

Conesus Zoning Enforcement

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INTRODUCTION

The intent of this report is to discuss the zoning enforcement process, including options for enforcement, along with the laws giving authorization for enforcement in towns and villages of New York State. The report does not contain specific information regarding zoning enforcement in cities, which is governed by separate enabling legislation.

The first section will briefly describe the roles of the various local boards who are involved in zoning administration and enforcement. It is important that these boards understand their responsibilities as well as the responsibilities of the other local boards, so that they may interact and cooperate as necessary.

The second section of this report will outline the steps involved in the zoning enforcement process. The actual process will vary between municipalities, and users of this report should always check their local law to be sure they are complying with any specific procedures within it. This report will reference those portions of the state law that authorize zoning enforcement.

Lastly, the Appendix of this report provides examples of forms used for administrative control that may be adopted by the zoning enforcement officer (ZEO) for local use.

This report was originally produced in 1991, updated in 1994 by the Jefferson County Planning Department in cooperation with the New York State Tug Hill Commission and the former St. Lawrence-Eastern Ontario Commission, and updated in 1996 by Mark Gebo, Esq., partner in Hrabchak & Gebo, P.C., Attorneys and Counselors at Law in Watertown, New York. This edition of the report has been updated by the New York State Department of State.

LOCAL BOARDS – POWER AND DUTIES

The Legislative Body – The legislative body (town board and village board of trustees) plays a major role in zoning administration and enforcement, for it is they who appoint members of the planning board, the zoning commission, the zoning board of appeals (ZBA), and the zoning enforcement officer (ZEO). The legislative body must approve the by-laws, rules and regulations that govern these boards and officials, and also the procedures to be used in administering the law. Although it is usually the zoning commission or planning board that drafts various land use laws and procedures, the legislative body must approve of and adopt them to make them binding laws.

The legislative body is responsible for site plan review and special permit approval, unless this authority has been delegated. Site plan review and special permit approval may be delegated to either the planning board or the ZBA. However, the power to approve subdivisions can only be delegated to the planning board. The legislative body is also responsible for enforcement unless it delegates its authority to a ZEO. By delegating some of the above mentioned powers to other boards and officials, the legislative body frees up time for its other numerous responsibilities. This is a good idea, but it is important to remember that once these powers have been delegated, the legislative body cannot overrule a decision made by the ZBA, ZEO, or planning board. It may appeal a decision, as may any other concerned citizen, but it cannot simply overrule one.

Powers of the legislative body are pursuant to Articles 4 and 7 of the Village Law and Articles 4 and 16 of the Town Law.

The Zoning Board Of Appeals (ZBA) – The ZBA is appointed by the legislative body when a zoning law is first enacted. Both Town and Village Law specifically require that a ZBA be appointed whenever a zoning law exists.

The basic power of the ZBA falls into two jurisdictional areas: original jurisdiction and appellate jurisdiction. There are two types of appellate jurisdiction: an interpretation of the zoning law and a zoning variance.

Original jurisdiction comes from the enabling legislation, which states, “Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article.” Examples of original jurisdiction would include special use permits and site plan review. However, the ZBA will not have any original jurisdiction unless given this authority in the local zoning law.

Appellate jurisdiction or appeals jurisdiction is the power of the ZBA to review the application of a person who applied to the ZEO for a zoning permit and was denied one. An “aggrieved” citizen can also appeal the decision of the ZEO where a permit was granted. In both instances, the ZBA is the first level of appeal from a decision of the ZEO.

The two types of appeals are an interpretation and a variance of the zoning regulations. There are two types of variances: an area variance and a use variance. An applicant for an area variance must meet the criteria set forth in Section 267-b (3) of the Town Law and Section 7-712-b (3) of the Village Law. The area variance criteria include weighing the following factors:

- a) Whether an undesirable change to the character of the neighborhood will take place if the variance is granted.
- b) Whether the benefit sought can be achieved by some other method not requiring a variance.
- c) How substantial the variance request is.
- d) Whether the proposed variance would have an adverse impact on the physical or environmental conditions of the neighborhood.
- e) Whether the difficulty was self-created.

With an area variance request, the ZBA must weigh these five factors and weigh on balance, the potential benefit to the applicant against the potential burden to health, safety and welfare if the area variance is granted.

