NEW YORK
STATE OF
OPPORTUNITY.

Division of Local
Government Services

James A. Coon Local Government Technical Series

Subdivision Review in New York State



A Division of the New York Department of State

Kathy Hochul, Governor

Robert J. Rodriguez, Secretary of State

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One Commerce Plaza, 99 Washington Avenue
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** Source: Southeastern Wisconsin Regional Planning Commission, December 1996
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**** Source: NYDOS
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Part I: Subdivision Review Process Objectives

This publication describes the subdivision review process in New York. Subdivision review is a technique that controls how a parcel of land is divided into smaller lots, how those lots are laid out, how the infrastructure serving the lots is installed and how any parks or open spaces are situated on the tract. In New York, the subdivision of land is primarily regulated at the local level.

In the 1920s, municipalities in New York were statutorily authorized to review and control the subdivision of land.[1] Since that time, countless subdivisions have been reviewed by planning boards and many court decisions about subdivisions have been rendered. In the early 1990's, the State Legislature authorized the Joint Legislative Commission on Rural Resources to develop recommendations for recodifying the State laws dealing with zoning and planning in light of changing times and precedential court decisions. In 1992, the provisions concerning subdivision review in the Town Law and the Village Law were substantially revised as a result.[2] Three years later, the State Legislature enacted similar legislation for cities.[3]

Subdivision of land is often the engine that drives development in a community. The purpose of subdivision control is "to provide for future growth and development, afford adequate facilities for housing, transportation, distribution, comfort, convenience, safety, health and welfare of its population."[4] Whether subdivisions will be pleasant places to live, have parks, playgrounds or other recreational areas, have adequate streets and sidewalks for residents is within the purview of the planning board's review of subdivision plats.

Subdivision and Zoning

It is important to distinguish subdivision approval from the other major land use control - zoning. While zoning and subdivision control are entirely separate and distinct parts of the planning implementation process, they complement each other, and taken together can ensure well-ordered development. Both are exercises of a municipality's "police power." **Zoning** has as its principal purpose the prescription of **what land may be used** for. Zoning accomplishes this by establishing different districts and providing for permissible uses in each (e.g., residential, commercial, industrial). **Subdivision control**, however, is concerned with **how land is used** - i.e., it attempts to ensure that when development does occur, it will be accompanied by adequate services and facilities.

> *The Appellate Division has spelled out the dichotomy between the two land use techniques: Subdivision control attempts to guide the systematic development of a community or area while "encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents" (Matter of Golden v. Planning Board of Town of Ramapo, supra, 30 N.Y.2d at 372, 334 N.Y.S.2d 138, 285 N.E.2d 291). It "reflects a legislative judgment that the building up of unimproved and undeveloped areas ought to be accompanied by provision for roads and streets and other essential facilities to meet the basic needs of the new residents of the area" (Matter of Brous v. Smith, 304 N.Y. 164, 169, 106 N.E.2d 503). Subdivision control is aimed at protecting the community from an uneconomical development of land, and assuring persons living in the area where the subdivision is sought that there will be adequate streets, sewers, water supply, and other essential services (2 Anderson, New York Zoning Law and Practice §21.91, at 64 [3rd Ed]).*
>
> *On the other hand, the primary goal of municipal zoning is the development of a balanced, cohesive community which efficiently uses the municipality's available land.*

1 Cities, L.1926, c. 690; villages L.1926 c. 719 and towns L.1927, c. 175.
2 L.1992, c. 727.
3 L.1995, c. 423.
4 Town Law §278(1), Village Law §7-738(1), General City Law §37(1).

One of the basic purposes of zoning is to provide in an orderly fashion for the residents' need for various types of residential, commercial and industrial structures. The concern is whether the municipality as a whole will be a balanced and integrated community (see, Berenson v. Town of New Castle, 38 N.Y.2d 102, 109, 378 N.Y.S.2d 672, 341 N.E.2d 236). However, zoning "has proven characteristically ineffective in treating with the problems attending subdivision", and thus the need for the planning board and its power to regulate subdivisions (Matter of Golden v. Planning Board of Town of Ramapo, supra, 30 N.Y.2d at 372, 334 N.Y.S.2d 138, 285 N.E.2d 291).[5]

While the two controls can work together, and probably should, for maximum benefit to the municipality, it is permissible under the statutes to have either without the other.

The Importance of Good Design

New York State contains a tremendous diversity of people and geography and a remarkably varied economy. Municipalities may contain special features such as natural landscapes (mountains, rivers, lakes, fields), architecturally interesting buildings (residences, apartments, commercial, religious, civic, social), quality business districts, historic features and parks, and a pedestrian network connecting to the surrounding community. These community differences are a source of the State's strength. Good planning allows new developments to blend into or build upon the best aspects of a community. Ideally, subdivision development will satisfy the developer, incoming residents, and the community at large.

The State's land use statutes permit cities, villages and towns (and in certain cases, county and regional planning boards) to review subdivisions to see that good subdivision design is obtained. Today, many municipalities are trying to bring back "traditional neighborhoods" through subdivisions featuring mixed land uses, interconnected streets, diverse architectural styles and pedestrian-friendly features like sidewalks, pathways and street trees. In addition, local governments can ensure that streets meet local standards and that recreation areas are suitably located, thus assuring the taxpayer that the new development will be an asset and not a liability to the community. Future services, safety, health and fiscal considerations need to be examined in connection with approval of the subdivision plat.

Importantly, a subdivision development can change the character of the community. Once land is divided into lots and streets are laid out, development patterns are set. Review of subdivision plats is often the community's only opportunity to ensure that new neighborhoods are properly designed. For this reason, well-designed and properly administered subdivision regulations can be very useful in the orderly development of a community.

The goal of good subdivision design is to ensure that all development is well built, attractively designed and integrated with the greater community. In the past, there was less emphasis on how subdivisions fit into the community, which contributed to suburban sprawl and higher public utility and service costs. Today, there is more focus on how better planned subdivision designs can improve the quality of life in metropolitan areas by creating compact, attractive communities and conserving shrinking open space. A network of streets, sidewalks and paths can tie the community together.

In small towns and villages, the importance of good subdivision regulations cannot be over emphasized. Where land is still plentiful and community character not entirely settled, well-drafted subdivision regulations can wisely guide the decisions of local governments and developers when laying out lots and installing facilities in a residential tract. Attractive and livable subdivisions may well influence where people choose to live and where businesses are established. Well-drafted subdivision regulations can ensure that new development in the municipality will be compatible with desired traditional building patterns in one part of the community, and that they will reinforce the "sense of place" and neighborhood feeling experienced in traditional neighborhoods. The regulations can control the location, scale and physical character of such new development, as well

5 *See* Marx v. Zoning Bd. of Appeals of Village of Mill Neck, 137 A.D.2d 333, 336-337 (2nd Dept. 1988).

as the manner in which they would fit into the existing pattern of woods, open space and developed areas. The accepted standards will be set forth in the subdivision regulations as minimum criteria for new developments.

Good subdivision design can create functional, well balanced and aesthetically pleasing neighborhoods. Some subdivisions accommodate diverse housing lifestyles that include high density attached dwellings near employment centers and lower density housing with significant open space in outer lying areas. Subdivisions may also be built which assist in combating the effects of climate change by: using green building materials; using advanced energy and environmental design standards; decreasing the amount of impervious paved surfaces or replacing them with porous materials; and/or reusing pre-existing structures where available.

By contrast, poor subdivision designs can negatively affect the community by increasing traffic and storm-water drainage on existing roads and streets, thereby enlarging the need for additional public facilities. Excessive or overly rapid subdivision development in a particular area, coupled with the inadequate provision of street improvements, transportation options, public facilities and services, and open space, can cause serious long-term problems, such as substandard development, wasted land, and even "dead" subdivisions, if there proves to be no market for the new lots created.[6] Failure to plan for the subdivision of land is felt by the local government in many areas such as tax burdens, the high cost of extending utilities, street and traffic problems, health hazards caused by waste water treatment systems unsuited to a particular area, and a loss of a sense of community.

This publication endeavors to set out good subdivision design principles that can be adapted to any type of municipality.

6 *See* Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359 (1972).



Part II: A Primer about SEQRA, County and Municipal Referrals, and Agricultural Districts

SEQRA

The State Environmental Quality Review Act (SEQRA) requires State and local government agencies to consider the environmental impacts of their actions before deciding to undertake them (Environmental Conservation Law Article 8). The review of subdivision plats by local planning boards is an action triggering the application of SEQRA.

The Town, City and Village Law subdivision statutes (Town Law §276, General City Law §32, and Village Law §7-728) comprehensively integrate SEQRA procedures into the subdivision plat review process. This was intended to simplify the planning boards' obligation to comply with SEQRA but, in practice, it may have made the statutes more cumbersome to use. Understanding the basic elements of SEQRA is helpful in conducting subdivision review.

Types of Actions Subject to SEQRA

The SEQRA regulations (6 NYCRR Part 617) contain most of the details about the environmental review process. The regulations provide that SEQRA applies to local government "actions" which may affect the environment. A planning board's decision on a subdivision plat application is considered such an "action." The SEQRA regulations classify "action" as either "Type I" actions (those considered more likely than other actions to require preparation of an Environmental Impact Statement (EIS)), "Type II" actions (those that require no further SEQRA review) or "Unlisted" actions (the vast majority of actions that do not appear on either a Type I or a Type II list.) Large-scale subdivisions having potentially significant adverse effects on the environment appear on the Type I list.[7]

Determining Significance of an Action

The "determination of significance" for Type I and Unlisted actions is the most critical, and one of the most litigated, steps in the SEQRA process. This is the step in which the lead agency must decide whether or not a proposed Type I or Unlisted action is likely to have a significant adverse impact upon the environment. If the lead agency finds the potential for one or more significant adverse environmental impacts, it must prepare a positive declaration identifying the significant adverse impact(s) and requiring the preparation of an EIS. If the lead agency finds that the action is likely to have no significant adverse impacts on the environment, no EIS is necessary and the lead agency must prepare a negative declaration.

Lead Agencies and Involved Agencies

The State Subdivision Enabling statutes address those instances where the planning board is the "lead agency" under SEQRA (where it has more control over the timing of hearings and decisions) and those where it is merely an "involved agency" (where it has less control over such matters).

The purpose of having a lead agency is to coordinate the SEQRA process so that when an action is to be carried out, funded or approved by two or more agencies, a single environmental review is conducted. The lead agency is responsible for making key SEQRA determinations during the review process. The lead agency is responsible for the "determination of significance" of any Type I or Unlisted action and whether an Environmental Impact Statement must be prepared.

7 Relevant to subdivisions, Type I actions which involve: 50 or more residential units not to be connected to existing community or public water and sewerage systems; the physical alteration of 10 acres; and any Unlisted action occurring within or contiguous to a historic building or site, as well as other actions listed at 6 NYCRR §617.4 (b).

An "involved" agency has a discretionary decision to make regarding some aspect of the action. The planning board is often an involved agency when it reviews a subdivision application. Involved agencies fully participate in the SEQR process but their responsibilities vary depending upon which of them is selected as the lead agency, in which case the others act in a supportive role as involved agencies. Where the planning board is the only agency required to make a decision in connection with a proposed subdivision, it is the lead agency.

The Environmental Assessment Form

A key tool in determining the environmental significance of an action is the "environmental assessment form (EAF)." An environmental assessment form is a SEQRA document developed to assist the lead agency by providing a checklist to aid in identifying and assessing the information needed to make a determination of significance. A properly completed environmental assessment form describes the proposed action, its location, its purpose and its potential impacts on the environment. Applicants for subdivision approval must complete Part 1 of the environmental assessment form; the lead agency completes Parts 2 and 3.

The Determination of Significance

Based on the information contained in the environmental assessment form, the lead agency must make a determination of significance of potential environmental impacts of the proposed subdivision. To make the determination of significance, the lead agency uses criteria in the SEQRA regulations that are indicators of significant adverse impacts to the environment. After considering this information, the lead agency must decide whether the proposed action will or will not have a significant adverse impact on the environment. A determination of significance for Type I and Unlisted actions will result in one of the following: a positive declaration, a negative declaration, or a conditioned negative declaration.[8]

Positive Declaration: If the proposed subdivision "may include the potential for at least one significant adverse environmental impact" an EIS must be prepared.[9]

Negative Declaration: If the lead agency determines "either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant" it may issue a Negative Declaration, in which case an EIS need not be prepared. Issuance of a Negative Declaration ends the SEQRA process.[10]

Conditioned Negative Declaration: If the lead agency determines that an Unlisted action, may result in one or more significant adverse environmental impacts but also identifies mitigation measures that, if implemented, will modify the proposed action so that no significant adverse environmental impacts will result, it issues a Conditioned Negative Declaration. The Conditioned Negative Declaration must be published and the public must be given at least a thirty day period to comment. Once issued, a Conditioned Negative Declaration, like a Negative Declaration, ends the SEQRA process.

8 The SEQR Handbook (4th Edition – 2020) NYS Department of Environmental Conservation p. 73. *See* https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf
9 *See* 6 NYCRR Part 617.7 (a)(1).
10 Id.

