

I. SUMMARY OF THE DRAFT ZONING CODE

The Draft Zoning Code seeks to implement certain recommendations of the Town of Amherst's "Bicentennial Comprehensive Plan," as amended on December 11, 2017 ("Amended Comprehensive Plan") to update the Town's existing Zoning Code with a focus on creating new zoning for commercial and mixed-use districts within various parts of the town, while ensuring that those new districts will be sensitive to surrounding neighborhoods. Consistent with this goal, the Draft Zoning Code replaces a number of the existing "Business" and "Special Purpose" districts with new "Mixed Use" districts that are designed to foster traditionally scaled infill development ("Infill Districts") in certain areas of the Town and appropriately scaled redevelopment of larger commercial and mixed use areas ("Retrofit Districts"). The Draft Zoning Code also deletes the existing "Traditional Residential District (TR-3)", adds a new multi-family district ("Multifamily 30") and a new "Airport Overlay" district. The Draft Zoning Code also reorganizes and reformats the regulations for all districts, and incorporates graphical elements for each district, but, by and large, it does not substantively alter the allowable uses, bulk and density, dimensional or performance requirements for the remaining existing residential and special purpose districts.

II. GENERAL LEGAL PRINCIPLES

A. **Zoning Authority**. New York courts have observed that "[t]owns and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant and in the absence of legislative delegation of power their actions are ultra vires and void." *Matter of Kamhi v. Planning Board of the Town of Yorktown*, 59 N.Y.2d 385, 389 (1983).

However, both the New York State Constitution and numerous state statutes confer very broad authority on municipal entities, including towns, to adopt and enforce zoning and land use regulations. See New York State Constitution Art. IX §2(c)(10) (authorizing local governments to adopt local laws related to, among other things, "order, conduct, safety, health and well-being of person or property therein"); Municipal Home Rule Law §10(1)(ii)(a)(11)-(12) (authorizing local governments to adopt local laws relating to, among other things, the "protection and enhancement of its physical and visual environment" and the "protection, order, conduct, safety, health and well-being of persons or property therein"); Statute of Local Governments § 10 (granting towns the "power to adopt, amend and repeal zoning regulations").

Specifically with respect towns, New York Town Law expressly provides:

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city....

Town Law § 261. See *also* Town Law § 261-b (authorizing incentive zoning); §261-c (authorizing planned unit development zoning); Town Law §272-a(1)(b) (declaring that local land use regulation to be "among the most important powers and duties ... [of] a town government").

This authority is granted broadly, and New York's highest court has observed that the local regulation of land use is "one of the core powers of local governance," which must be respected so as to "provide for the development of a balanced, cohesive community' in consideration of 'regional needs and requirements.'" *Matter of Wallach v.*

Town of Dryden, 23 N.Y.3d 728, 743 (2014); see also *Trustees of Union College v. Schenectady City Council*, 91 N.Y.2d 161, 165 (1997) (observing that municipalities may “enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community]”). As such, zoning laws, as legislative acts, are entitled to an “exceedingly strong presumption of constitutionality” and will be struck down only if it “bears no substantial relations to the police power objective of promoting the public health, safety, morals or general welfare.” *Nicholson v. Incorporated Village of Garden City*, 112 A.D.3d 893, 894 (2d Dept. 2013).

On the other hand, zoning laws that go beyond this broad grant of authority, such as zoning laws that seek to regulate the user or owner of land, rather than the use itself, are invalid.¹ Similarly, zoning laws cannot dictate forms of ownership or occupancy², nor unreasonably regulate operational details of a land use, unless such operational details have substantial external effects (although those determinations can be very fact specific).³ Zoning laws also cannot infringe upon constitutionally protected rights,⁴ nor affect a taking of private property without just compensation.⁵

¹ See, e.g., *Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead*, 20 N.Y.3d 481 (2013) (invalidating zoning law prohibiting check cashing establishments since it “violated the principle that zoning is concerned with the use of land, not with the identity of the user”).

² See, e.g., *Blue Is. Dev., LLC v. Town of Hempstead*, 131 A.D.3d 497 (2d Dept. 2015) (invalidating rezoning conditioned upon developing property as condominiums for sale rather than as rental units).

³ Compare *Old Country Burgers Co. v. Town Bd. of Oyster Bay*, 160 A.D.2d 805 (2d Dept. 1990) (holding that prohibition on drive through windows during certain hours was invalid exercise of zoning power) with *Mead Square Commons, LLC v. Village of Victor*, 97 A.D.3d 1162 (4th Dept. 2012) (upholding prohibition on “formula fast-food restaurants” in certain zoning districts in the Village).

⁴ See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (invalidating municipal sign ordinance that impermissibly regulated the content of signs in violation of the First Amendment).

