay for their services, and to provide for such other expenses as may be necessary and proper, not to exceed the appropriation that may be made therefore by the county legislative body for such county planning board.
(i) Authority to receive and expend funds. In furtherance of the purposes of this article, the county planning board may receive and expend public funds and grants from private foundations or agencies and may apply for and accept grants from the federal government or the state government and enter into contracts for and agree to accept such grants, donations or subsidies in accordance with such reasonable conditions and requirements as may be imposed thereon.

3. County planning board powers and duties.

(a) Review of certain municipal planning and zoning actions. The county legislative body may, by resolution, authorize the county planning board to conduct reviews of certain classes of planning and zoning actions by a city, town or village within such county pursuant to sections two hundred thirty-nine-l and two hundred thirty-nine-m of this article, and to review certain subdivision plats pursuant to section two hundred thirty-nine-n of this article.
(b) County comprehensive plan. The county legislative body may request the county planning board to assist in the preparation of a county comprehensive plan and amendments thereto pursuant to section two hundred thirty-nine-d of this article.
(c) County official map. The county legislative body may request the county planning board to prepare a county official map and amendments thereto pursuant to section two hundred thirty-nine-e of this article.
(d) County studies. The county planning board may undertake studies relevant to the future growth, development, and protection of the county and municipalities therein, including studies in support of a county comprehensive plan.

(e) Local studies. The county planning board may assist a city, town, or village in the study of ways to obtain economy, efficiency and quality in the planning and provision of municipal services.
(f) Collection and distribution of information. The county planning board may collect and distribute information relative to county or municipal planning and zoning in such county. Upon request from the county or a municipality, the planning board may recommend to the legislative body of the county or such municipalities whose jurisdictions are served by the county planning board a comprehensive plan which shall designate suitable areas to be zoned for land uses, taking into consideration, but not limited to, such factors as existing and projected highways, parks, open spaces, parkways, public works, public utilities, public transportation terminals and facilities, population trends, topography and geologic structure.
(g) Local technical assistance. The county planning board may furnish such technical services as a municipality within the county may request. Such services may include, but not be limited to assistance with planning and land use functions, use of geographic information systems, infrastructure development, as well as inter-municipal services delivery, and may be provided directly by the county planning board or in coordination with other county departments or agencies. The charges, if any, to be made for such services shall be established by the county legislative body.
(h) Highway construction. Before the final approval of any plan involving the construction or reconstruction of any state or county highway, with or without federal aid, the county planning board shall be given an opportunity to examine such plans and offer suggestions with respect thereto. This paragraph shall in no manner be construed as nullifying or contravening the final approval of the commissioner of transportation.

4. Annual report. The county planning board shall submit an annual report to the county legislative body and include in such report topics that are required in the by-laws of the county planning board.

5. Voting requirements. Every motion or resolution of a county planning board shall require for its adoption the affirmative vote of a majority of all the members of the county planning board.

§ 239-l. Coordination of certain municipal zoning and planning actions; legislative intent and policy

1. Definitions. For the purposes of this section and sections two hundred thirty-nine-m and two hundred thirty-nine-n of this article, the following terms shall apply:

(a) "County planning agency" means a county planning board, commission or other agency authorized by the county legislative body to review proposed actions referenced for intercommunity or county-wide considerations subject to the provisions of this section, and sections two hundred thirty-nine-m and two hundred thirty-nine-n of this article.
(b) "Regional planning council" means a regional planning board or agency established pursuant to the provisions of this chapter.

2. Intent. The purposes of this section, sections two hundred thirty-nine-m and two hundred thirty-nine-n of this article shall be to bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction. Such review may include inter-community and county-wide considerations in respect to the following:

(a) compatibility of various land uses with one another;
(b) 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;
(c) impact of proposed land uses on existing and proposed county or state institutional or other uses;

(d) protection of community character as regards predominant land uses, population density, and the relation between residential and nonresidential areas;
(e) drainage;
(f) community facilities;
(g) official municipal and county development policies, as may be expressed through comprehensive plans, capital programs or regulatory measures; and
(h) such other matters as may relate to the public convenience, to governmental efficiency, and to the achieving and maintaining of a satisfactory community environment.