The Environmental Impact Statement

The "heart" of the SEQRA process[11] is the environmental impact statement (EIS), a document that analyzes the potential significant adverse environmental impacts of a proposed project and lays out some reasonable avenues to avoid causing them. The EIS process is two-fold: a draft environmental impact statement (DEIS) is first prepared, followed by a final environmental impact statement (FEIS). The purpose of the DEIS "is to relate environmental considerations to the inception of the planning process, to inform the public and other public agencies as early as possible about proposed actions that may significantly affect the quality of the environment, and to solicit comments which will assist the agency in the decision making process in determining the environmental consequences of the proposed action."[12]

When an EIS is required, the time periods for subdivision review do not begin to run until a draft environmental impact statement (DEIS) has been accepted as adequate for public review and comment. In judging whether to accept a DEIS as adequate for public review and comment, the lead agency must determine when the document has adequate information to make public review meaningful but it need not wait until the document is perfect in all respects. If the planning board accepts the document as adequate in scope and content for public review, it issues a "Notice of Completion of the Draft Environmental Impact Statement." [13]

SEQRA and the Complete Subdivision Plat

The State Subdivision Enabling Statutes provide that, in order for a subdivision plat application to move forward, the application must first be deemed to be "complete."[14] The determination of completeness is important, as the time periods for subdivision plat approval do not begin to run until the plat is "complete." A subdivision plat application is considered complete when, after all submission requirements are met, the lead agency has filed, pursuant to SEQRA, either:

- A negative declaration (or a conditioned negative declaration) or
- A notice of completion of the draft environ mental impact statement (DEIS)

Compliance with SEQRA is but one part of a complete plat. Usually, the municipality has extensive application and submission requirements in its subdivision regulations that must be met before the clerk of the planning board will send a "complete plat" to the board. Some planning boards furnish a checklist that lists the kinds of data needed at this stage, and can be used by the planning board to keep a record of the status of each subdivision during the review process.

Once the preliminary plat is deemed complete, the statutory time periods run. Planning boards must be careful to comply with all procedures during the preliminary plat stage. If, for example, a planning board refuses to close a public hearing on a preliminary plat within the statutory time period on the mistaken ground that the landowner had not yet complied with entire SEQRA process, the board's failure to render a timely decision on the plat application will result in a default approval by operation of law.[15]

County Referral

The General Municipal Law §239-n permits county legislative bodies to require that county or regional planning agencies review subdivisions before a local planning board decision is made. If the county or regional planning agency has been authorized to review subdivisions, the local planning board must refer subdivisions to the county or region for its review. County review of subdivision

11 Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 415 (1986); Henrietta v. Department of Envtl. Conservation, 76 A.D.2d 215, 220 (4th Dept., 1980).
12 ECL 8-0109(4).
13 6 NYCRR §617.9 (a)(3).
14 Town Law §276(5)(c); Village Law §7-728(5)(c); Gen. City Law §32(5)(c).
15 Twin Lakes Farms Associates v. Town Clerk of Town of Bedford, 215 A.D.2d 667 (2nd Dept., 1995).

proposals can provide a valuable way to bring inter-local considerations to bear on subdivisions. The county input is quite important where a proposed subdivision plat straddles municipal boundaries. Each local planning board may only review that portion of the subdivision lying within its own municipality; however the county has jurisdiction to review the inter-local impacts of the proposed subdivision.

Plats that are subject to county review, if so authorized, are those that apply to real property located within 500 feet of any of the following:

- A municipal boundary
- The boundary of an existing or proposed county or State park or recreation area
- The right-of-way of an existing or proposed county of State parkway, thruway, expressway, road or highway
- The existing or proposed right-of-way of a 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
- The boundary of a farm operation located in an agricultural district, as defined by Article 25-AA of the Agriculture and Markets Law[16]

The county or regional planning agency has 30 days after receipt of the plat to make its recommendations to the referring municipality. If the county or regional planning agency fails to report in that time period, the referring municipality may take a final action on the plat. If the county or regional planning agency makes recommendations more the 30 days after receipt but two or more days prior to the final action on the plat, the municipality must comply with the voting requirements below. When the county planning agency must review a plat, the courts have held that the statutory period within which the local planning board must issue its decision on a final plat (62 days) does not commence until the planning board has received the county planning agency's recommendation, or until 30 days has expired with no recommendation having been made by the county.[17]

Where the county planning agency has reviewed a plat under General Municipal Law §239-n and has recommended either *modification* or *disapproval* of the plat, the local planning board may not act contrary to that recommendation except by a majority-plus-one (a supermajority) vote of its total membership. In a 1999 case, In the *Matter of Aloya, et al v. Planning Board of the Town of Stony Point*, the Court of Appeals found that where a planning board approved a subdivision plat application by a simple majority vote of the board, but failed to reach a supermajority to override a county's recommendation of disapproval, the planning board had taken an action, preventing a default approval, but the application was nevertheless denied as it failed to satisfy the supermajority requirements of General Municipal Law §239-n.[18]

Where the county has instead recommended approval, or has reported that the plat presents no significant county-wide or inter-community impact, the local planning board is free to take any action with a simple majority vote.[19] The planning board must file its report with the county or regional planning agency within 30 days of the planning board taking its final action on the plat. If the municipality acted contrary to the recommendation of modification or disapproval of the county or regional planning agency, it must give its reasons for doing so in the report.

The county or regional planning agency may enter into an agreement with the referring municipality that some plats (those creating fewer than five lots, for example) are of a purely local concern and therefore not subject to referral.[20]

16 Gen. Mun. Law §239-n; Town Law §276(10); Village Law §7-728(1); Gen. City Law §32(10).
17 King v. Chmielewski, 76 N.Y.2d 182 (1990).
18 In the Matter of Gil Aloya, et a., v. Planning Board of the Town of Stony Point, 93 N.Y.2d 334 (1999).
19 Gen. Mun. Law §239-n(5).
20 Gen. Mun. Law §239-n (3)(b).

Referrals to Adjoining Municipalities

Adjacent municipalities must be afforded notice of a public hearing held on a subdivision application when the applicant's property is within 500 feet of the adjacent municipal boundary.[21] Notice must be given to the clerk of the adjacent municipality by mail or electronic transmission at least ten days prior to the hearing. This notice gives representatives of the adjacent municipality the opportunity to attend the hearing on the subject application.

If a proposed subdivision straddles a municipal boundary, the portions of the plat should be submitted separately to each local planning board, though each board should take into account the impacts of the entire proposed development.[22]

State Agricultural Districts

Article 25-AA of the Agriculture and Markets Law was enacted to conserve and protect land for agricultural production and as a valued natural and ecological resource. To accomplish those objectives the statute provides for the creation of agricultural districts. To be eligible for designation, an agricultural district must be certified by the county for participation in the State program. Once designated, participating farmers within the district can receive reduced property assessments and relief from local nuisance claims.

State law requires that municipalities evaluate and consider the possible impacts of certain projects on the functioning of farms in agricultural districts. Applicants proposing subdivisions located on property within designated State Agricultural Districts containing a farm operation or, within 500 feet of a farm operation in a designated State Agricultural Districts, must submit an Agricultural Data Statement to the planning board along with a subdivision plat application.[23] The planning board clerk must then forward the application requiring an agricultural data statement to the county planning board, county planning, or regional planning council;[24] failure to forward it may result in invalidation of the board's decision.[25] The statement must contain specific information about the location of the proposed subdivision in relation to the farm operation(s). The planning board is required to consider the statement in its review of the possible impacts of the proposed subdivision on the functioning of farm operations within the Agricultural District. These statements are generally available in county planning department offices or on their websites. Copies of the statement are then forwarded to the owners of the identified farm operations.

Other Government Agencies Concerned with Subdivision

NYS Department of Transportation - When the new subdivision abuts or joins a State highway, the storm water drainage control proposed at the intersection and along the highway will be a matter of concern to the NYS Department of Transportation. If the Department is considering widening or relocating a State highway, this may be taken into consideration at the time of local approval of the subdivision.

Adirondack Park Agency - In the 12 county Adirondack Park, approval for a subdivision may be required from the Adirondack Park Agency.

New York City Watershed - Subdivisions within the 1,900 square mile New York City Watershed may require permits from the New York City Department of Environmental Protection.

21 Gen. Mun. Law §239-nn.
22 *See* the facts of Bower Associates v. Town of Pleasant Valley, 2 N.Y.3d 617 (2004).
23 Agriculture & Mkts. Law §305-a(2), (3), (4); Town Law §283-a and Village Law §7-739.
24 Id.
25 Goldberger v. Westerlo, Index 6447-06 (Sup. Ct. Alb. Co.)(Nov. 2, 2007).

Sulfolk County and Central Pine Barrens Commission - Suffolk County has considerable powers over sewage disposal from subdivisions.[26] Also in Suffolk County, in portions of the Towns of Brookhaven, Riverhead and Southampton, the Central Pine Barrens Commission has jurisdiction over most new development including subdivisions, pursuant to Article 57 of the Environmental Conservation Law.

Public Service Commission - Utility companies servicing new developments are closely involved in subdivision activity. The location of their lines, poles and mains is subject to the guidance of the planning board and the regulations of the Public Service Commission.[27] The Public Service Commission regulations define a subdivision as consisting of five or more lots and generally require underground facilities if the subdivision is subject to local or State agency approval.

26 Town Law §277(11); Village Law §7-730(10).
27 *See* 16 NYCRR Part 604.



Part III: The Subdivision Review Process

The subdivision of land in New York is controlled at the local government level. Municipalities are authorized but not mandated to regulate subdivisions. Pursuant to State statute, the governing bodies of cities, towns and villages may pass *resolutions* authorizing their planning boards to review and approve preliminary and final subdivision plats.[28] Local planning boards have been given general jurisdiction to review subdivision plats (although in certain instances, a county planning commission can conduct subdivision review).[29] Once delegated to the planning board, the local legislative body relinquishes authority to review the plat.[30]

After a local planning board has been authorized to exercise plat approval powers, State law requires the municipal clerk to immediately file a certificate of the planning board's new review authority with the county clerk or register.[31] Thereafter, no subdivision plat can be filed with the county clerk without the planning board's approval, endorsed in writing on the plat in such manner as the planning board designates.[32]

Defining Subdivision

A subdivision plat contemplates division of one tract into a number of smaller lots with eventual separate ownership of each such lot.[33] Before it can begin conducting subdivision plat review, the municipality must define the term "subdivision" to establish the number of lots, blocks or sites for which subdivision review will be required. State Subdivision Enabling Statutes do not define this term except in the context of the phrase:

> *…the division of any parcel of land into a number of lots, blocks or sites as specified in a law, rule or regulation, with or without streets or highways, for the purpose of sale, transfer or ownership, or development.*[34]

It is critical that the local legislative body provide a number in the subdivision definition; this establishes the planning board's jurisdiction to review subdivision plats. If the division of land fits the definition of subdivision, then subdivision review can occur. If the particular division of land falls below the lot number in the definition, subdivision review cannot occur. With an abundance of caution, many municipalities wisely require subdivision review whenever land is divided into "two or more lots, blocks or sites." Setting the definitional threshold for subdivision review at "two or more" lots prevents landowners from trying to circumvent subdivision review entirely. It is possible to define that term "subdivision" to exclude certain divisions of property, which would not be subject to the planning board's jurisdiction. Adopting such a definition however can invite repeated submissions of plats with fewer divisions that escape review. Limiting how frequently land divisions can be made without review is in many ways more difficult than for the municipality to simply review all subdivisions plats.

What is a plat? A subdivision "plat" is a map or drawing, prepared in accordance with local regulations, showing the divisions of the tract of land and the layout of a proposed subdivision including roads and lots at approximate distances and bearings, key plan, topography and drainage, and all proposed facilities at a suitable scale and in such detail as local regulation may require and

28 Cities are granted subdivision control authority in General City Law §§32, 33 and 34; villages in Village Law §§7-728, 7-730 and 7-732; and towns in Town Law §§276, 277 and 278. The cities of Syracuse and Schenectady are special cases, having the power to review and approve subdivisions outside of their corporate limits. For Syracuse, see chapter 447, Laws of 1920; for Schenectady, see chapter 671, Laws of 1915.

29 In counties which have adopted an alternative form of county government, a county planning commission controls land subdivisions in towns outside cities and villages. Alternative County Government Law §552.

30 Liberty Meadows v. Village of Port Jefferson 24 Misc.3d 1160 (Sup. Ct. Suffolk Co. 2009); Woodhull Associates v. Board of Trustees of Village of Northport 63 A.D.2d 677 (2nd Dept. 1978). Cf. SRW Associates v. Town Bd. of Town of Brookhaven, 121 A.D.2d 713 (2nd Dept., 1986).

31 Town Law §276(3); Village Law §7-728(3); Gen. City Law §32(3).

32 Town Law §279; Village Law §7-732; Gen. City Law §34.

33 Riegert Apartments Corp. v. Planning Board of the Town of Clarkstown, 57 N.Y.2d 206, 211 (1982).

34 Town Law §276(4)(a); Village Law §7-728(4)(a); Gen. City Law §32(4)(a).

containing any information required by the planning board. Plat review may vary in complexity with regard to the size, location and potential environmental impact of the proposed subdivision.

Subdivision may also be defined to encompass a lot line adjustment or the review of old filed maps. There is no express statutory requirement that defines a lot line adjustment as a subdivision. The State Subdivision Enabling Statutes explain:

> *The term "subdivision" may include any alteration of lots lines or dimensions of any lots or sites shown on a plat previously approved and filed in the office of the county clerk or register of the county in which such plat is located.*[35]

A lot line adjustment or alteration is a means by which a boundary line dividing two lots is adjusted or moved. Such a move is typically made by agreement between the owners of the parcels. A change in the location of the boundary line effectively creates two lots with new dimensions.

