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ZONING AND LAND USE PLANNING

Cluster Zoning: A Win-Win for Municipalities and Developers

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A view held by some opponents of property development is that construction of commercial, industrial, or residential properties is by necessity anti-environment and damaging to open space, parkland, playgrounds, wetlands, floodplains, or other similar areas.

Of course, there are many reasons to dispute that contention, and a wide variety of federal, state, and local environmental and zoning laws and regulations both encourage development while helping to ensure that the environment is protected.

For a host of reasons, one long-standing zoning tool—cluster zoning—may be on the precipice of a broad reawakening. That is because cluster zoning can meet many of the needs of today's homeowners for everything from access to outdoor space to shops within walking distance of their residences, while at the same time leaving sensitive natural resources secure for generations to come at no cost to taxpayers.

The Law

New York law authorizes towns, villages, and cities to approve "cluster development." New York State Town Law Section 278 defines cluster development as a subdivision in which the applicable zoning ordinance or local law is modified to provide an alternative permitted method for "the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping." The purpose of cluster development is "to enable and encourage flexibility of design and development of land in such a manner as to preserve the natural and scenic qualities of open lands." *See also*, Village Law § 7-738; General City Law § 37.

Most commonly, development is grouped or "clustered" so that natural, scenic, or historic resources, or environmentally-sensitive lands, including hazard-prone lands, within a subdivision remain undeveloped. In exchange, a developer is provided with the flexibility to subdivide and improve its property in a manner that deviates from the otherwise applicable bulk and area requirements of the zoning code.

Local governments benefit through the protection of land deemed worthy of preservation without cost to the public. Moreover, as a development's footprint is reduced, so, too, are the developer's expenses for the installation of necessary infrastructure such as roads, water and sewer lines, storm drains, and street lighting. And, if the infrastructure improvements are dedicated to, and accepted by, a municipality, the future cost to taxpayers for maintaining these improvements is similarly reduced. The non-monetary benefits of cluster development are the promotion of innovative design and the creation of more walkable communities.

Under Section 278, a town board may authorize, by zoning ordinance or local law, the planning board to approve a cluster development simultaneously with the approval of a subdivision subject to the conditions in its zoning ordinance or law and the following four conditions:

- The planning board determines that the application for a cluster

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development benefits the town;
• The cluster development results in a number of building lots or dwelling units that does not exceed the number that could be permitted if the land were subdivided into lots conforming to the minimum lot size and density requirements of the town's zoning ordinance or local law;
• The planning board imposes conditions on the ownership, use, and maintenance of the open lands in the subdivision "as it deems necessary to assure the preservation of the natural and scenic qualities of such open lands"; and
• The cluster development includes areas within which structures may be located as well as the height and spacing of buildings, open spaces and their landscaping, off-street open and enclosed parking spaces, streets, driveways, and other features required by the planning board and, at the planning board's discretion in the case of a residential development, detached, semi-detached, attached, or multi-story dwelling units.

In the Courts

Over the years, numerous courts have interpreted the law on cluster development. *See, e.g., Matter of Bayswater Realty & Capital Corp. v. Planning Board of Town of Lewisboro*, 76 N.Y.2d 460 (1990); *Matter of Kamhi v. Planning Board of Town of Yorktown*, 59 N.Y.2d 385 (1983); *Matter of Maor v. Town of Ramapo Planning Board*, 44 A.D.3d 665 (2d Dept. 2007); *Application of Rouse v. O'Connell*, 78 Misc.2d 82 (Sup. Ct. Suffolk Co. 1974).

A decision issued about two decades ago by the Appellate Division, Fourth Department, in *Matter of Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board,* 253 A.D.2d 342 (4th Dept. 1999), illustrates many of the practical aspects of cluster zoning.

The case arose after Chrisanntha, Inc., applied to the planning board for the upstate town of Penfield for cluster subdivision approval of two eight-story apartment buildings with 212 units, 24 townhouses, and two lots with existing residences. In conjunction with that application, Chrisanntha submitted a conventional subdivision plan showing what could be built on the parcel as zoned, subject to existing legal and physical requirements. Following issuance of a final environmental impact statement, the planning board approved the project.

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Penfield Panorama Area Community, Inc. (PPAC), a nonprofit organization of citizens residing in the vicinity of the project, challenged the approval of the project, asserting among other things that Section 278 did not authorize the planning board to grant height variances and that the density calculations violated Section 278 and Penfield's zoning ordinance.