3. Review considerations. In no way shall the review of inter-community and county-wide considerations pursuant to the provisions of this section, or pursuant to sections two hundred thirty-nine-m and two hundred thirty-nine-n of this article, preclude a county planning agency or a regional planning council from making informal comments, or supplying such technical assistance as may be requested by a municipality.

§ 239-m. Referral of certain proposed city, town and village planning and zoning actions to the county planning agency or regional planning council; report thereon; final action

1. Definitions. As used herein:

(a) The term "proposed" as used in subparagraphs (ii) and (iii) of paragraph (b) of subdivision three of this section shall be deemed to include only those recreation areas, parkways, thruways, expressways, roads or highways which are shown on a county comprehensive plan adopted pursuant to section two hundred thirty-nine-d of this article or adopted on an official map pursuant to section two hundred thirty-nine-e of this article.
(b) The term "referring body" shall mean the city, town or village body responsible for final action on proposed actions subject to this section.
(c) The term "full statement of such proposed action" shall mean all materials required by and submitted to the referring body as an application on a proposed action, including a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations. When the proposed action referred is the adoption or amendment of a zoning ordinance or local law, "full statement of such proposed action" shall also include 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 or regional planning council. Notwithstanding the foregoing provisions of this paragraph, any referring body may agree with the county planning agency or regional planning council as to what shall constitute a "full statement" for any or all of those proposed actions which said referring body is authorized to act upon.
(d) The term "receipt" shall mean delivery of a full statement of such proposed action, as defined in this section, in accordance with the rules and regulations of the county planning agency or regional planning council with respect to person, place and period of time for submission. In no event shall such rule or regulation define delivery so as to require in hand delivery or delivery more than twelve calendar days prior to the county planning agency's or regional planning council's meeting date. In the absence of any such rules or regulations, "receipt" shall mean delivery in hand or by mail to the clerk of the county planning agency or regional planning council. Where delivery is made in hand, the date of receipt shall be the date of delivery. Where delivery is made by mail, the date as postmarked shall be the date of delivery. The provisions of this section shall not preclude the rules and regulations of the county planning agency or regional planning council from providing that the delivery may be a period greater than twelve days provided the referring body and the county planning agency or regional planning council agree in writing to such longer period.

2. Referral of proposed planning and zoning actions. In any city, town or village which is located in a county which has a county planning agency, or, in the absence of a county planning agency, which is located within the jurisdiction of a regional planning council duly created pursuant to the provisions of law, each referring body shall, before taking final action on proposed actions included in subdivision three of this section, refer the same to such county planning agency or regional planning council.

3. Proposed actions subject to referral.

(a) The following proposed actions shall be subject to the referral requirements of this section, if they apply to real property set forth in paragraph (b) of this subdivision:

(i) adoption or amendment of a comprehensive plan pursuant to section two hundred seventy-two-a of the town law, section 7-722 of the village law or section twenty-eight-a of the general city law;

(ii) adoption or amendment of a zoning ordinance or local law;

(iii) issuance of special use permits;

(iv) approval of site plans;

(v) granting of use or area variances;

(vi) other authorizations which a referring body may issue under the provisions of any zoning ordinance or local law.

(b) The proposed actions set forth in paragraph (a) of this subdivision shall be subject to the referral requirements of this section if they apply to real property within five hundred feet of the following:

(i) the boundary of any city, village or town; or

(ii) the boundary of any existing or proposed county or state park or any other recreation area; or

(iii) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; or(iv) 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; or

(v) the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or

(vi) the boundary of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the agriculture and markets law, except this subparagraph shall not apply to the granting of area variances.

(c) The county planning agency or regional planning council may enter into an agreement with the referring body or other duly authorized body of a city, town or village to provide that certain proposed actions set forth in this subdivision are of local, rather than inter-community or countywide concern, and are not subject to referral under this section.

4. County planning agency or regional planning council review of proposed actions; recommendation, report.

(a) The county planning agency or regional planning council shall review any proposed action referred for inter-community or county-wide considerations, including but not limited to those considerations identified in section two hundred thirty-nine-l of this article. Such county planning agency or regional planning council shall recommend approval, modification, or disapproval, of the proposed action, or report that the proposed action has no significant countywide or inter-community impact.