Some municipalities define "subdivision" to include lot line adjustments.[36] In such instances, a lot line adjustment is considered a subdivision or resubdivision of land. When so defined, all lot line adjustments, being subdivisions, will be subject to the statutory procedure for subdivision review, as well as any local subdivision regulations. The planning board's role will usually be limited to reviewing the boundary lines of the newly configured lots and to determine whether they are in conformance with applicable subdivision laws and any local zoning regulations. Importantly, those lots with adjusted boundary lines will be entitled to the statutory exemption period accorded approved subdivisions from subsequently enacted zoning amendments that increase lot area requirements (Town Law §265-a, Village Law §7-709 and General City Law §83-a). Other municipalities, by contrast, provide that a lot line adjustment is not a subdivision of land at all (not even a minor subdivision) and allow lot line changes using a simple administrative process. In that case, lot line adjustments are often processed and decided by municipal planning staff or building officials or even the planning board itself using expedited procedures, which usually do not involve a public hearing. Staff will examine the adjustment application to ensure that it meets the eligibility requirements.

Whether considered a subdivision or not, the lots created through the line adjustment must conform to applicable zoning regulations and the procedure must not result in an increase in the number of lots or parcels. The lot line adjustment authorizes, but does not create, the new boundary line. Ultimately, the private owners must decide to convey the property and file new deeds with the county. If the lot line adjustment creates a change in the acreage of any particular lot, the municipality should recognize such a change in its assessment for tax purposes.

Also, the local legislative body can, in defining the term "subdivision," confer upon planning boards the power to review ***old maps*** filed prior to the grant of authority to review subdivision plats, if the land remains entirely or partially undeveloped.[37] The State Subdivision Enabling Statutes define the term undeveloped to mean those plats where 20% or more of the lots within the plat are unimproved, unless existing conditions, such as poor drainage, have prevented their development.[38] All of the requirements of the subdivision laws and regulations apply to the planning board's action on plats that are entirely or partially undeveloped. The statutory provision has been used to reclaim outdated layouts that never were developed and obtain better street layouts and new lots meeting current zoning standards.

Similarly, a subdivider might wish to replace an approved subdivision plat with a changed or improved one. Such an act, referred to as "resubdivision," can be treated by the planning board exactly as though it was an original plat. Note that if the area involved in a resubdivision is owned by more than one party, or if rights have been given to others, all parties involved must be co-applicants or agree to the resubdivision before it can be processed by the planning board.

35 Id. (Emphasis added.)
36 Lindberg v. Town Of Manlius Planning Bd. 41 A.D.3d 1231 (4th Dept., 2007).
37 Town Law §276(2); Village Law §7-728(2); Gen. City Law §32(2).
38 Id.

The Department has taken the position that where a single parcel of land (described in a single deed) is split by a public highway, the sale of the portion on one side of the highway is not subject to subdivision review where "subdivision" is defined as the division of a parcel into two or more parcels. The reason is that the placement of a public road is a factor over which the landowner can have no control. In this sense, it is a "de facto" subdivision.

Area Variance – The Direct Appeal

If any lot in the proposed subdivision fails to meet the dimensional requirements in a zoning regulation, the applicant must seek an area variance from the local zoning board of appeals. For example, an owner of land wishing to create two building lots where one lot would have less than the required lot frontage needs to obtain an area variance from the zoning board of appeals. An area variance from the zoning board of appeals varying the lot frontage requirement is necessary in order that the lot may be built upon for zoning purposes. After the lot owner obtains the area variance, the planning board can proceed to decide on the application for subdivision of the parcel into two lots.

Typically when an area variance is sought, the appeal to the zoning board of appeals may only be made after the zoning enforcement officer has made a determination that the application fails to meet the zoning requirements. However, when dealing with a subdivision application, the appeal may be made directly to the zoning board of appeals, bypassing the determination of the enforcement officer.[39] When the zoning board of appeals reviews such an application, it must request that the planning board provide written recommendations regarding the requested variance.

Vested Rights and Statutory Exemptions

Developers may obtain common law vested rights to complete the approved subdivision according to the zoning provisions in effect at the time it was applied when they expend substantial monetary resources and undertake substantial construction efforts.[40] Vested rights obtained in this way may protect a subdivider from subsequent zoning changes which increase the minimum lot sizes that would otherwise render substandard and non-conforming, the lots in the approved subdivision. However, a planning board may not disapprove a subdivision plat to prevent the owner from obtaining vested rights in advance of a contemplated zoning change.[41]

If the local legislative body amends the local zoning regulation to increase the area or dimensional requirements after a subdivision plat is filed with the county clerk, and the lots created in the approved subdivision do not comply with the dimensional requirements, those new dimensional requirements will generally apply to those lots. The State Statute gives municipalities the ability to adopt zoning amendments while providing protection to developers and builders by providing limited exemptions from zoning amendments if certain conditions existed at the time the subdivision plat was filed in the office of the county clerk:

1.) If there were both a zoning board and a planning board with subdivision plat approval powers, the plat is entitled to a three-year exemption from the increase in area requirements after the filing of the approved subdivision plat or first section thereof;

2.) If there was zoning but no planning board empowered to approve subdivision plats, the plat is entitled to a two-year exemption from the increased area requirements after the filing of the approved subdivision plat or first section thereof;

39 Exeter Building Corp. v. Town of Newburgh, 49 A.D.3d 731 (2nd Dept., 2008) leave to appeal denied 10 N.Y.3d 716 (2008).
40 Ellington Const. Co. v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead, 77 N.Y.2d 114 (1990).
41 Walton v. Town of Brookhaven, 41 Misc. 2d 798 (Sup. Ct. Suffolk Co. 1964).

3.) If there was no zoning and there was a planning board with power to approve subdivision plats, the approved plat is entitled to a two-year exemption from the increase in the area requirements after the filing of the approved subdivision plat or first section thereof; and

4.) If there was neither zoning nor a planning board with power to approve subdivision plats, the approved plat is entitled to a one-year exemption from the increase in the area requirements of the new zoning regulations after the filing of the approved subdivision plat or first section thereof.[42]

Following the expiration of the exemption period, all substandard-sized lots in common ownership on previously filed plats that predate the zoning amendments must comply with the new lot size requirements of the zoning regulations, unless the owner has acquired vested rights to complete construction.[43]

A Warning to Planning Boards about "Default Approval"

The time frames set forth in the State Subdivision Enabling Statutes are important. The statutes provide that planning boards must conduct hearings or decide subdivision applications within certain periods of time. If the planning board misses any of the many different time periods in the State Subdivision Enabling Statutes - whether the missed date is for holding a public hearing within 62 days of receipt or a completed plat application or making a decision on the plat application - the preliminary or final plat under consideration is deemed approved by "default."[44] The developer is entitled to demand that the municipal clerk issue a certificate of default approval showing the date of submission of the application of the preliminary or final plat and the failure of the planning board to take action within the required time.[45] This certificate of default approval will constitute evidence of legal approval of the plat.[46]

Strict procedural compliance with the subdivision statutes is therefore critical to local planning boards. Default approval is the penalty for missing any of the requisite time periods. The default approval can apply to a plat that has lots which do not conform to the zoning restrictions.[47] The time periods in which the planning board must act may be extended by the mutual consent of the applicant and the board.

As noted in Part II, the time periods for subdivision review do not begin to run until the application is "complete," including the filing of either the negative declaration or the notice of completion of a DEIS pursuant to SEQRA. Additionally, once the subdivision review commences, SEQRA can alter the time frames for holding hearings and making key decisions on the plat. For this reason, close attention should be given to all procedural time periods.

It is important for the planning board to carefully follow the statutory time schedules, which are discussed in this section.

42 Town Law §265-a(2); Village Law §7-709(2); Gen. City Law §83-a(2).
43 *See* Ellington Const. Corp v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead, 77 N.Y.2d 114 (1990).
44 Town Law §276(8); Village Law §7-728(8); Gen. City Law §32(8).
45 Id.
46 Id. It should be borne in mind that the statutes provide that the plat must be filed with the County Clerk within 60 days of approval. If a certificate of default approval is issued, it expires after 60 days unless the plat is filed within that time. Town Law §276(11); Village Law §7-728(11); Gen. City Law §32(11).
47 Cohalan v. Schermerhorn, 77 Misc. 2d 23 (Sup. Ct. Suff. Co. 1973). Neither default approval of the subdivision plat nor its recording with the county is sufficient to alter the zoning of the property or create an estoppel against the enforcement of zoning restrictions. 77 Misc. 2d at 27.

Procedural Steps in the Subdivision Review Process

The State Subdivision Enabling Statutes provide distinct procedures for planning boards to follow when reviewing a final plat (one step) and when reviewing both preliminary and final plats (two steps). The State Statutes combine the subdivision and SEQRA procedures with the goal of helping planning boards to keep track of the legal requirements in subdivision review. Importantly, SEQRA must be completed during the preliminary plat step. Part III explains the interplay of SEQRA and subdivision review.

Subdivisions may be defined and delineated by local regulation, as either "major" or "minor" with the review procedures and criteria for each set forth in the local regulation.[48] Minor subdivisions often correspond to the one step review process involving only final plat. Because only the final plat is reviewed, the proposed subdivision can proceed through the application process with greater speed than larger ones that require the two step process.

Larger subdivisions – often defined as "major" subdivisions – can be reviewed using a two step process, involving both a preliminary plat and final plat. This two step process provides an opportunity to comprehensively address the concerns of large scale developments, such as parkland reservation, higher density on clustered plats, open space ownership and maintenance, road construction and water and sewer line extensions.

Sketch Plans and Concept Plans

While not mandated by State law, many municipalities offer applicants for subdivision plat review a pre-submission conference – called a sketch or concept plan meeting – to discuss the proposed subdivision and the requirements necessary for subdivision review. The sketch plan review does not constitute formal submission of an application and SEQRA does not usually apply to it.[49] This meeting is a practical necessity where the project is a large one or where the developer is new in the community. It is beneficial to both parties because the community will gain knowledge of the developer's intent and the developer will learn about the regulatory obligations, before committing to significant outlays of time and money.

At this meeting, the applicant should provide the planning board with basic data regarding the proposal. At a minimum, this should include a map showing the important existing natural and man-made features in and around the property and a sketch plan showing the major features of the proposed subdivision. This information can then form the basis with which the planning board can advise the applicant on the next steps required to gain subdivision plat approval and of the necessary data that will have to be provided with the application.

"One Step" (Final) Subdivision Plat Review

One step plat review is often employed by municipalities for small subdivisions without significant infrastructure and where each lot has frontage on a public road, saving time and money for both the municipality and the landowner. No preliminary plat precedes the final plat.

Review begins with the submission of a complete application for final plat approval. The specific types of information to be provided by the applicant should be identified as final plat submission requirements in the municipality's subdivision regulations. The applicant is expected to present a carefully worked out final plat[50] showing the layout and dimensions of lots, roads, open space and public facilities on the site.

48 Town Law §276(4)(a); Village Law §7-728(4)(a); Gen. City Law §32(4)(a).

49 SEQRA: Frequently Asked Questions for Local Officials https://dos.ny.gov/seqra-faq. But *see* Monteiro v. Town of Colonie, 158 A.D.2d 246 (3rd Dept. 1990).

50 Town Law §276(4)(d); Village Law §7-728(4)(d); Gen. City Law §32(4)(d).

Commencement of Final Plat Review

The time periods for subdivision review begin to run when the planning board has received a "complete" final plat application (containing all materials meeting the municipality's submission requirements). The last step in determining when a final plat is "complete" is defined by statute:

> *(c) … a final plat shall not be considered complete until a negative declaration has been filed or until a notice of completion of the draft environmental impact statement has been filed in accordance with the provisions of the state environmental quality review act. The time periods for review of such plat shall begin upon filing of such negative declaration or such notice of completion.*[51]

Until the planning board files a negative declaration or a notice of completion for a draft environmental impact statement, the subdivision plat application remains incomplete and the time periods for a public hearing are not triggered and do not begin to run.[52] The failure to complete the initial review pursuant to SEQRA can avoid default approval.[53]

Additionally, if the municipality is situated in a county that conducts county or regional review of subdivision plats pursuant to General Municipal Law 239-n (see section on *County Referral*), the final plat will not be considered complete and the time period for subdivision review will not begin to run until the planning board receives the county (or regional) board's recommendation or until 30 days had expired with no response.[54]

Once the final plat submission is complete, the statutory time frames begin to run.

The Public Hearing

The first important time frame for planning boards to pay attention to is the time for holding a public hearing on the final plat. A public hearing is required to be held by the planning board for each subdivision application. Usually, the hearing must be opened and closed in 120 days.

Time for the Public Hearing – When the Planning Board Is the Lead Agency

When the planning board is the "lead agency" under SEQRA and has issued a "negative declaration," the planning board must conduct a public hearing within 62 days of the receipt of the complete final plat submission by the clerk of the planning board.[55]

Similarly, when the planning board, as lead agency, has filed a "notice of completion of a DEIS", the public hearing on the final plat must be held within 62 days. There is an optional public hearing that can be held on the DEIS. If a public hearing is to be held on the DEIS, the public hearing must be held jointly with the public hearing on the final plat.[56] If no public hearing is held on the DEIS, the hearing on the final plat must be held within 62 days after the filing of the notice of completion of the DEIS.[57]

In any event, the public hearing must also comply with the posting and notice requirements of the Open Meetings Law.[58] The public hearing must be closed within 120 days after it is opened.