⁵ “[A] zoning law effects a regulatory taking if either: (1) ‘the ordinance does not substantially advance legitimate state interests’ or (2) the ordinance denies an owner economically viable use of his land.” *Bonnie Briar Syndicate v Town of Mamaroneck*, 94 NY2d 96,105 (1999). However, “[a] reasonable land use restriction imposed by the government in the exercise of its police power characteristically diminishes the value of private property, but is not rendered unconstitutional merely because it causes the property’s value to be substantially reduced, or because it deprives the property of its most beneficial use.” *Putnam County Natl. Bank v City of New York*, 37 AD3d 575, 577(2007). Given this standard, takings claims are almost always dependent on the application of a local land use restriction to a specific property.

Nor can zoning laws regulate activity that has been preempted by State or Federal law.⁶ However, the courts have generally interpreted preemption narrowly and have thus upheld zoning restrictions on activities regulated under State or Federal law where those regulations are incidental to a legitimate zoning objective.⁷

With regards to the Draft Zoning Code, its express purpose and objectives are set forth in considerable detail in § 203-1.1.2 (essentially unchanged from § 203-1-1 in the existing Code), and those stated purposes and objectives fall well within the authority granted by Town Law § 261 and its related provisions. Moreover, although questions of preemption and constitutionality often are fact intensive as applied to specific properties or factual situations, our review does not reveal obvious instances where the Draft Zoning Code, on its face, seeks to go beyond the express authority to regulate land uses, bulk, density, size, location and orientation of structures, aesthetics or similar land use characteristics, or seeks to regulate areas that are preempted by State or Federal law.

B. Comprehensive Plan Consistency. Pursuant to Town Law § 272-a(11), “[a]ll town land use regulations must be in accordance with a comprehensive plan adopted pursuant to this section.” A comprehensive plan sets forth a municipality's land use goals and objectives and provides general guidelines for municipal zoning and

⁶ See, e.g., *Amerada Hess Corp. v. Town of Oyster Bay*, 36 A.D.3d 729 (3d Dept. 2007) (holding that town could not condition special use permit for store on prohibition of the sale of alcohol, as the State Alcoholic Beverage Control (ABC) Law's “comprehensive and detailed” regulatory scheme governing the sale of alcohol preempted the regulation of such sales); *Halpern v. Sullivan County*, 171 A.D.2d 157 (3d Dept. 1991) (holding that county law providing owners of mobile homes with protections not afforded by Real Property Law § 233, which governed the legal relationship between mobile home park owners and mobile home owners, was preempted by the state statute).

⁷ See, e.g., *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014) (holding that zoning law prohibiting hydraulic fracturing was not preempted by state law regulating oil and gas extraction); *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91 (2001) (holding that ABC Law did not preempt restriction on topless dancing in establishments holding liquor licenses).

other land use regulations, and, as such, a comprehensive plan is viewed as flexible and subject to change. *Kravetz v. Plenge*, 84 A.D.2d 422, 428, 446 N.Y.S.2d 807, 810 (4th Dept. 1982) ("Although stability and regularity are essential to the operation of zoning plans, zoning is not static; the obligation is the support of comprehensive planning with recognition of the dynamics of change, not slavish servitude to any particular plan."). Therefore, in the absence of a "clear conflict" with an adopted comprehensive plan, "a zoning classification may not be annulled for incompatibility with the comprehensive plan." *Nicholson v. Incorporated Vil. Of Garden City*, 112 A.D.3d 893, 894 (2d Dept. 2013); see also *Matter of Youngewirth v. Town of Ramapo*, 155 A.D.3d 755, 758 (3d Dept. 2017) (holding that zoning changes can only be found to be inconsistent with a comprehensive plan if the changes are wholly arbitrary. "If the validity of the legislative classification for zoning purposes is even 'fairly debatable,' it must be sustained").

There is no apparent conflict between the Draft Zoning Code and the Town's Amended Comprehensive Plan. On the contrary, the Draft Zoning Code appears to codify numerous express goals and objectives of the Town's Amended Comprehensive Plan. For example, the creation of new mixed use districts intended to revitalize older commercial corridors and districts within the Town by encouraging appropriately-scaled and designed development, as provided for in the Draft Zoning Code, is one of the primary goals of the Amended Comprehensive Plan, as set forth at the following sections:

- 2.2 (Vision Statement) - identifying preservation an exceptional quality of life by, among other things, "revitalizing older neighborhoods and commercial corridors while accommodating quality new development."