With respect to a use variance, the test is unnecessary hardship. The test for this is found in Section 267-b (2) of Town Law and Section 7-712-b (2) of Village Law. To be entitled to a use variance, the applicant must establish:

- a) That he cannot realize a reasonable return for any of the permitted uses. This requires dollars and cents proof.

- b) That the property is unique in that zoning district.
- c) That if granted, the variance would not change the essential character of the neighborhood.
- d) That the hardship has not been self-created.

The applicant must satisfy all four criteria in order to be entitled to a use variance. The use variance is much more stringent than the area variance and much harder to get.

The variance power of the ZBA is needed to provide flexibility from the strictness of the zoning law when its literal interpretation would be unwarranted under the circumstances.

The powers of the ZBA are presented in Section 267 of the Town Law and Section 7-712 (1) of the Village Law.

The Zoning Commission – New York state law provides that a zoning commission is responsible for developing the first zoning law. This zoning commission will cease to exist after the legislative body, by resolution, accepts the commission’s final report. The appointed zoning commission members can be the same people that make up the planning board, even though they have a different title and purpose. Section 266 of the Town Law and Section 7-710 of the Village Law govern the role of the zoning commission.

The Planning Board – The planning board has an advisory role and must be aware of community needs and goals. They are development experts who assist in the formulation of growth policies and advise other local boards on matters that affect the community’s development.

The planning board can be given review and approval authority for special permits, subdivisions, site plans, and other land use-related laws, such as a historic district law. The planning board will only have this review and approval power if the local legislative body delegates the authority to it. When given this authority, the planning board must adopt appropriate regulations to govern its review and land use decisions. The administration of any or all of these land development laws can be a major responsibility of the planning board.

To carry out its duties, the planning board, on referral, may assist in the preparation of a comprehensive plan for development, and make investigations, maps, reports, and recommendations dealing with local planning and development. (Town Law, Section 272-a; Village Law Section 7-722).

Village Law Section 7-718 and Town Law Section 271 authorize the creation of the planning board, and successive sections govern the authority of the board.

The Zoning Enforcement Officer (ZEO) – The ZEO is the municipality's representative on land use regulation and enforcement, and is the primary contact for all applicants. His major duties are to prepare or acquire forms necessary to properly administer the zoning law, issue zoning permits, conduct inspections and investigations, issue a zoning certificate of compliance or occupancy, maintain records of all administrative actions and papers, and enforce the zoning law through the various methods discussed in this report.

The actual powers and duties of the position will vary among municipalities. They must be clearly

spelled out in either the local zoning law or a separate ordinance or law providing for the enforcement of all zoning and land use laws.

The ZEO's power is limited to enforcement of the law as it is written. The ZEO has no power to modify or waive the zoning regulations even if he disagrees with a requirement of the regulation. When the ZEO finds that certain requirements of the zoning are inappropriate and consistently create problems for applicants, then he can and should propose an amendment to the legislative body. The legislative body is the only board that has the authority to make a zoning amendment and this power cannot be delegated. Also, the ZEO must deny a permit whenever he is in doubt about a proposal's legality, or about how the zoning law applies to the particular case. An applicant who is denied a permit can appeal to the ZBA for an interpretation of the zoning regulation or for a variance.

The ZEO must pursue all violations of the law equally or he will open himself to lawsuits for discriminatory enforcement.

The Violator – Enforcement action can be taken when a local law or ordinance is violated, or a condition attached to an approval granted by a municipal board is not met. While the landowner can always be held responsible for a violation on his property, enforcement action may also be taken against other responsible parties, such as tenants and building contractors.

ZONING ENFORCEMENT PROCESS

Step 1: Report of Violation – (1) The zoning enforcement process begins when the ZEO becomes aware of a violation. The ZEO may discover the violation himself, or it may be reported to him by a municipal official or local resident. To improve the effectiveness of citizen involvement, every local government should have an established system for taking citizen complaints.

(2a) Ideally a Citizen Complaint Form requesting information about the supposed violation should be filed with one designated office. This should be handled at a central location that is well publicized so that residents are aware of the location. Usually the town or village clerk's office is the first point of contact for a citizen; therefore it is probably the best location to receive complaints.

Questions are often raised whether an investigation should be done of oral complaints or anonymous complaints. These should be taken seriously and investigated. Once the municipality is on notice of a potential violation, a duty might very well exist to investigate it, whether or not the complainant has identified himself.