51 Town Law §276(6)(c); Village Law §7-728(6)(c); Gen. City Law §32(6)(c).

52 *See* Kittredge v. Planning Board of the Town of Liberty 57 A.D.3d 1336 (3rd. Dept. 2008). "In sum, reading the statute as a whole, we conclude that Town Law §276 (5)(d)(i)(1)... require[s] that a public hearing be held after a lead agency has completed its initial review pursuant to SEQRA."(Emphasis added).

53 Benison Corporation v. Davis, 51 A.D.3d 1197 (3rd Dept. 2008); Pheasant Meadow Farms, Inc. v. Town of Brookhaven, 31 A.D.3d 770 (2nd Dept., 2006).

54 King v. Chmielewski, 76 N.Y.2d 182 (1990).

55 Town Law §276(6)(d)(i)(1)(a); Village Law §7-728(6)(d)(i)(1)(a); Gen. City Law §32(6)(d)(i)(1)(a).

56 Town Law §276(6)(d)(i)(1)(b); Village Law §7-728(6)(d)(i)(1)(b); Gen. City Law §32(6)(d)(i)(1)(b).

57 Id.

58 Public Officers Law Article 7.

Time for the Public Hearing - When the Planning Board Is NOT the Lead Agency

If the planning board is not the lead agency under the SEQRA regulations, it is an "involved agency." The State Subdivision Enabling Statutes provide that if the planning board can obtain the agreement of the lead agency, the public hearing on the final plat and DEIS should be held jointly.[59] Notice of a joint hearing must be advertised in a newspaper of general circulation within the municipality at least 14 days before the hearing date.[60]

If a joint hearing is not held, the planning board must hold the hearing on the final plat within 62 days after the receipt of a complete final plat. Notice of this hearing must be published in a newspaper of general circulation in the municipality at least five days in advance.[61]

In any event, the public hearing must also comply with the posting and notice requirements of the Open Meetings Law.[62] The public hearing must be closed within 120 days after it is opened.

Time for Decision

In instances when ***a negative declaration*** has been issued for the final plat, the planning board must render a decision on the final plat within 62 days of the close of the public hearing.[63]

If an ***environmental impact statement*** under SEQRA has been prepared, the final environmental impact statement (FEIS) must be filed within 45 days after the close of the public hearing on the final plat.[64] If the planning board is the lead agency, decision making on the final plat must occur within 30 days of the filing of the final EIS. When the planning board is not the lead agency, the planning board must render a decision on the final plat within 62 days after the close of the public hearing or within 30 days of the adoption of SEQRA findings by the lead agency, whichever period is longer.[65]

A discussion of the planning board's findings as well as the considerations for decision-making on the plat appears at the end of this Part.

"Two Step" (Preliminary & Final) Subdivision Plat Review

A two step review is often used to review larger scale subdivisions. For those municipalities that have chosen a two step subdivision review process, the first step is the application for ***preliminary plat*** approval. Once the preliminary plat is approved, application is then made for ***final plat*** approval.

Preliminary Plat Review

A preliminary plat is defined in the State Subdivision Enabling Statutes as "a drawing prepared in a manner prescribed by local regulations showing the layout of a proposed subdivision including, but not restricted to, road and lot layout and approximate dimensions, key plan, topography and drainage, all proposed facilities unsized, including preliminary plans and profiles, at suitable scale and in such detail as local regulations may require."[66] At the preliminary plat step of review, the subdivider is usually expected to present a carefully worked out plan, but not in as final or refined a format as the final plat. The preliminary plat should be at a suitable scale with accurate drafting so that all of the characteristics of the final plat can be anticipated.

59 Town Law §276(6)(d)(ii); Village Law §7-728(6)(d)(ii); Gen. City Law §32(6)(d)(ii).
60 Id.
61 Id.
62 Public Officers Law Article 7.
63 Town Law §276(5)(d); Village Law §7-728(5)(d); Gen. City Law §32(5)(d).
64 Id.
65 Town Law §276(5)(e)(iii); Village Law §7-728(5)(e)(iii); Gen. City Law §32(5)(e)(iii).
66 Town Law §276(4)(b); Village Law §7-728(4)(b); Gen. City Law §32(4)(b).



Source: Ethan Spoo

Figure 1: PRELIMINARY PLAT
A preliminary plat is a requirement in a two step subdivision review process. It shows the division of land and the proposed layout including roads, lots, and basic utilities. The natural and manmade features on-site as well as the area surrounding the proposed subdivision should also be on the preliminary plat, including any interconnectivity with the proposed subdivision. The preliminary plat is drawn to scale but usually lacks the engineering details shown on a final plat. The two step subdivision review process encourages open dialog between the developer and the planning board early in the process and a discussion of potential issues with the subdivision application, before time and money is spent on the final design.

Commencement of Preliminary Plat Review

The time periods for subdivision review begin to run when the planning board has received a "complete" preliminary plat application (containing all materials meeting the municipality's submission requirements). The last step in the determining when a preliminary plat is "complete" is defined by statute:

> *(c) …A preliminary plat shall not be considered complete until a negative declaration has been filed or until a notice of completion of the draft environmental impact statement has been filed in accordance with the provisions of the State Environmental Quality Review Act. The time periods for review of a preliminary plat shall begin upon filing of such negative declaration or such notice of completion.*[67]

When the planning board receives the preliminary plat and all necessary information and a *negative declaration* is issued under SEQR, the preliminary plat is considered complete and the planning board must conduct a public hearing within 62 days.[68] Similarly, when the planning board receives the preliminary plat and all necessary information and *a DEIS has been prepared*, the preliminary plat is considered complete when the notice of completion of the DEIS has been filed.

67 Town Law §276(5)(c); Village Law §7-728(5)(c); Gen. City Law §32(5)(c).
68 Town Law §276(5)(d)(i)(1); Village Law §7-728(5)(d)(i)(1); Gen. City Law §32(5)(d)(i)(1).

Conducting the Public Hearing

After the review commences, planning boards must hold a public hearing on the preliminary plat. A public hearing is required to be held by the planning board for each preliminary plat application. Usually, the hearing must be opened and closed in 120 days.

The public hearing presents the planning board with an opportunity to receive public input and information about the subdivision proposal. The hearing is advantageous because it allows the developer, as well as the public, to state their perspectives about the proposal. Residents and owners of nearby properties often have intimate knowledge of existing conditions in the area which may not have been recognized by others. The Department's free on-line publication, Conducting Public Meetings and Public Hearings[69] offers a thorough discussion of the procedures for running public hearings.

When the Planning Board is the Lead Agency

When the planning board, acting as lead agency, issues a *negative declaration* under SEQR, the preliminary plat is considered complete and the planning board must conduct a public hearing within 62 days of its receipt.

When the planning board, acting as the lead agency, has required preparation of a DEIS, the preliminary plat is considered complete when the notice of completion of the DEIS has been filed. The public hearing on the preliminary plat must be held jointly with any public hearing on the DEIS within 62 days after the filing of the notice of completion of the DEIS.[70] If no public hearing is held on the DEIS under SEQR, the hearing on the preliminary plat must be held within 62 days after the filing of the notice of completion of the DEIS.[71]

Notice of the public hearing on the preliminary plat must be published at least once in a newspaper of general circulation within the municipality.[72] If no hearing will be held on the DEIS, notice must be published at least five days prior to the public hearing on the preliminary plat.[73] If the public hearing on the preliminary plat and the public hearing on the DEIS are to be held jointly, notice of the public hearing at least 14 days in advance is required.[74] The public hearing must also comply with the posting and notice requirements of the Open Meetings Law.[75] In addition, if a DEIS has been prepared, the final environmental impact statement (FEIS) must be prepared and filed within 45 days after the close of the public hearing on the preliminary plat.[76]

When the Planning Board Is NOT the Lead Agency

If the planning board is not the lead agency under the SEQRA regulations, it is an "involved agency." When the lead agency issues a *negative declaration* under SEQR, the preliminary plat is considered complete and the planning board must conduct a public hearing within 62 days of its receipt.

When the lead agency has required preparation of a DEIS, the preliminary plat is considered complete when the notice of completion of the DEIS has been filed. If a public hearing is held on the DEIS, the statutes provide that if the planning board can obtain the agreement of the lead agency, the public hearing on the preliminary plat and DEIS should be held jointly.[77] Notice of a joint hearing must be advertised in a newspaper of general circulation within the municipality at least 14 days before the hearing date.[78]

69 https://dos.ny.gov/conducting-public-meetings-and-public-hearings
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Public Officers Law Article 7.
76 Id.
77 Town Law §276(5)(e); Village Law §7-728(5)(e); Gen. City Law §32(5)(e).
78 Id.

If a joint hearing is not held, the planning board must hold the hearing on the preliminary plat within 62 days after the receipt of a complete preliminary plat. Notice of this hearing must be published in a newspaper of general circulation in the municipality at least five days in advance.[79] The hearing must be closed within 120 days, and the planning board's decision on the preliminary plat must be made within 62 days of the close of the hearing, if an EIS was not required.

If an EIS was required, the planning board may not make its decision on the preliminary plat until an FEIS has been filed and the lead agency has made its SEQRA findings.[80]

Decision on the Preliminary Plat

The decision on the preliminary plat is likely the most important step taken by the planning board in the subdivision process. At this stage, the design features of the entire project are determined and the planning board ensures that adequate public facilities are available, or will be available in the foreseeable future, to serve the proposed development. The planning board should therefore attend to every detail and design of the subdivision at the preliminary plat step, before rendering its decision. The decision is so significant that once the preliminary plat is approved, most elements of it cannot be revisited if the final plat, when submitted, complies with the approval. An Appellate Division court stated:

> *"Preliminary approval involves decisions concerning significant design features such as street location and layout, topography, minimum lot size, public improvements and the amount of open space needed for public recreation. The planning board may accept the preliminary plat as submitted, modify it or reject it [citations omitted]. Once preliminary approval has been granted, the final plat implements the design determinations made at the earlier stage and shows the project in greater detail.*
>
> *Preliminary plat approval has greater weight than mere informal reaction to a preliminary plat ... It has even been held that, absent new information, a subsequent modification or rejection of a preliminarily approved subdivision layout is an arbitrary and capricious act subject to invalidation. Preliminary plat procedures and default provisions would lack significance if they were subject to nullification as a result of a mere change of heart by the planning body."*[81]

The Court of Appeals reiterated the critical nature of this decision:

> *The preliminary plat approval finally determines important design features of a subdivision and is intended to fix the broad outlines of the proposed development so that both the developer and the town can know the state of the subdivision approval process before additional expenses are incurred incidental to the preparation and approval of detailed final plans. (Citations omitted)*
>
> *Approval of the preliminary plat does not guarantee approval of the final version.... But, "a planning board may not modify a preliminary plat and then disapprove of the layout of a final plat that conforms to the modifications prescribed by the board".*[82]

Within a strict statutory time frame, the planning board must consider all design elements of the preliminary plat. The failure of the planning board to meet those time frames could result in "default approval" of the plat.

79 Id.
80 Town Law §276(5)(e)(iii); Village Law §7-728(5)(e)(iii); Gen. City Law §32(5)(e)(iii).
81 Sun Beach Real Estate Development Corp. v. Anderson, 98 A.D.2d 367, 372-373 (2nd Dept. 1983).
82 Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Town of Brookhaven, 78 N.Y.2d 608, 612 (1991).

Time for Decision on Preliminary Plat

The next step is for the planning board to reach a decision on the preliminary plat application. By this stage, the planning board should have developed a broad basis for making a decision which should include the information provided with the application.

If an EIS was not required, the planning board's decision on the preliminary plat must be made within 62 days after the close of the public hearing.[83]

If an EIS was required, the planning board may not make a decision on the preliminary plat until a FEIS has been filed.[84] If the planning board is the lead agency, within 30 days of the filing of the FEIS, the planning board must issue findings on the FEIS and make its decision on the preliminary plat. If the planning board is not the lead agency but merely an involved agency, the planning board must make its own findings and its decision on the preliminary plat within 62 days after the close of the public hearing on the preliminary plat or within 30 days of the adoption of SEQRA findings by the lead agency, whichever period is longer.[85]

Additionally, in New York, the decision on a preliminary subdivision plat is subject to judicial review. The 30-day statute of limitations for challenging preliminary subdivision plat approval is triggered when the preliminary plat is filed, rather than after filing of the approved final plat.[86]

Factors for Decision Making

The State Subdivision Enabling Statutes provide that a planning board "shall approve, with or without modification, or disapprove" preliminary plats.[87] The planning board's authority to approve or disapprove plats must be exercised within the standards specified by the State Subdivision Enabling Statutes, together with the standards set forth in any subdivision regulations adopted by the community. Planning board members should review Part III of this publication, which discusses in detail the factors a planning board considers when reviewing a preliminary or final plat.

The State Subdivision Enabling Statutes set out general standards allowing planning boards to regulate the details of subdivisions. The statutory standards are sufficient to guide planning boards in their decision making, even where no local regulations have been adopted[88] or where they have been invalidated by a court.[89]

Although not necessary, most municipalities have adopted local subdivision regulations to supplement the State Statutory standards. Local subdivision regulations often establish procedural and substantive standards with which proposed subdivisions must comply. The regulations usually set forth the procedures involved in applying for subdivision plat approval, the information and plats to be furnished by the developer, and the local standards that will be applied to lot layout and infrastructure. Local subdivision regulations can be tailored to address issues of growth and change unique to the community and not adequately addressed by the statewide standards.