(b) Such county planning agency or regional planning council, or an authorized agent of said agency or council, shall have thirty days after receipt of a full statement of such proposed action, or such longer period as may have been agreed upon by the county planning agency or regional planning

council and the referring body, to report its recommendations to the referring body, accompanied by a statement of the reasons for such recommendations. If such county planning agency or regional planning council fails to report within such period, the referring body may take final action on the proposed action without such report. However, any county planning agency or regional planning council report received after thirty days or such longer period as may have been agreed upon, but two or more days prior to final action by the referring body, shall be subject to the provisions of subdivision five of this section.

5. Extraordinary vote upon recommendation of modification or disapproval. If such county planning agency or regional planning council recommends modification or disapproval of a proposed action, the referring body shall not act contrary to such recommendation except by a vote of a majority plus one of all the members thereof.

6. Report of final action. Within thirty days after final action, the referring body shall file a report of the final action it has taken with the county planning agency or regional planning council. A referring body which acts contrary to a recommendation of modification or disapproval of a proposed action shall set forth the reasons for the contrary action in such report.

New York Department of State Office of General Counsel Legal Memorandum

STATUTE OF LIMITATIONS IN THE CASE OF A FAILURE TO REFER ADOPTION OR AMENDMENT OF LOCAL ZONING ORDINANCE OR LAW TO THE COUNTY PLANNING BOARD

General Municipal Law Sections 239-m and -n require cities, towns and villages to refer certain actions, such as adoption and amendment of zoning ordinances and comprehensive plans, issuance of special use permits, approval of site plans and subdivision plats to the county planning agency if they apply to property within 500 feet of a municipal boundary, a county or state highway or other property listed in the statutes. The statutes authorize municipalities and counties to agree that certain of the actions listed are of local concern, rather than county-wide, and need not be referred to the county. If an action is subject to referral, however, an action may be challenged on the grounds that referral was not conducted or conducted improperly, and the courts may well invalidate the action. Importantly, failure to refer a covered legislative enactment matter to the county could result in the matter being invalidated for up to six years after it was purportedly enacted, though a recent case decided by the Appellate Division, Third Department, tacitly suggests that the period in which the enactment may be challenged may only be four months.

Unlike other causes of action pertaining to planning and zoning matters, judicial review of a claim that the requirements of §§239 -m and -n have not been followed is not a matter of reviewing the record for substantial evidence to support a referring body's decision, but simply whether the referral was made in accordance with the statutory procedures. If not, the action will be invalidated. This is so because failure to properly refer is a "jurisdictional defect which renders the enactment invalid" (*Caruso v. Town of Oyster Bay*, 172 Misc.2d 93, affirmed as modified 250 A.D.2d 639 [1997]).

Section 239 -m requires that both legislative actions (adopting or amending a zoning law) and administrative actions (e.g., site plan review, variance approvals, etc) be referred to the county. The enabling statutes provide a thirty day statute of limitations for administrative actions (i.e., Town Law §§267-c [1], 274-a [11], and 274-b [9] require an Article 78 proceeding to be filed within 30 days of the filing of a decision on a variance, site plan review and special use permit, respectively), but not for legislative actions. There is no stated time period in the city, town or village enabling laws within which an action must be brought. Therefore, the time period within which to bring an Article 78 proceeding against a municipality regarding the procedures used to enact legislation is four months (CPLR §217; *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y. 2d 193, [1987]), but where a proceeding is brought alleging the validity of a legislative act based upon failure to refer to the county ("not a mere procedural irregularity but is rather a jurisdictional defect involving the validity of a legislative act" *Ernalex Const. Realty Corp. v. City of Glen Cove*, 256 A.D. 2d 336 [2d Dept 1998]), such a proceeding is a request for a declaratory action rather than an Article 78 proceeding.

A declaratory judgment action, not an Article 78 proceeding, is the method for challenging the validity of a legislative action (*Kamhi v. Yorktown*, 141 A.D. 2d 607, *aff'd* 74 N.Y. 2d 423 [1989]). In both *Ernalex Const. Realty Corp. v. City of Glen Cove*, supra, and *Janiak v. Town of Greenville*, 203 A.D. 329 (2d Dept 1994), the Appellate Division held that because a declaratory judgment action, rather than an Article 78 proceeding, was the proper vehicle for challenging the validity of a local zoning law, **a six-year statute of limitations** was applicable (CPLR §213).

Along the lines of “an ounce of prevention is worth a pound of cure,” municipal boards are advised to strictly comply with the General Municipal Law §239-m and §239-n (if applicable) requirements.