(2b) Every system of receiving citizen complaints should include follow-up. The best system would be an immediate follow-up letter (see Appendix 2) that tells the citizen the complaint has been received and what department is handling the problem. Prior to writing this, the ZEO will need to investigate the complaint so that he can determine whether a violation actually exists and what enforcement action will be required.

Step 2: Investigation – (3a) Once a possible violation has been observed or reported, the ZEO is empowered to investigate the matter, make a preliminary determination of whether or not it constitutes a violation, and take the appropriate action in the enforcement process. Town Law Section 138 grants to the building inspector “the right to enter and inspect at any time any building, structure, or premises and to perform any other act necessary for the enforcement of such codes, ordinances, rules or regulations, or any of them.” Towns and villages must specifically empower the ZEO to enter onto private property. However, the best advice when in doubt about the legality of entering private property against an owner's will is to consult with the municipal attorney before entering such property. Without the owner's consent in a non-emergency situation, a search warrant (see Appendix 4) is required. It should be noted that this power of an enforcement officer to enter onto private property to make inspections is relatively untested.

Any investigation should be logged by the ZEO using an Enforcement Inspection Report (see Appendix 5) regardless of the results. This creates a record of initial inspection, and the report can be referred to for further questions or problems with the project.

Step 3: Notification To Remedy Violations And Administrative Actions –If a zoning violation does exist, then enforcement steps must be taken. The first step is to inform the property owner of the violation so that it can be corrected. Often zoning violations are an oversight on the owner’s part, and simply advising him of the violation will resolve the problem. There are a variety of ways that a violator can be notified, and generally the situation will dictate the most appropriate method.

(4) Usually the first attempt at notification is informal contact with the property owner to explain the violation and the potential of enforcement. A record of the contact and the results should be kept. If the owner is hard to contact, then another alternative is a letter requesting voluntary compliance sent to the property owner (see Appendix 6). The letter should clearly identify the violation and state that “...This is the only letter you will receive. If you do not correct the violation by [DATE] or contact this office and make arrangements for an extension from that date, we will begin enforcement action....” It is very important that this letter be sent by certified or registered mail with a return receipt requested. This will insure the owner receives it and provide proof that it was received.

Many local governments require that even informal contact with landowners be documented. While a “Notice of Apparent Violation” looks formal, it does not have any great legal significance. It is simply a way to inform the landowner that he may be in violation of the zoning law and that he needs to abate or correct the violation. The landowner can be given the opportunity to discuss the case with the enforcement officer.

(5) A second more formal letter, a “Notice of Violation Order to Remedy” amounts to a determination by the ZEO that a violation exists, and directs the landowner to take specific corrective action.

There are four possible administrative actions that can and should be used in conjunction with notification to prevent the landowner from continuing the violation. The first is revocation or suspension of permits. Second, new permits for construction, occupation or any other activities should be denied from the date on which the violation is first determined to exist until such violation is removed or the matter resolved. Third, a Stop Work Order or revocation of the building permit should be given to prevent additional investment on the part of the property owner until the matter is resolved. A Stop Work Order on construction projects must be authorized in the zoning law itself. Finally, a Cease and Desist Order may be given in an attempt to halt a continuing violation other than construction. A Stop Work Order is often used to stop construction.

It is important that the ZEO keep a record of any administrative actions and any other enforcement actions that go beyond informal contact, and an enforcement action check list that can be used for record-keeping is a useful tool. The ZEO must also keep the legislative body informed of all zoning violations and the administrative steps taken to remedy these violations.

Step 4: The Violator's Alternatives –Hopefully, upon notification of the zoning violation, the landowner will revise his plans to conform with the zoning law. **(6) The landowner does have three other legal alternatives. He can appeal the ZEO's decision and apply to the ZBA for a zoning interpretation or variance, or he can apply to the legislative body for a zoning amendment.** These alternatives provide a method for landowners to obtain relief from unreasonable restrictions of the zoning law.

The landowner may wish to apply for administrative relief, otherwise known as a zoning variance. The two types of zoning variances are a use variance and an area variance. A use variance involves a request for a use of land that is prohibited by the zoning law and requires proof of “unnecessary hardship.” An area variance is a request to vary the dimensional standards, such as lot size, setbacks, sign area, number of parking spaces, etc. The test for an area variance is not as strict as the test for a use variance and requires “a balancing of interests.” These tests are established in Village Law, Section 7-712-b, and in Town Law, Section 267-b.