Preliminary plats are also reviewed for environmental issues, particularly where a conservation or clustered subdivision is proposed. The environmental review conducted as part of the SEQRA process may reveals the need to address environmental area protection, stormwater management and lotting patterns to avoid sensitive areas or watercourses. Many residential subdivisions provide land for parks, recreational facilities or money in lieu thereof to supplement existing facilities. These considerations are extensively addressed in Part V of this publication.

83 Town Law §276(5)(d)(iii) and (e)(iii); Village Law §7-728(5)(d)(iii) and (e)(iii); Gen. City Law §32(5)(d)(iii) and (e)(iii).

84 Id. According to the statutes, the FEIS will be filed within 45 days following the close of the public hearing held on the draft environmental impact statement or if no public hearing is held on the draft environmental impact statement, within 45 days following the close of the public hearing on the preliminary plat.

85 Town Law §276(5)(e)(iii) (2); Village Law §7-728(5)(e)(iii)(2); Gen. City Law §32(5)(e)(iii)(2) .

86 *See* Town Law §282; Matter of Long Is. Pine Barrens Socy. v. Planning Bd. of Town of Brookhaven, 78 N.Y.2d 608, 613-614 (1991).

87 Town Law §276 (5)(d)(iii) and (e)(iii); Village Law §7-728(5)(d)(iii) and (e)(iii), Gen. City Law §32(5)(d)(iii) and (e)(iii).

88 Application of Gruner, 12 A.D.2d 838 (3rd Dept. 1961)

89 Friends of Pine Bush v. Planning Bd. of City of Albany, 105 Misc. 2d 168 (Sup. Ct. Albany Co. 1980), rev'd on other grounds, 86 A.D.2d 246 (3rd Dept. 1982), aff'd, 59 N.Y.2d 849 (1983).

Voting on the Preliminary Plat

Under the State Subdivision Enabling Statutes, the planning board may approve, approve with modification, or disapprove the preliminary plat. An affirmative vote of a majority of all members of the planning board, regardless of vacancies and absences, is necessary in order to take action on the preliminary subdivision plat.[90] Where an action is the subject of a referral to the county or regional planning agency, the voting provisions of sections 239-n of the General Municipal Law shall apply. It is therefore critical that the leadership of the board strive to achieve an effective majority within the required time period for decision, to avoid the possibility of a default approval.

Findings

Before making a decision on the preliminary plat, the planning board must make sure it has complied with SEQRA. Where an FEIS is prepared, SEQRA findings must be made at the time of or prior to the decision on the preliminary plat. (See Part III of this publication)

If the planning board approves the preliminary plat as submitted, there are no explicit statutory requirements for written findings. The clerk of the planning board simply certifies that the preliminary plat has been approved by the planning board and mails the planning board's decision to the subdivision applicant. [91] A copy of the planning board's decision must also be filed with the municipal clerk within five business days of the decision.[92]

If the planning board approves the plat but requires that modification be made before the final plat is submitted, the planning board "shall state in writing any modifications it deems necessary for submission of the plat in final form"[93] and state the grounds for a modification "upon the records of the planning board."[94] The clerk of the planning board must also file and mail the decision as above noted.

If the preliminary plat is not approved, the planning board must state on the record its grounds for disapproval. The grounds for disapproval of the subdivision plat must also be stated upon the records of the planning board. This ensures that the record contains substantial evidence to support the board's decision.[95]

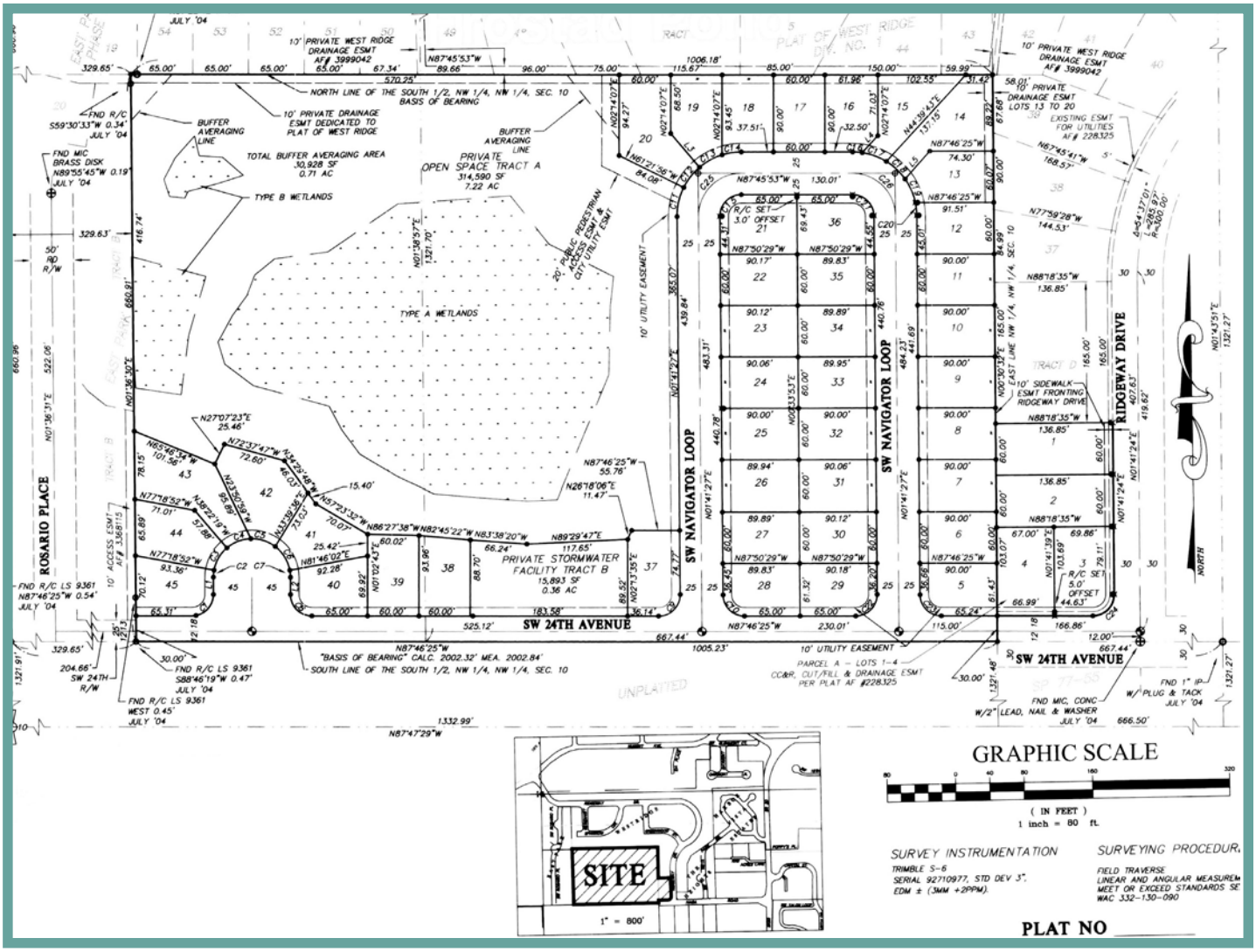
Final Plat Step

By the time the preliminary plat has been approved, the subdivision process is almost completed. The information that is typically added between the preliminary and final plat step includes a detailed survey of the site and the engineering detail for the design of the roads and other required infrastructure.

The applicant must submit the final plat to the planning board for review within six months of the approval of the preliminary plat.[96] If the developer doesn't submit a final plat to the planning board in this time period, the approval of the preliminary plat may be revoked by the planning board.[97]

The final plat should incorporate any modifications required by the planning board at the preliminary plat step. This is reflected in the statutory definition of "final plat" which is defined as:

90 Town Law §271(16); Gen. Constr. Law §41.
91 Town Law §276(5)(f); Village Law §7-728(5)(f); Gen. City Law §32(5)(f).
92 Town Law §276(5)(g); Village Law §7-728(5)(g); Gen. City Law §32(5)(g).
93 Town Law §276(5)(d)(iv); Village Law §7-728(5)(d)(iv), Gen. City Law §32(5))(d)(iv).
94 Town Law §276(5)(d); Village Law §7-728(5)(d); Gen. City Law §32(5)(d).
95 Diamond v. Specter, 39 A.D.2d 942 (2nd Dept., 1972), aff'd 32 N.Y.2d 811 (1973).
96 Town Law §276(5)(h); Village Law §7-728(5)(h); Gen. City Law §32(5)(h).
97 Id.



Source: Ethan Spoo

Figure 2: FINAL PLAT

The Final Plat is a map, drawn to scale, on the division of a specific property. It includes boundary lines, streets, lots, public facilities, and open space as well as a locator map, showing the subdivision in relation to the larger area. The Final Plat sometimes shows building placement. Please note the additional engineering design details compared to the sample preliminary plat.

> *"a drawing prepared in a manner prescribed by local regulation that shows a proposed subdivision, containing in such additional detail as shall be provided by local regulation all information required to be shown on a preliminary plat and the modifications, if any, required by the planning board at the time of the approval of the preliminary plat is such preliminary plat has been so approved."*[98]

The time periods for reviewing a final plat begin to run when the board has received a complete final plat from the clerk of the planning board. If the municipality is situated in a county that conducts county or regional review of subdivision plats pursuant to General Municipal Law 239-n (see section on County Referral), the final plat will not be considered complete and the time period for subdivision review does not begin to run until the planning board receives the County Board's recommendation or until 30 days had expired with no response.[99]

98 Town Law §276(4)(d); Village Law §7-728(4)(d); Gen. City Law §32(4)(d).

99 King v. Chmielewski, 76 N.Y.2d 182 (1990).

Decision on the Final Plat

With a two step review process, the decision on the final plat will focus on the consistency between the approved preliminary plat and the submitted final plat. If the planning board determines that the final plat is in "substantial agreement" with the approved preliminary plat, the board must make its decision, by resolution, on the final plat application within 62 days of its receipt by the clerk of the planning board.[100] Importantly, as one court noted, "a planning board may not modify a preliminary plat and then disapprove of the layout of a final plat that conforms to the modifications prescribed by the board."[101]

However, when significant changes have been made between the preliminary and final plats and the final plat is not in substantial agreement with the approved preliminary plat, a new public hearing must be conducted and a new determination of significance under SEQRA must be made by the planning board.[102] Similarly, if the final plat is significantly different from the preliminary plat that was initially referred to the county or regional planning agency, the final plat may need to be referred to the agency.[103]

Under the State Subdivision Enabling Statutes, the planning board may:

1.) Approve the final plat approval
2.) Conditionally approve the final plat (with or without modification) or
3.) Disapprove the final plat.[104]

A planning board typically grants "final approval" of the subdivision without conditions for small subdivisions with little need for on-site infrastructure. When approved, the duly authorized officer of the planning board must sign the final plat without delay. Within five business days from the date of the adoption of the resolution stating the board has approved the final plat, the chairman or other duly authorized member of the planning board must cause a copy of the resolution of final plat approval to be filed in the office of the municipal clerk.[105]

"Conditional approval of a final plat" means the planning board, upon approving a final plat, has imposed one or more conditions that must be satisfied to obtain final plat approval.[106] Planning boards have broad authority to "impose reasonable conditions in the course of approving a subdivision."[107] These conditions may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property.[108]

The various conditions that can be imposed by the planning board on the subdivision as a condition of approval are discussed at length in Part VI of this publication. Planning boards may also impose conditions under SEQRA regulations that are practicable and reasonably related to the impacts identified in a conditioned negative declaration or an FEIS.

The planning board's conditional approval does not immediately qualify a final plat for recording in the county clerk's office nor authorize issuance of any building permits, prior to the signing of the

100 Town Law §276(6)(b); Village Law §7-728(6)(b); Gen. City Law §32(6)(b).
101 Sun Beach Real Estate Development Corp. v. Anderson, 98 A.D.2d 367, 373 (2nd Dept., 1983), aff'd, 62 N.Y.2d 965 (1984). *See* also, Walton v. Town of Brookhaven, 41 Misc.2d 798 (Sup. Ct. Suffolk Co. 1964): "A plan reading of [Town Law] section 276 must lead to the conclusion that where a [preliminary] plat is modified it must then be approved (assuming compliance with modifications or revisions). Apparently disapproval is required at first, and not after an applicant has incurred expense and expended effort to meet recommendations made upon primary submission of a plan. Moreover, referring to the town's regulations in this case, the final plat and its approval follow almost as a formality."
102 Town Law §276(6)(d); Village Law §7-728(6)(d); Gen. City Law §32(6)(d).
103 Ferrari v. Town of Penfield Planning Bd., 181 A.D.2d 149 (4th Dept., 1992).
104 Town Law §276(6)(d); Village Law §7-728(6)(d); Gen. City Law §32(6)(d).
105 Town Law §276(9); Village Law §7-728(9); Gen. City Law §32(9).
106 Town Law §276(4)(e) and (f), Village Law §7-728(4)(e) and (f); Gen. City Law §32(4)(e). and (f).
107 O'Mara v. Town of Wappinger, 9 N.Y.3d 303, 310-311 (2007).
108 McKennett v. Hines, 289 A.D.2d 246, 247 (2d Dept. 2001).

plat by a duly authorized officer of the planning board.[109] An approval with conditions authorizes the officer to sign the plat only after the subdivider fulfills the stated conditions. Conditional approval can only last for 180 days, although the planning board may extend this time frame by two additional periods of up to 90 days each. If the stated conditions have not been satisfied within the allowed period, the conditional approval expires. If the subdivider wishes to obtain subdivision approval, a new application for preliminary subdivision plat review must be submitted.[110]

Conditional final plat approval may require submission of the plat in sections, phases of development or after installment of infrastructure. Prior to granting final approval of a plat, the planning board may permit the plat to be subdivided into two or more sections and may impose such conditions upon the filing of each section as it may deem necessary to assure the orderly development of the subdivision, before the sections may be signed by the duly authorized officer of the planning board. Conditional or final approval of the sections of a final plat may be granted concurrently with conditional or final approval of the entire plat, subject to any requirements imposed by the planning board. Also, when a subdivision is constructed in phases, final plat approval may be required after the public improvements have been completed for each phase. After the subdivider has satisfied all conditions required in the planning board's resolution granting conditional final plat approval, the plat can receive final approval and be signed by the duly authorized officer of the planning board. A copy of the signed final plat must be filed in the office of the clerk of the planning board or filed with the municipal clerk as determined by the local legislative body.[111]

Voting on the Final Plat

An affirmative vote of a majority of all members of the planning board, regardless of vacancies and absences, is necessary in order to take action to approve or disapprove the subdivision plat.[112] Where an action is the subject of a referral to the county or regional planning agency, the voting provisions of sections 239-n of the General Municipal Law applies. (See Part II for a discussion of County Referral).