New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 245—NO. 17
WEDNESDAY, JANUARY 26, 2011

ZONING AND LAND USE PLANNING

Statutes of Limitations In Zoning Referral Cases

By **Anthony S. Guardino**

Section 239-m N.Y. General Municipal Law requires the referral of certain proposed city, town, and village planning and zoning actions to a county planning agency or regional planning council. The proposed actions that must be referred range from the very broad, such as the adoption or amendment of a comprehensive plan,[1] zoning ordinance, or local law, to the much narrower and more property specific, such as the issuance of special use permits, the approval of site plans, and the granting of use or area variances.[2]

In many instances, however, the required referral by the city, town, or village body responsible for final action is never made. Parties opposing a zoning change may seek to rely on the absence of a required referral as a basis for seeking to overturn the decision. But how long do such parties have to bring actions on that ground?

Appellate courts in New York are divided on this issue. Generally speaking, the Appellate Division, Second Department, views the absence of a referral to be a jurisdictional defect to which no statute of limitations applies. By contrast, the Appellate Division, Third Department, has ruled that the failure to refer is subject to the statute of limitations that otherwise governs an Article 78 proceeding seeking review of the underlying action. Whether one rule or the other applies can have significant practical implications. For one thing, if there is no statute of limitations, a challenge theoretically can be brought to a zoning decision even after a building has been constructed.

ANTHONY S. GUARDINO *is a partner at Farrell Fritz. He can be reached at aguardino@farrellfritz.com.*

Jurisdictional Defect

For an explanation of the reasoning behind the Second Department's standard, consider the decision it issued a few years ago in *Matter of Eastport Alliance v. Lofaro*.[3] The case arose when the Town of Southampton's planning board modified and approved a site plan submitted to it by landowner H.T.L., LLC, and granted H.T.L. a wetland permit allowing it to build and operate a catering hall on waterfront property. A civic association and several residents who lived near the property commenced an Article 78 proceeding to review the planning board's determinations. Among other things, they alleged that it had failed to refer H.T.L.'s applications to the Suffolk County Planning Commission as it had been required to do.

Parties opposing a zoning change may seek to rely on the absence of a required referral as a basis for seeking to overturn the decision. But how long do such parties have to bring actions on that ground?

The Second Department ob-served that Suffolk County's Ad-ministrative Code required that the planning board refer land use applications such as H.T.L.'s to the planning commission for review and recommendation.[4] It then ruled that where, as in this case, the required referral had never been made, the planning board "was without jurisdiction" to approve the applications. Moreover, it held, where a local land use agency acted without jurisdiction in approving or denying a site plan, special permit, or other land use application, a challenge to such an administrative action, as ultra vires, was "not subject" to the 30-day limitations period applicable to review of the site plan, special permit, or other land use determination. It then concluded that the planning board's approval was "null and void."

More recently, the Second Department decided *Matter of Hampshire Mgt. Co., No. 20, LLC v. Feiner*.[5] In that case, Hampshire Management Co., No. 20, LLC, sought to set aside a resolution of the Town of Greenburgh town board that approved an amended site plan on condition that an electrical transformer be relocated either to the location on the original approved site plan or to another suitable location approved by the town board. The town board moved to dismiss the proceeding as time barred by the 30-day statute of limitations of Town Law §274-a. Supreme Court, Westchester County, granted the motion and dismissed the petition.

Hampshire appealed, contending that the statute of limitations was inapplicable because the town board had acted without jurisdiction. Citing to, among other cases, *Matter of Eastport Alliance*, the Second Department agreed with that statement of the law, but

made clear that "it is a jurisdictional defect itself which renders agency action void and tolls the statute of limitations, not merely an allegation of such a defect." In this case, the court found that Hampshire had failed to establish a jurisdictional defect and, therefore, concluded that the Supreme Court had properly dismissed the proceeding, as Hampshire's petition had not been timely filed under Town Law §274-a.[6]

Third Department's View

The Third Department has taken a difference view of the issue. For example, in *Stankavich v. Town of Duanesburg Planning Bd.*,[7] the planning board of the upstate Town of Duanesburg granted a special use permit to Southwestern Bell Mobile Systems, doing business as Cellular One, which allowed it to construct a 250-foot cellular telephone tower and a utility building on property in the town. The planning board's decision was filed in the town clerk's office on Sept. 25, 1996. It subsequently issued another special use permit to Cellular One in accordance with a revised site plan showing a free-standing tower in place of the original tower with support cables. This decision was filed on Nov. 1, 1996. Cellular One then proceeded to construct the tower and began operations on Dec. 31, 1996.