The landowner may have doubts about the ZEO's interpretation of the zoning law. Even a well written zoning law has areas that are questionable and open to interpretation. When this occurs, an appeal can be made to the ZBA for an interpretation of the zoning law. It should be noted that only the ZBA can interpret the zoning law. Neither the town or village board, the planning board, nor the ZEO have the power to interpret the zoning law, nor does the village or town attorney.

Finally, the landowner may wish to apply for a zoning amendment. An amendment is a form of legislative relief and can only be approved by the town or village board. A public hearing must be held before formal adoption of a zoning amendment, and any amendment must be consistent with the comprehensive plan.

These alternatives are available to provide local relief from unreasonable zoning restrictions. If the requested relief is denied, then the landowner must abate the violation or appeal the decision to the Supreme Court under Article 78 of the Civil Practice Law and Rules. In some instances of willful violation, the landowner may simply continue the zoning violation. When this occurs, the ZEO is obligated to take further enforcement action against the violator.

Step 5: Judicial Enforcement – **(8) When attempts to abate a zoning violation using administrative powers have failed, then stronger enforcement methods can be used, such as the imposition of criminal penalties and civil penalties or sanctions that require abatement or removal of the violation. Judicial enforcement of land use controls is always available, but should be used only when the informal efforts and administrative remedies have failed.**

When a violation does require judicial enforcement, it is very important that the ZEO contact the legislative body to determine which enforcement procedure it wishes to pursue. The type of violation and the circumstances involved will determine which method of enforcement is most appropriate.

Criminal Proceedings – In New York State, zoning violations and offenses are considered misdemeanors for jurisdictional purposes; therefore, criminal procedures apply. Enforcement actions can be taken to the local criminal court for zoning violations. The local court can impose fines or imprisonment consistent with the local zoning law.

Town Law Section 268 and Village Law Section 20-2006 provide for fines of up to \$350.00 for a first

violation, or a period of imprisonment of up to six months, or both, for a first offense. For a second offense within a five-year period, the statute provides for a fine of not less than \$350.00 nor more than \$700.00, or imprisonment for a period not to exceed six months, or both; and upon conviction for a third or subsequent offense committed within a period of five years, a fine of not less than \$750.00 nor more than \$1,000.00, or imprisonment for a period not to exceed six months, or both.

Although zoning violations and offenses are considered misdemeanors for jurisdictional purposes, they do not necessarily confer all the protections of misdemeanors, if the fines or imprisonment provisions are low enough to qualify for treatment as a violation. The principal distinction between being treated as a violation, as opposed to a misdemeanor, is that the offender is not entitled to a jury trial or the appointment of an assigned attorney if unable to afford one of his own. Where the fine would exceed \$250.00 for a single violation or imprisonment could exceed more than fifteen days for a single violation, then the misdemeanor protections of appointed counsel and jury trials will apply.

To institute criminal proceedings against a violator, the ZEO must file an Information and Supporting Deposition with the local justice. The Information contains three parts. The first part is an accusatory part that tells the defendant the date, time, and place that the violation took place, and what section of the law was violated. The second part is a factual part that outlines in detail the facts relied on for establishing that violation. The third part is the signature part, in which the ZEO affirms the information under penalties of perjury or swears to it before a notary.

The Supporting Deposition is meant to add more detail to what is in the Information. Where a ZEO has not observed things directly, a Supporting Deposition should be taken from all persons with direct knowledge. The Supporting Deposition should be attached to the Information. Frequently, photographs or other documentary evidence may also be important and may be attached. The Information must, however, on its face, contain each and every element of what must be proven to establish the violation. To assist the ZEO in determining what these elements are, the use of a Proof Chart is recommended. Once the Information and Supporting Depositions are obtained and properly signed, the local justice will then issue a Summons through the local police that will require the violator to appear in criminal court on a specified date. This process may take some time.

(7) One way to shorten the time period is to authorize the ZEO to use an appearance ticket. The appearance ticket is a criminal process similar to a traffic citation that provides a quick and easy method for the ZEO to bring a case to court. The ZEO can issue an appearance ticket to the violator immediately, and then file the information and complaint letter with the local justice. The legislative body can delegate to the ZEO the authority to issue appearance tickets through either the zoning law or a separate local law, as specified in Municipal Home Rule Law, Article 2, Section 10 (4) (a) and Criminal Procedure Law, Section 150.20 (3).