Findings of the Planning Board

In rendering its decision, the planning board must make written findings and often, SEQRA findings. While the State Subdivision Enabling Statutes do not expressly provide for written findings when a final plat is *approved without conditions*, the courts have held that all planning board decisions on subdivision plats must be supported by written findings on the record. One court observed:

> *A court will not set aside a planning board's determination to approve or disapprove a subdivision if it is rational and supported by substantial evidence….The absence of such [written] findings and the inadequacy of the evidence in the record to support [the planning board's] determination requires vacatur of that determination and remittal of the matter to [the planning board] for a hearing, proper findings and a new determination*[113]

Conditional approval can be granted to the final plat as submitted by the applicant and without further modification by the planning board. However, the board can also request modifications which are different from the original final plat submitted by the applicant. The grounds for a modification must be stated "upon the records of the planning board," and "the planning board shall state in writing any modifications it deems necessary for submission of the plat in final form."[114] The modifications must be based upon either a requirement in applicable state or local law or be

109 Town Law §276(4)(e); Village Law §7-728(4)(e); Gen. City Law §32(4)(e).
110 Town Law §276(7); Village Law §7-728(7); Gen. City Law §32(7).
111 Id.
112 Town Law §271(16); Gen. Constr. Law §41.
113 Graham v. Town of Tully Planning Board, 237 A.D.2d 923, 924 (4th Dept. 1997).
114 Town Law §276(5)(d)(iv); Village Law §7-728(5)(d)(iv), Gen. City Law §32(5)(d)(iv).

necessary to minimize or avoid an environmental impact disclosed during the SEQRA process. (See SEQRA finding requirements below).

The grounds for disapproval of the subdivision plat must also be stated upon the records of the planning board. This ensures that the record contains substantial evidence to support the board's decision.[115] General complaints of neighbors and an unsupported finding that a subdivision "would not be in harmony with the surrounding area" are insufficient to deny plat approval.[116] Once a planning board disapproves the final plat application, it rescinds the prior preliminary plat approval by operation of law.

SEQRA Findings

In all cases where a Final Environmental Impact Statement (FEIS) has been filed, whether or not the planning board is the lead agency, it must make written SEQRA findings at the time of or prior to its decision on the plat.[117] SEQRA findings must be made whether the planning board's action is to approve, modify or disapprove and must:

- Consider the relevant environmental impacts, facts and conclusions disclosed in the FEIS
- Weigh and balance relevant environmetal impacts with social, economic and other considerations
- Provide a rationale for the planning board's decision, such as the imposition of conditions on preliminary plat approval necessary to minimize an environmental impact; or a description of the environmental factors resulting in a plat's disaproval
- Certify that the requirements of SEQRA regulations have been met
- Certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision a series of mitigating measures[118]

SEQRA provides authorization to local planning boards to impose substantive conditions upon an action to ensure environmental impacts have been mitigated.[119]

Certification and Filing of the Final Plat

The planning board must designate a duly authorized officer to sign the plat following completion of the conditions stated in the resolution of conditional approval. The duly authorized officer cannot certify that the conditions have been satisfied and sign the plat until the conditions have been completed.[120] Final plat approval qualifies the plat for recording in the office of the county clerk or register in the county in which such plat is located.

The State Subdivision Enabling Statutes specify the procedures to be used after the subdivision plat has been approved. Within five business days of the adoption of the resolution granting conditional or final approval of the final plat, the plat (1) must be certified by the clerk of the planning board[121] as having been granted conditional or final approval and a copy of the resolution and plat shall be filed in such clerk's office, and (2) the chairman or other duly authorized member of the planning board shall cause a copy of the resolution to be filed in the office of the municipal

115 Diamond v. Specter, 39 A.D.2d 942 (2nd Dept., 1972), aff'd 32 N.Y.2d 811 (1973).
116 Reed v. Planning Bd. of the Town of Chester, 120 A.D.2d 510 (2nd Dept., 1986).
117 *See* 6 NYCRR Part 617.11.
118 *See* 6 NYCRR Part 617.11(d).
119 *See* 6 NYCRR Part 617. 3(b).
120 Town Law §276(4)(f), Village Law §7-728(4)(f); Gen. City Law §32(4)(f).
121 Town Law §276(7); Village Law §7-728(7); Gen. City Law §32(7).

clerk.[122] The municipal clerk must then certify the date of the submission of the final plat or the failure of the planning board to take action within the required time periods resulting in a default approval.

Counties act as filing agencies for all subdivision plats under the law. Once the plat is signed (or a default approval certificate is issued), the subdivider has 62 days to file the approved final plat or the certificate in the office of the county clerk or register. If the subdivider fails to do so, the approval automatically expires.[123]

The subdivision statutes provide that no plats shall be filed with the county clerk unless they have been approved by a planning board that has been empowered to approve plats.[124] The statutes further provide that the approval must: be endorsed in writing on the plat in the manner specified by the planning board (such as by signature of the chair and the clerk of the board); stipulate that the plat does not conflict with the county official map; and have received county approval for road access pursuant to General Municipal Law §239-f where the property has access to roads or drainage systems shown on the county official map. Counties are required under Real Property Tax Law[125] to report monthly on real property transfers based on Real Property Transfer Report Form 5217. The report includes information about any new parcels being filed, allowing cities, towns and villages to watch for the creation of illegal subdivisions.

Real Property Law §333-a, provides that the county clerk may not accept for filing any deed that refers to a map, unless that map has also been filed with the county clerk. Real Property Law §334 requires any person or corporation who subdivides property into lots, plots, blocks or sites for sale to the public, to file a subdivision map prepared and certified by a licensed land surveyor. As a condition of recording a deed, Real Property Law §333 requires the transferor and transferee of real property fill out a form certifying that the property conveyed is the entire parcel owned by the transferor, or if the property is only a portion of the transferor's property, that the parcel either does not need, or has received, approval from the local planning board.

If only a section of the approved plat is filed, the entire approved plat must be filed with the municipal clerk within 30 days of the filing of the section with the county clerk. The statutes further require that a filed section must contain at least 10% of the total number of lots of the entire subdivision. The remaining unfiled sections expire unless filed before the exemption period to which they are entitled under Town Law §265-a, Village Law §7-709, and General City Law §83-a ends.

Fees

Project Review Fees - Many municipalities have enacted local legislation passing to the subdivider the municipality's cost of hiring outside experts to assist the planning board with its subdivision review. State statutes do not include any provisions with respect to the fees that may be charged for subdivision review. However, state courts have held that local governments have implied authority to adopt local laws or ordinances which pass on to applicants the reasonable and necessary costs of project reviews, as in the case *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*.[126]

The N.Y. Attorney General's and Comptroller's offices have both issued opinions advising that by enacting local legislation, municipalities can require developers to pay the costs of outside review by engineers, attorneys and land surveyors engaged by planning boards in connection with development review. The fees established must be reasonable, based on reliable factual studies and bear a relation to average costs incurred by the local government. Reasonable classifications of applicants may be established and different fees fixed for each such class, if the local government has a rational basis for such distinctions.[127] Fees charged to developers cannot be open-ended or subject to the untrammeled discretion of local officials.[128] Moreover, the fees may not be charged to offset the cost of general governmental functions.[129]

122 Town Law §276(9); Village Law §7-728(9); Gen. City Law §32(9).
123 Town Law §276(11); Village Law §7-728(11); Gen. City Law §32(11).
124 Town Law §279; Village Law §7-732; Gen. City Law §34.
125 Real Prop. Tax Law §574.
126 Jewish Reconstructionist Synagogue of North Shore v. Village of Roslyn Harbor, 40 N.Y.2d 158 (1976).
127 *See*, e.g., Jewish Reconstructionist, supra; 1983 Op. State Compt. 83-70, p 81.
128 Atty. Gen. Op. 89-69; Op. State Compt. 90-14; Cimato Bros., Inc. v. Town of Pendleton, 270 A.D.2d 879 (4th Dept., 2000).
129 *See* Torsoe Bros. Const. Corp. v Board of Trustees of Inc. Village of Monroe, 49 A.D.2d 461 (2nd Dept., 1975).

SEQRA Fees and Costs - A planning board acting as lead agency can charge to a project applicant under SEQR, the reasonable costs of preparing the EIS or of having an outside expert to independently review an EIS. The applicant cannot be made to pay for both the cost of preparation and review of the EIS. No fee may be charged for preparation of an EAF or determination of significance.

In the event that a generic EIS (GEIS) has been prepared for the geographic area where the applicant's project is located, the fee charged to applicants can include a chargeback to recover a portion of the planning board's costs for the preparation of the GEIS. The chargeback may be based on the percentage of the remaining developable land or the percentage of road frontage to be created in the project, or other reasonable methods. The DEC has detailed regulations to be used as a guide for how large a fee can be charged to applicants for the cost of preparing or reviewing an EIS.[130]

130 6 NYCRR §617.13.



Part IV: The Three Cs of Subdivision: Conventional, Cluster and Conservation Plats

Planning boards and local officials now realize that there is a wide range of available options for achieving attractive subdivisions. The State Enabling Acts encourage creative approaches to subdivision design, subject only to the need to preserve the integrity of the community's comprehensive plan. The most familiar types of subdivisions are conventional subdivisions, cluster subdivisions and conservation subdivisions. Recently, the mixing of small scale commercial uses into residential subdivisions has become popular. These mixed use subdivisions can be used with conventional, cluster or conservation subdivisions to create residential neighborhoods with appropriate retails uses to serve the residents.

Each type of subdivision discussed here must comply with the basic requirements of the applicable zoning regulations as well as the State Subdivision Enabling Statutes for giving public notice, holding public hearings, adhering to submission requirements, making county and inter-municipal referrals and adopting written decisions supported by written findings. The planning board's action of modifying the zoning requirements to permit cluster subdivision takes place simultaneously with the action of approving the subdivision plat.

Conventional Subdivisions

A conventional subdivision plat shows the division of land into residential lots and streets laid out in strict accordance with the minimum zoning and subdivision regulations and other applicable regulations. The plat usually indicates the approximate dimensions, key plan, topography and drainage of the tract, including all proposed facilities at suitable scale and in such detail as local regulations may require. Conventional subdivisions are often placed on undeveloped land and converted agricultural or forested lands, or other open space.

After World War II, the conventional subdivision style formed the foundation of the developed suburban landscape. Courts found a legitimate purpose in land use regulations aimed at achieving a homogeneous, traditional single-family neighborhood. "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs," according to the U.S. Supreme Court in *Village of Belle Terre v. Boraas*.[131] The "American Dream" of owning a home in the suburbs is exemplified by the conventional subdivision.

Recent planning history shows that many conventional subdivisions were created using the basic application of the subdivision statutes and zoning regulations. They commonly exhibit lot patterns of nearly equal area with uniform road frontage and setbacks from roads or neighboring property owners. The conventional subdivision pattern is the result of local zoning codes that require low to moderate densities and separation of uses. Streets consume a large fraction of the land. These subdivisions are often criticized for producing monotonous, uninteresting developments that lacked trees, sidewalks or play areas for children. Residents without these community amenities often turned to their local governments to provide safe walkways and play areas.

In recent years, conventional subdivisions have been criticized as creating homogenous residential land uses which utilize all available land, emphasize the use of the automobile, lower residential densities and lack physical connections to nearby developments and the greater community. In short, they have been cited as the cause of "suburban sprawl."