On April 11, 1997, an Article 78 proceeding was filed seeking to declare the special use permits invalid due to the planning board's failure to comply with General Municipal Law §239-m. The planning board moved to dismiss the petition on the ground that it was barred by the 30-day statute of limitations in Town Law §274-b(9). The Supreme Court, Schenectady County, granted the motion, finding the petition to be time-barred, and the petitioners appealed.

The Third Department declared that the petitioners' argument that the planning board's granting of the special use permits was jurisdictionally defective and subject to collateral attack was "not without merit." However, it continued, the Third Department said that it did not necessarily follow that the statute of limitations defense was negated "in light of this apparent jurisdictional defect." According to the Third Department, every action had to be commenced within the time specified in the CPLR or other applicable statute, and if no limitation was specified, it had to be commenced within six years of the accrual of the cause of action.

In this case, the Third Department explained, the petitioners were seeking to annul the special use permits on the ground that the planning board lacked jurisdiction due to its failure to comply with General Municipal Law §239-m. It then ruled that, because the petitioners' challenge had not sought to test the constitutionality or validity of the zoning ordinance but only had questioned the procedure followed by the planning board in granting the permits and, in essence, had claimed that the planning board had acted illegally, this matter "could have been resolved" in an Article 78 proceeding. Consequently, the Third Department held, the 30 day period of limitations in Town Law §274-b(9) governed and, because the proceeding had not been commenced within 30 days of the filing of the planning board's decision, the Supreme Court's dismissal of the petition as time-barred was proper.[8]

Conclusion

Interestingly, at the end of its decision in *Stankavich*, the Third Department offered what could be considered a practical basis for its decision. The appellate court observed that because the petitioners had commenced their proceeding after Cellular One had constructed its facility and had failed to safeguard their interests by promptly seeking an injunction, it "would, in any event have found this proceeding barred by laches." The Third Department seemed to recognize the inherent unfairness of allowing an unlimited period of time, especially where a project had been constructed before the petitioners had commenced their proceeding, to challenge zoning decisions for failure to comply with General Municipal Law §239-m. As a matter of fairness, that would seem to be the least that courts should do.

In light of the differences of opinion between the courts in the Second and Third departments, it is clear that this issue is ripe for consideration by the Court of Appeals.

1. See Town Law §272-a; Village Law §7-722.

2. The referral requirement applies only where the subject real property is within 500 feet of the boundary of any city, village or town; the boundary of any existing or proposed county or state park or any 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 county or state owned land on which a public building or institution is situated; or the boundary of a farm operation in an agricultural district.

3. 13 A.D.3d 527 (2d Dept. 2004).

4. See Suffolk County Charter §C14-8(A)(2); Suffolk County Administrative Code §A14-22(A)(6); §A14-24(A)(6); cf. General Municipal Law §239-m.

5. 52 A.D.3d 714 (2d Dept. 2008).

6. Cf. *Johnston v. Town Bd. of Town of Brookhaven*, 11 Misc. 3d 1092(A) (Sup. Ct. Suffolk Co. 2006) (claim that town board failed to comply with General Municipal Law §239-m referral provisions in failing to refer to the county its approval of rezoning application was "not a mere procedural irregularity" but rather was "a jurisdictional defect involving the validity of a legislative act" that was reviewable in a declaratory judgment action. Notwithstanding that it was a jurisdictional defect, court concluded in dicta that "the six-year statute of limitations set forth in CPLR 213 applie[d]," although it found that the town had properly referred the zoning change application pursuant to General Municipal Law §239-m).

7. 246 A.D.2d 891 (3rd Dept. 1998).

8. See, also, *Matter of Smith v. Town of Plattekill*, 13 A.D.3d 695 (3rd Dept. 2004) (challenge based on General Municipal Law §239-m defect is subject to statute of limitations); *Fiume v. Chadwick*, 16 Misc. 3d 906 (Sup. Ct. Broome Co. 2007) (jurisdictional defects do not prevent the running of the statute of limitations).