In its decision, the Fourth Department pointed out that the New York Court of Appeals, in *Matter of Bayswater*, held that a planning board had the discretion pursuant to Section 278 to "permit deviation from applicable minimum area, side and rear yard, depth, and frontage requirements." The Fourth Department then decided that a planning board also had the authority to allow deviation from applicable height requirements as part of cluster subdivision approval pursuant to Section 278, finding "no significant distinction between the authority to vary 'outward' restrictions, such as setbacks, and the authority to vary 'upward' restrictions" and noting that Section 278 itself contained a reference to the "height" of buildings.

The Fourth Department next considered PPAC's contention that the planning board's density calculation violated Section 278 and Penfield's zoning law because the planning board failed to subtract certain acreage in making its density calculation. The appellate court agreed that the planning board had erred in failing to subtract acreage for roads and streets and for stormwater detention areas in calculating the maximum density.

The appellate court explained that the property consisted of 19.278 acres and that the planning board subtracted approximately .1 acre for land located in a 10-year flood plain that could not be developed. It concluded that the planning board also should have subtracted all land identified on the subdivision plan for "roads and streets" even if the roads within the cluster subdivision would be private and not public because the town's zoning ordinance did not distinguish between public and private

roads and streets. Moreover, the appellate court continued, the planning board should have subtracted acreage identified on the subdivision plan as a "stormwater detention area" because that was an area "unsuited for development."

The appellate court, however, rejected PPAC's contention that the planning board also should have subtracted acreage for recreational areas, fire lanes, and a clear vision zone, reasoning that the subdivision plan did not show any recreational areas and the town's zoning ordinance did not require that the developer set aside land for parks or recreational use in a cluster subdivision—nor was there any requirement that lands for fire lanes or clear vision zones be subtracted from the density calculation. *See, also, Matter of Sepco Ventures, Ltd. v. Planning Board of Town of Woodbury*, 230 A.D.2d 913 (2d Dept. 1996) (planning board may not condition approval of cluster development on developer making off-site improvements to public roads); *Matter of New Scotland Avenue Neighborhood Ass'n v. Planning Board of City of Albany*, 142 A.D.2d 257 (3d Dept. 1988) (rejects challenge to cluster development of 124-unit townhouse project where conventional subdivision of site, meeting applicable zoning requirements, showed 124 single-family home sites).

Cluster Development Codes

As might be expected, local governments throughout the state have adopted cluster zoning rules as part of their local code. *See, e.g.,* Village of Trumansburg code, *available at* http://trumansburg-ny.gov/wp-content/uploads/2017/01/article4.pdf; Village of Lansing code, *available at* https://www.vlansing.org/Village_Code/Part_II/Chapter125SubdivisionofLand.pdf.

The local code dealing with cluster development enacted by the town of Clinton, *available at* https://ecode360.com/11843961, highlights the issues such a local law can cover.

The Clinton law begins by defining cluster development as a "subdivision development approach" in which building lots may be reduced in size and building units sited closer together, usually grouped into various cluster areas, "provided that the total development density does not exceed that which could be constructed on the site if the land were subdivided into lots conforming to the minimum lot size and density requirements" of the town's zoning rules.

The law then explains that a residential cluster development is intended to achieve one or more of seven different purposes, ranging from "[b]etter protection of natural and scenic resources" identified in the town's master plan and zoning law than would be provided by a conventional subdivision plan and provision of "adequate buffers for adjoining properties," to providing "a broader range of housing types and potentially lowering housing prices by reducing the length of roadways and other critical infrastructure costs" and preserving land suitable for agriculture.

Next, the law provides an example of a cluster subdivision demonstrating that the same number of houses can fit on the site used in the example while preserving 80 percent of its open space.

After referencing Town Law Section 278 as authority to approve cluster subdivisions and describing the conditions under which the planning board may require use of the cluster concept (e.g., important ground or surface waters, wetlands, floodplains, steep slopes, unique or locally important natural or historical areas exist on the parcel), the Clinton law covers lot count, site design, and applicable development standards and controls.

The law concludes with the procedures an applicant requesting approval for a cluster subdivision should follow when submitting an application to the planning board.

Conclusion

As municipalities find themselves with less funds to preserve open space and other environmental resources, more and more local planning boards are likely to consider, and approve, cluster subdivisions in the future. With a proper local law and a willing planning board, this zoning tool can be mutually beneficial for all involved parties.