Cluster Subdivisions

"Cluster subdivision" is a technique authorized by State Statute whereby the local legislative body empowers the planning board, when approving subdivision plats, to modify the dimensional requirements of the zoning law to group or "cluster" structures or lots at a higher density on the most

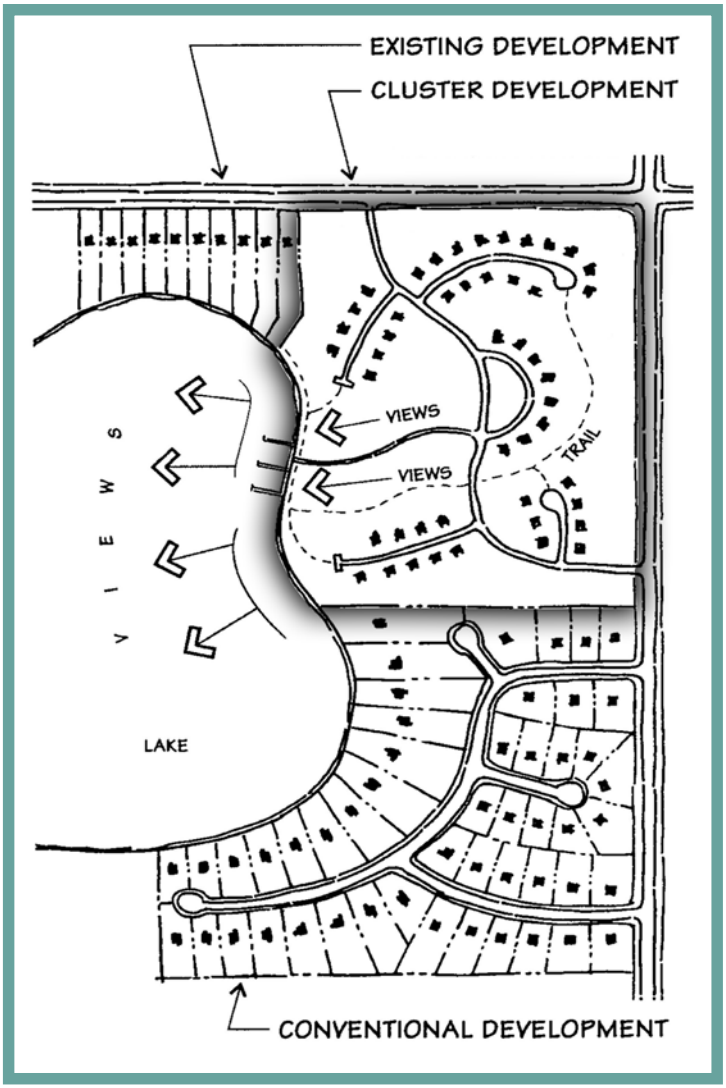
131 416 U.S. 1, 9 (1974).

suitable portion of the land, leaving other areas open "to preserve the natural and scenic qualities of open lands."[132] While adding greater flexibility in the overall subdivision design, the statutes provide that the number of lots or dwelling units in a cluster subdivision cannot exceed the number which would, in the planning board's judgment, be permitted on a conventional plat meeting the minimum lot size and density requirements of the zoning regulations.[133]

Cities, towns and villages have the authority to enact local laws or ordinances that provide for cluster subdivision.[134] In administering this technique, the planning board can approve a subdivision where the lots do not strictly comply with the area requirements of the applicable zoning regulations.

The technique allows the developer to distribute the units on the most buildable portion of the site and to economically reduce the construction and maintenance costs for roadways, sewer lines, and other infrastructure.[135] Attractive developments, some including retail stores, can be fashioned in ways not possible using conventional subdivision, thereby increasing the profitability of the units.

The benefits of open space on the residents of a clustered development cannot be evaluated merely in quantitative terms. Residents of the clustered subdivision can enjoy common access to expanses of open land such as hiking paths, ball fields, fishing ponds and wooded areas. In this way, open space is an asset that has been recognized as enhancing property values as well as the enjoyment of residents.



Source: Southeastern Wisconsin Regional Planning Commission

Figure 3: CLUSTER SUBDIVISION

Cluster subdivision, authorized by state statute, allows local governments to modify the dimensional requirements of the local zoning regulations, to group structures or lots at a higher density on the most suitable portion of land. This land use technique does not allow any additional units than are allowed in a conventional subdivision. It adds flexibility to existing zoning regulations and encourages innovative design to keep more open space and preserve the area's natural and scenic resources such as the view of the lake, in the sample cluster subdivision. In the illustration above, one hundred percent of the units in the cluster subdivision have views and access to the lake, whereas in the conventional development in the lower half of the illustration, only twenty six percent of the lots have views and access to the lake. This cluster subdivision also provides trails and more open space for residents as compared to conventional subdivisions.

132 Town Law §278(2)(b), Village Law §7-738(2)(b), General City Law §37(2)(b).
133 Town Law §278(3)(b), Village Law §7-738 (3)(b), General City Law §37(3)(b).
134 Town Law §278, Village Law §7-738, General City Law §37. A clustered development is defined as "a subdivision plat or plats, approved pursuant to this article, 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 in order to preserve the natural and scenic qualities of open lands." Id. at paragraph 1(a).
135 *See* Randall G. Arendt, Conservation Design for Subdivisions, pp. 6-7 (Island Press 1996).

By clustering a new subdivision, certain community planning objectives can be achieved. Municipalities wishing to preserve their natural and scenic resources also gain from the reservation of open lands in the cluster subdivision process, without added cost to the public. In contrast with conventional subdivisions, cluster subdivisions are recognized as combating sprawl.[136]

To use this technique, the local legislative body must first enact a local law or ordinance granting the planning board power to review a cluster subdivision. Once authorized, the planning board can, when approving a subdivision plat, modify the applicable zoning requirements (lot area, front and side yard depth, frontage, building height and coverage) to allow all of the development that could occur on the entire parcel of land to be developed on only a portion of the parcel. The cluster subdivision technique can also be used to alter the height of buildings, even when the height significantly exceeds the applicable zoning restrictions.[137] However, the planning board may not modify the use restrictions of the zoning regulations and may not, consistent with State law, permit a total overall density greater than that allowable under the zoning regulations applicable to that district.

Cluster development can be authorized either at the developer's option (discretionary cluster) or at the municipality's option (mandatory cluster).[138] In order to require clustering, the planning board needs additional local legislative authorization. With both options, the procedures for submission, approval and filing of plats for cluster development are the same as those required for conventional subdivisions.

In *discretionary cluster*, the developer voluntarily chooses to use the cluster process. Some municipalities offer incentives - such as allowing higher densities - to encourage developers to submit clustered subdivision plats. To use discretionary cluster, a developer submits a written application to the planning board requesting use of the cluster subdivision procedure and submits both a conventional plat approvable by the planning board and a cluster subdivision plat. The conventional plat is used to calculate lot yield and becomes a tool for comparison. The planning board has discretion to determine if the cluster subdivision would benefit the municipality.[139] If not, the planning board is free to deny the applicant the use of cluster, and require submission of a conventional subdivision plat.

In *mandatory cluster*, the subdivider is required to submit a clustered subdivision application to the planning board "subject to criteria contained in the local law or ordinance authorizing cluster development."[140] At a minimum, the mandatory cluster criteria should designate the zoning districts subject to mandatory review, the open space requirements, and the permitted uses of the open space. Other considerations might be the size of the entire undivided tract to which lot count will apply. Usually, mandatory cluster is often required for larger subdivisions. For example, cluster could be mandated for parcels exceeding 15 acres in size or where more than 15 residential lots are proposed.

Whether cluster subdivision is discretionary or mandatory, several important issues should be considered, including:

- Designating or mapping the areas subject to cluster subdivision
- Computing lot count
- Establishing the minimum amount of open space
- Ensuring adequate infrastructure to serve the cluster subdivision
- Establishing the amount by which minimum lot sizes may be reduced
- Providing for mixed uses and different housing types
- Establishing permitted open space uses

136 William H. Whyte, Cluster Development (American Conservation Association 1964).
137 Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board, 253 A.D.2d 342 (4th Dept. 1999).
138 Town Law §278(3)(a), Village Law §7-738(3)(a), General City Law §37(3)(a).
139 Id.
140 Id.

These issues will be discussed in greater detail, below.

Designating or Mapping the Areas Subject to Cluster Subdivision

Many municipalities, when authorizing cluster subdivision, have included specific minimum gross acreage for the entire project or select zoning districts. In the Town of Newstead, the cluster technique is "restricted to tracts of no less than 10 acres."[141] The local cluster enactment may also specify which zoning districts or areas of the community qualify for the cluster procedure. For example, the Town of Cortlandt, in authorizing cluster subdivision, allows its application in "any R (Residential) Zoning District or any CC (Community Commercial) Zoning Districts."[142]

Computing Lot Count

An important issue for the developer and the community deals with the number of lots or units - variously termed lot count or lot yield - which the developer will be able to build on the clustered plat. Clustering is intended to be density neutral. The overall number of lots in a cluster subdivision should be the same as for conventional subdivisions in the applicable zoning district. The State cluster statutes limit the lot yield to a:

> *"number of building lots or dwelling units which shall in no case exceed the number which could be permitted, in the planning board's judgment, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning ordinance or local law applicable to the district or districts in which such land is situated and conforming to all other applicable requirements."*[143]

The starting point for computing the lot count in a cluster subdivision begins with a conventional subdivision plat. An applicant for cluster subdivision must first provide the municipality with a conventional subdivision arrangement showing maximum usage of the property in accordance with applicable zoning and other lawful restrictions. As one land use expert succinctly stated:

> *A conventional subdivision layout...must be approved in order to establish the appropriate density for a cluster development. "The [[conventional] plat must result in a standard layout that, consistent with applicable zoning regulations and practical considerations, could be approved by a planning board." It must depict lots which comply with all requirements of the zoning law and must consider environmental constraints on development as well as roads, parks and other attributes which would reduce the development yield of the property.*[144]

After submitting a conventional plat showing, where appropriate, roads, parklands, lots meeting the minimum lot size and setback requirements, and lots laid out to ensure safe, buildable sites, the resulting number of dwelling units on the conventional plat would be the lot yield or lot count that may be clustered.[145] *Penfield Panorama Area Community, Inc. v. Town of Penfield Planning Board*[146] is an illustrative case. There, the Appellate Division invalidated a cluster subdivision approval because the Planning Board did not subtract from the lot density calculation all land identified on the conventional plat for roads and streets nor subtract other land found unsuitable for development.

141 Newstead Town Code §450-54 (B) (2010 edition).
142 Cortlandt Town Code §307-19 (2010 edition).
143 Town Law §278(3)(b), Village Law §7-738(3)(b), General City Law §37(3)(b).
144 Terry Rice, 1998-1999 Survey of New York Law: Zoning and Land Use, 50 Syracuse Law Review 917, 944-945 (2000).
145 Density is usually determined by preparation of a conventional plat. *See* New Scotland Ave. Neighborhood Ass'n v. Planning Bd. of City of Albany 142 A.D.2d 257, 535 N.Y.S.2d 645 (3rd Dept. 1988).
146 253 A.D.2d 342 (4th Dept. 1999)

Under the statutory provision, regardless of the form a cluster development may take -- multifamily, town house, single family homes on smaller lots, or other non-residential building clusters -- the maximum number of units allowed on the parcel may be no greater than that which would be allowed under a conventional subdivision layout. The Appellate Division has held that the determination of lot count for a conventional subdivision is merely a preliminary step in the approval process for a cluster development and is not a final determination subject to judicial review and SEQRA is not required to be undertaken prior to ascertaining the lot yield from a conventional plat.[147]

Some communities seek to attract developers of cluster developments by offering them density bonuses to increase the number of lots or units in the development over the lot yield allowed in a conventional subdivision. Density bonuses are often keyed to the creation of affordable housing units, retention of active farms or addition of more open space. The local legislative body may wish to provide for density bonuses through a special permit application process.

The Town, Village and General City Law statutes clarify how a municipality may tally lot yield when a proposed cluster subdivision straddles two or more zoning districts. In those instances, the lot yields may be added together. The statutes state:

> *"[W]here the plat falls within two or more contiguous districts, the planning board may approve a cluster development representing the cumulative density as derived from the summing of all units allowed in all such districts, and may authorize actual construction to take place in all or any portion of one or more of such districts."*[148]

The planning board can therefore permit the cluster development to occur anywhere on the plat, without regard to the density limitations of the zoning district in which it is situated.

Establishing the Minimum Required Amount of Open Space

The percentage of the cluster subdivision that will be devoted to open space should ideally be specified by the local legislative body in the cluster regulations to guide both the applicant and the planning board. Absent such a provision, the planning board must determine an appropriate amount of open space based on the characteristics of the site and particularly when environmentally sensitive areas, such as wetlands, ponds or steep slopes are on the site. The overall size of the open space should be significant because below a certain size, the benefits to be gained by the community in open space may not equal the financial burdens that may be imposed in terms of maintenance costs and supervision. In the Town of Rhinebeck, the cluster provisions provide a range of minimum required open space set asides, from 80% open space on a tract in a RA10 (Rural Agricultural) district to 20% open space on a tract in non-residential districts.[149]

Ensuring Adequate Infrastructure to Serve the Cluster Subdivision

Developers often find the clustering technique financially advantageous because infrastructure costs associated with road construction, utility installation and drainage systems can be greatly reduced and yet the same number of units can be built and sold. Clustered subdivision may also result in fewer impervious surfaces and more natural drainage which in turn will reduce storm water run-off, flooding and soil erosion. Cluster subdivisions have many of the same requirements for providing water and sanitary waste treatment services as other subdivisions (discussed in Part V), however the installation and maintenance costs may be less due to the compact nature of the cluster development.

147 Maor v. Town of Ramapo Planning Board, 44 A.D.3d 665, 843 N.Y.S.2d 163 (2nd Dept. 2007).
148 Id.
149 Rhinebeck Town Code §125-43 (H) (2010 edition).