One problem with the use of criminal proceedings is that they require the “beyond a reasonable doubt” standard of proof. The ZEO and the municipality represented should be prepared to provide such proof in a criminal court of law.

The Town Law provides that each week that a violation continues constitutes a new and separate offense. This raises the possibility that a violator may have successive fines imposed for each week that a violation continues. In order to obtain successive fines, a violator must be served with a new Information and Supporting Deposition and Criminal Summons for each and every week that a fine is sought. This will require repeated inspections of the property to assure that the violation still exists. It is

possible to list more than one violation in the same Information. For example, if a ZEO has been to the property on four or five occasions over a period of two months, trying to obtain voluntary compliance, and is now seeking court action because such voluntary compliance was not forthcoming, then all four incidents may be separately listed as separate counts within one Information. The ability to get successive fines is often a valuable deterrent in obtaining voluntary compliance after the start of a court action. Further, because of the high cost of going to court on such violations, local justices can help to offset some of this expense to a municipality by imposing a high fine.

Because zoning law violations are treated as misdemeanors for jurisdictional purposes, it is the district attorney who has the primary responsibility for prosecution. Traditionally, district attorneys do not like to prosecute local code violations. Accordingly, district attorneys will delegate that responsibility to village and town attorneys. This should, however, be confirmed in writing, either by an annual letter from the district attorney with a blanket authorization for municipal code violations, or by asking for specific authorization when a specific violation is filed. Once authorized by the district attorney to prosecute the code violations, the village or town attorney in essence becomes an unpaid assistant district attorney - unpaid by the county, that is. The village or town attorney should file an oath of office with the county clerk as an assistant district attorney when this occurs.

Civil Proceedings – The standard zoning enabling act provides the authority for governments to bring actions to “prevent..., restrain, correct, or abate” violations of zoning regulations. An injunction is the typical action used to accomplish this and is the final enforcement step for local governments.

An injunction is a court order that prevents someone from doing something, such as violating the zoning law. Jail sentences and heavy fines can be imposed for willfully violating court orders. This threat provides a significant deterrent effect and is important to have in cases of willful and determined violators. The local government has no power to issue injunctions - they can only be issued by a state court. The forms and process of filing for an injunction can be difficult; therefore, the municipal attorney should be called in to institute the proper action.

There are two types of injunctions that courts may impose: permanent and preliminary. The preliminary injunction provides temporary relief before a trial, while a permanent injunction is a permanent order requiring a property owner to “abate” a violation. A permanent injunction could require that all or portions of a building in violation of zoning requirements be torn down. A preliminary injunction can be issued to restrain enforcement of the zoning law or to suspend use or construction of a building. The preliminary injunction is a drastic remedy and will only be issued if irreparable damage could result from continuing the questionable conduct.

A violator who is issued an injunction must either:

- comply
- appeal the injunction to a higher court
- face strict penalties if the injunction is violated

Final Follow-up Letter (to petitioner) (9) In addition to the immediate follow-up letter, a subsequent letter explaining the final results of the enforcement action should also be sent to the citizen. If no action was taken, then an explanation of why should be presented.

CONCLUSION

The purpose of zoning enforcement is to prevent or correct violations of the zoning law which is established to protect the general health, safety and welfare of the municipality. The zoning law is only as good as its enforcement, for without proper enforcement, the zoning law is merely words on paper. Therefore, great care should be taken when drafting the enforcement section of the zoning law. The authority to enforce and the procedures for doing so should be clearly spelled out. The ZEO should be given very specific guidelines on his powers and duties. This will alleviate unnecessary confusion and lead to greater consistency in the enforcement of the local law.

When a violation comes to the attention of the ZEO, it is mandatory that the enforcement process begin. In most cases, the violation will be an oversight on the landowner's part and informal contact or a notice of violation is all that will be needed. If notification fails to remedy the situation, then the enforcement procedure provides for other administrative and judicial remedies to force the owner into compliance. These enforcement powers should be provided for and used in cases of willful violation of the local law.

Written documentation and good record keeping are critical elements of the enforcement process. Documentation is best accomplished through standardized forms that the legislative body or ZEO has developed to meet the needs of the municipality. Many sample forms that can be used as guidelines.

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