- 2.3 (Key Initiatives) – calling for the application of design standards to enhance community character and the adoption of zoning regulations that encourage the “reuse of underutilized/obsolete land for economically viable uses,” “tailor commercial zoning districts to the unique physical characteristics of older commercial areas in need of revitalization,” and improved code enforcement and design standards.
- 3.1 (Land Use Development Overview) - recognizing the need for the Town’s land use regulations to “include specific guidance for revitalizing commercial and mixed-use zones, encouraging energy efficient forms of redevelopment, and employing development principles that focus development in areas served by existing infrastructure.”
- 3.2 (Goals, Objectives, and Policies) – Identifying an “interconnected mix of land uses that includes revitalized older neighborhoods and commercial centers and corridors, quality new development, vibrant activity centers, agriculture, and green spaces throughout the community” as a primary goal; and the implementation of “context sensitive zoning and incentives to improve the quality and appearance of non-residential development” and the encouragement of “revitalization and reinvestment in older neighborhoods and commercial corridors” as primary objectives; and the development of “improved regulations to encourage mixed-use” development, design standards to enhance community appearance, and new zoning classifications consistent with these goals and as key policies.
- 3.3 (Conceptual Land Use Plan) – outlining future land use classifications that largely mirror the proposed zoning classifications in the Draft Zoning

Code, including the development of zoning classifications organized around “center,” “corridor” and “nodes.”

Similarly, the Draft Zoning Code’s proposed structural changes to the existing code, and amendments to the code’s provisions regarding review procedures and enforcement, are consistent with the Amended Comprehensive Plan’s goal of improving the “predictability and consistency of the rezoning and other development approval processes through the application of clear town-wide land use policies.” Amended Comprehensive Plan, p. 3-26.

III. PROCEDURAL REQUIREMENTS FOR ADOPTION

A. Form of Enactment. The Draft Zoning Code seeks to amend the existing Chapter 203 of the Town of Amherst Code (*i.e.*, the Zoning Code), which was enacted as Local Law No. 6 of 2006. Since the existing Zoning Code was enacted as a local law, the doctrine of legislative equivalency mandates that any amendments thereto be enacted in the same manner. *Paradis v. Town of Schroepfel*, 289 A.D.2d 1027 1028 (4th Dept. 2001). Thus, while a town is authorized to enact zoning either by local law or ordinance (Town Law § 261), since the existing Zoning Code was enacted by local law, the Draft Zoning Code must also be enacted by local law.

Even if this were not the case, there are advantages of enacting the Town’s zoning regulations via local law, as, unlike an ordinance, a “local law is cloaked with the same strong presumption of constitutionality as a [state] statute” (*Nicholson v. Incorporated Village of Garden City*, 112 A.D.3d 893, 894 (2d Dept. 2013)) and a local law may supersede state enabling legislation, so long as the law is not inconsistent with that enabling law or the State Constitution (Municipal Home Rule Law § 22).

In fact, it appears that the Draft Zoning Code is intended to be enacted by local law, but the issue should be noted since the text of Draft Zoning Code is somewhat ambiguous by repeated use of the term “ordinance.” See Draft Zoning Code § 203-1.1.1 (“This Local Law shall be known as the Zoning Ordinance of the Town of Amherst ...”). Although the term “ordinance” is often used interchangeably with “law”, local laws and ordinances are technically legally distinct (as outlined above), and, therefore, for clarity’s sake, we recommend amending § 203-1.1.1 to read: “This Local Law shall be known as the Zoning Code of the Town of Amherst ...” and changing all references to “Zoning Ordinance” to “Zoning Code” throughout the Draft Zoning Code.

B. County Referral. General Municipal Law § 239-m requires that the “adoption or amendment of a zoning ordinance of local law” that affects property within 500’ of, among other things, a municipal boundary, state or county park, state or county highway, must be referred to the county planning agency (in this case, the Erie County Department of Environment and Planning (ECDEP)) for recommendation as to the regional implications of such action. The County Planning Agency has 30 days (or such other time as may be agreed upon) to make such recommendation (if any). GML § 239-m(4)(b).

C. Notice and Hearings. A zoning amendment requires a public hearing. Town Law § 264(1) mandates that notice of such public hearing be published in a paper of general circulation within the community at least 10 days prior to the hearing. Since the Draft Zoning Law will affect properties located with 500’ of (a) public housing project; (b) municipal boundaries; (c) a county boundary; and (d) a state park or parkway, the Town must also serve written notice at least 10 days prior to the hearing on a public

housing authority, clerks of the adjacent municipalities, county clerk and regional state park commission. *Id.* at § 264(2).

In addition to the requirements of the Town Law, the existing Chapter 203 of the Town Code imposes additional notice and hearing requirements. Sections 203-8-3 and 8-5 mandate that, in addition to a public hearing by the Town Board, the Planning Board must also hold a public hearing on any proposed amendment to the map or text of the zoning code. A town is obligated to “comply with its own procedural rules regarding enactment of [a] zoning ordinance” (*Matter of Loudon House LLC v. Town of Colonie*, 123 A.D.3d 1406, 1408 (2014)), and therefore these requirements must be adhered to in enacting the Draft Zoning Code.⁸

The current code (and the Draft Zoning Code) also provide that the Town must publish notice of any public hearing “for a time period as required under SEQRA.” Town Code § 203-8-2-3 (see also Draft Zoning Code § 203-7.2(C)(1)(a)). This is a curious provision, given that SEQRA does not require public hearings (they are optional, and even then only when an Environmental Impact Statement is required)⁹ and many actions that might require a public hearing under the Zoning Code may be exempt from SEQRA review.¹⁰ However, when an optional public hearing is conducted under SEQRA, notice must be published 14 days in advance. 6 NYCRR § 617.9(a)(4)(i). Therefore, if it is the intent of the code to require notices of public hearings to be published at least 14 days in advance, and the Town wishes to preserve that intent in the Draft Zoning Code, we recommend revising Draft Zoning Code § 203-7.2(C)(1)(a) to

⁸ The Draft Zoning Code carries the requirement for 2 public hearings over into new §§ 203-7.2.2 and 7.2.4. Since State law does not require two public hearings, the Town might consider eliminating the need for 2 hearing in the Draft Zoning Code.

⁹ See 6 NYCRR § 617.9(a)(4).

¹⁰ For example, area variances require a public hearing (Town Law § 267-a(7)), but many area variances are exempt from SEQRA review (6 NYCRR § 617.5(c)(16)-(17)).

state that public hearing notices be published 14 days in advance. However, since state law only requires 10 days advance notice, we recommend revising the Draft Zoning Code to require only 10 days' notice.

The existing code (and Draft Zoning Code) also provide for the mailing of "courtesy notices" of any public hearing, at least 10 days in advance, to: (a) the owners of properties affected by the proposal; (b) owners of property within 600' of the subject property; (c) any person who has requested such notices on an annual basis; and (d) any homeowners' or residents' associations registered with the Town located within the "geographical area" of the subject property, as well as the posting of a 2'x3' sign, 10 days in advance, on the "affected property." Town Code § 203-8-2-3(B) (see also Draft Zoning Code § 203-7.2(C)(2)). Given the scope of this project, that would essentially require mailing notices to every property owner and every HOA and residents' association in the Town. However, the existing (and proposed) code expressly provides that these notices "are not jurisdictional" and the failure to provide such notices "shall not affect the validity of any action" at such hearing. *Id.*

D. SEQRA Compliance. The adoption of the Draft Zoning Code is an "action" subject to SEQRA (6 NYCRR § 617.2(b)(3)) and, to the extent it changes allowable uses within any zoning district, affecting 25 or more acres of the district, it constitutes a Type I action (*id.* at § 617.4(b)(2)). Therefore, before the Town Board adopts the Draft Zoning Code, it must comply with SEQRA. *Id.* at § 617.3(a).

As a Type I action, the adoption of the Draft Zoning Code would normally require the Town Board to prepare a Full Environmental Assessment Form (EAF) and make a determination of significance (*i.e.*, determine whether an Environmental Impact Statement must be prepared). *Id.* at § 617.6 and § 617.7. However, since the

Amended Comprehensive Plan was prepared to serve as a Generic Environmental Impact Statement, as authorized by Town Law § 272-a(8), and which specifically contemplated the amendment of the Town's zoning regulations in a manner consistent with the Draft Zoning Code, it is not necessary to complete an EAF or make a determination of significance.

Rather, the Findings Statement prepared in connection with the Amended Comprehensive Plan should be reviewed to ensure that it fully addresses all potential adverse environmental impacts associated with the adopting of the Draft Zoning Code and, if not, an Amended Findings Statement should be adopted. See 6 NYCRR § 617.10(d).

E. Referendum. The adoption or amending of zoning laws is *not* subject to either mandatory or permissive referendum, and therefore no referendum is required *or permitted*. See MHRL §§ 23 -24; *Matter of McCabe v. Voorhis*, 243 NY 401 (1926) (holding that a municipality may not hold a referendum in the absence of constitutional or statutory authorization).

F. Filing and Publication. Within 20 days of adoption, the Town Clerk must file a certified copy of the local law in the Clerk's office and one copy with the Secretary of State. MHRL § 27(1). The local law will become effective upon the effective date indicated in the law or upon filing with the Secretary of State, whichever is later. *Id.* at § 27(3).

In addition, as a zoning law, Town Law §§ 264 and 265 require that the text or summary of such law or amendment, including the accompanying map, shall be entered in the minutes of the Town Board and published once in a newspaper of general circulation in the Town.