Establishing the Amount by Which Minimum Lot Sizes May Be Reduced

There is no rule of thumb that can be applied to the question of lot size reduction. The statutes recognize that units of detached or attached housing in a cluster development may be situated on smaller lots than the underlying zoning authorizes. Thus, the amount of reduction in lot size that may be permitted will vary widely from one community to another. For example, Town Code of the Town of Newstead §450-54 (C) provides "Reduction of lot area shall not exceed 50% in cluster subdivisions. Reductions in lot width and other bulk dimensions shall not exceed 33%." Land costs, the type, intensity and quality of existing development and the availability of various public and private facilities are all factors that will influence the reduced lot size. The nature of the soil, the topography, and the quality and quantity of available water also enter into the picture. This is particularly crucial in areas without public water and sewers.

Providing for Mixed Uses and Different Housing Types

The State Subdivision Enabling Statutes apply to all kinds of subdivisions including residential, commercial and mixed use subdivisions. Where the zoning district permits both residential use and retail uses to serve them, a mixed use subdivision is possible.

Mixed use subdivisions can create traditional neighborhoods of attached or detached residences with well integrated retail establishments centered around a common area like a park. Such development can provide the inclusiveness, safety and attractiveness that future residents desire. Communities that incorporate residences and shops can also address many of the needs of the aged and disabled populations by decreasing the need for driving and making vital services more accessible. Highly detailed subdivision regulations are essential to create a well-designed mixed use subdivision.

A developer of a mixed use subdivision that utilizes the cluster technique can realize an immediate benefit in reduced cost for the installation of infrastructure, such as roads and water and sewer lines, as a result of the concentration of development in a smaller area. Cluster development with streetscapes and pedestrian scale buildings can make a community more attractive and enhance property values.

To create a mixed use subdivision, the underlying zoning regulations must be configured to permit a combination of residential and appropriate retail uses. Amending the zoning requires legislative action by the local legislative body.

A cluster subdivision may contain a variety of housing types and living environments for people with a wide range of incomes. The planning board has discretion to permit many housing types other than single family detached houses. State law provides that, in the case of a residential plat or plats in a cluster subdivision, "the dwelling units permitted may be, at the discretion of the planning board, in detached, semi-detached, attached, or multi-story structures."[150] A planning board is therefore authorized to approve a clustered subdivision comprising multi-family residential uses, although the zoning district only permits single family houses; thus, the planning board has the limited ability to change the uses, and not merely the area standards, allowed by the zoning.

Permitted Open Space Uses

The cluster technique can assist a municipality to achieve planning goals that call for protection of open space and scenic quality. Indeed, protecting open space can achieve several community objectives concurrently. For example, the same green area may serve as a recreation field, a scenic foreground to another vista, a buffer to a stream, a connector in a system of walking and bike trails, and a venue for community events.

150 Town Law §278(3)(d), Village Law §7-738(3)(d), General City Law §37 (3)(d).

Clustering of homes can direct development away from environmentally and culturally sensitive areas. Imaginatively used, the cluster subdivision technique can serve many open space goals. As discussed in Part IV, the planning board may, as a condition of plat approval, impose binding controls and restrictions over the "ownership, use and maintenance" of the open areas to preserve them for their intended purposes.

In the residential community, open space is often used to fulfill the needs of residents for active or passive recreation. Activities such as tennis, baseball and hiking can rarely be carried out in private back yards.

A clustered development can avoid developing natural areas and environmentally sensitive areas on-site by incorporating them into its common open space. By clustering a subdivision, natural features of significance can be preserved, steep slope areas can be avoided, and large sections of undeveloped open space can be retained.

In those communities where agriculture is a significant resource, the goal of land preservation may be realized by permitting its continued use for farming. The Town of Southold provides that "[a]ctive agricultural land with farm/agricultural support buildings may be used to meet the minimum required open space land"[151] in a cluster subdivision.

Conservation Subdivisions

A conservation subdivision, a type of cluster subdivision, is designed to permanently protect a large portion of a site with important environmental areas or cultural features, while clustering compact building lots on the remainder of the land. Conservation subdivision generically refers to the practice of compacting subdivision residential subdivision development whereby half or more of a parcel is set aside for open space or parkland[152]. In New York State, conservation subdivisions are achieved through the cluster subdivision process; State statutes do not specifically mention conservation subdivisions.

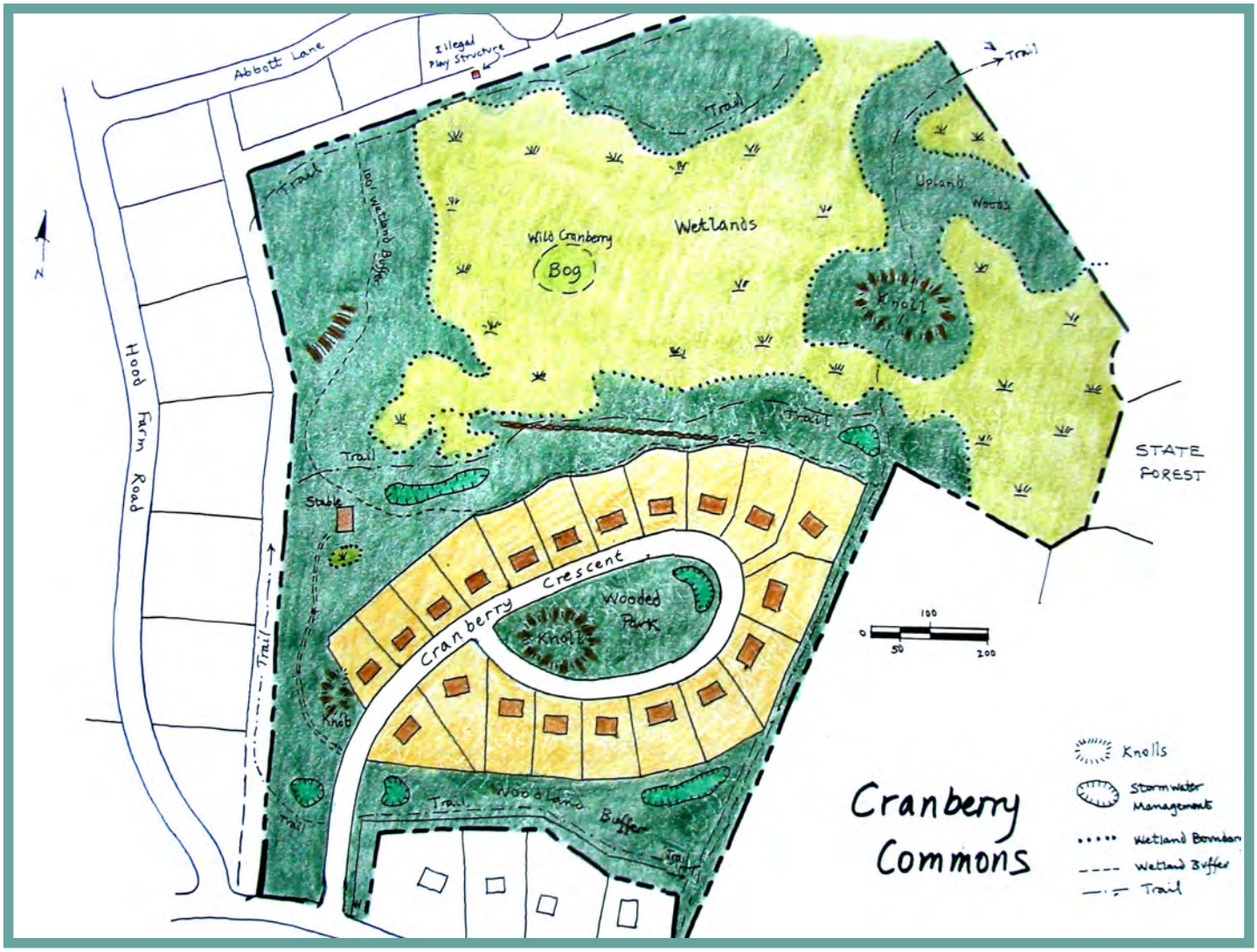
As with cluster subdivisions, conservation subdivisions typically result in more compact development and can reduce the cost to the developer of installing and maintaining roadways, sewer lines, and other infrastructure. The approach to creating a conservation subdivision is one of building within and around the natural landscape rather than building on top of it. The environmental benefits of a conservation subdivision - where, for example, stream corridors, woodlands, fields, wildlife habitat, steep slopes and/or wetlands, are protected and storm water is managed - can be significant.

Noted land use planner Randall Arendt, an authority on conservation subdivision, states that this type of subdivision focuses first on preserving the important resource value of the land to be subdivided.

> *Conservation subdivisions are specifically designed around each site's most significant natural and cultural resources, with their open space networks being the first element to be "green-lined" in the design process. This open space includes all of the "Primary Conservation Areas" (inherently unbuildable wetlands, floodplains, and steep slopes), plus 30-80% of the remaining unconstrained land, depending upon zoning densities and infrastructure availability.*
>
> * * *
>
> *A four-step process then ensues, Step One separating the site's resources into two categories. The first, Primary Conservation Areas (PCAs), are limited to inherently unbuildable wetlands, floodplains, and steep slopes (25%). Secondary Conservation Areas (SCA) are comprised of "the best of the rest." Because the PCAs would be off-limits to development in conventional developments in any event, they are not counted toward the minimum required open space percentages of conservation subdivisions. Therefore, 30-80% of the buildable land is usually designated as SCAs, depending on density (as noted above). Step Two consists of locating house sites in relation to the protected open space,*

151 Southold Town Code §240-43 (2010 edition).

152 *See* Randall G. Arendt, Conservation Design for Subdivisions, pp. 6-7 (Island Press 1996).



Source: Randall Arendt: now called Partridgeberry Place, Ipswich, MA.

Figure 4: CONSERVATION SUBDIVISION

This conservation subdivision protects an unbuildable wetland and bog as well as unconstrained open space such as grassland, woodland and trails for hiking and horseback riding. Other features that can be protected through conservation subdivision include stream corridors, fields, wildlife habitat, steep slopes, scenic vistas, and farmland. Conservation subdivision is a type of cluster subdivision that commonly sets aside 50 percent or more of the land to remain in harmony with nature and undeveloped in perpetuity. The number of residential units are compacted on a portion of the property, but cannot exceed the number allowed if the property were developed as a conventional subdivision.

> *to add livability, marketability, and value to the homes. Step Three is to "connect the dots" with streets and trails. Step Four consists simply of drawing in the lot lines. This process works best when guided by a landscape architect or physical planner, collaborating with a civil engineer. The creative skills of a landscape architect or physical planner are essential, balancing the technical training of engineers whose expertise lies principally in streets and drains.*[153]

A sound open space planning process can lay the foundation for a community's application of conservation subdivision regulations. Foundations of the plan include:

153 Randall G. Arendt, Conservation Subdivision Design: A Brief Overview, http://www.landchoices.org/conservationsubs/consubs_pdfs/csd_overviewweb.pdf

Inventory of natural and scenic resources for preservation - This may include identification of resources by the community through meetings, surveys or planning charettes; the inventory of environmental resources (such as significant wetlands and stream corridors); and integration of resource information identified by state or regional agencies into the local system (such as flood plains and productive agricultural lands).

Open space plan or component of comprehensive plan - This includes the development of an open space plan and its components, which may include a community vision plan, recreation plan, bikeway plan, and farmland preservation plan.

Recreation and trail planning - This includes the development of a recreational lands master plan, a recreational access plan for the disabled, a recreational facilities plan for a neighborhood, or a system of trails (both intra- and inter-community). It may also include the assessment of the impact of new development on such resources, the development of strategies for obtaining land or easements on land for recreation and trail purposes.

For further information about such planning, the publication Local Open Space Planning Guide may be downloaded at the Department of State website:
https://dos.ny.gov/local-open-space-planning-guide



Part V: Subdivision Application Review

Once the local legislative body adopts a resolution authorizing the planning board to approve subdivision plats, the State Subdivision Enabling Statutes give the planning board full authority to review all aspects of a plat. The layout of infrastructure facilities and services - such as streets, water supply and sewage disposal systems, street lights, electric lines, and telecommunication cables - can influence the location or placement of residences and other uses and structures in the subdivision and may affect its character.

Town Law §277, Village Law 7-730 and General City Law §33 contain complete, detailed procedures for planning boards to review subdivision plats and to review proposals for the installation of improvements within the subdivision. The improvements that serve the future subdivision residents are usually installed at the expense of the developer.[154] Other provisions authorize the planning board to require the reservation of parkland within the plat when appropriate.

Strictly speaking, a municipality may rely solely on the statutory list and procedure, without adopting local subdivision regulations. The planning board would base its decision on the general criteria for approving plats set forth in the State Subdivision Enabling Statutes. However, subdivision regulations clarify what the community wishes to see built and requires the developer to meet certain conditions in order to obtain plat approval. (*Adopting Subdivision Regulations* is discussed in detail in Part VIII.)

Applying both the State and local subdivision standards gives municipalities an important opportunity to influence the quality of community development. This is the method by which subdivision review is handled in most municipalities in New York State.

The State standards for review of preliminary or final subdivision plats - set forth in Town Law §277, Village Law 7-730 and General City Law §33 - address the two main areas of subdivision control – lot layout and improvements. The State Subdivision Enabling Statutes direct the planning board to require:

1.) The land shown on the plat be of such character that it can be used safely for building purposes without danger to health or peril from fire, flood, drainage or other menace to neighboring properties or the public health, safety and welfare.

2.) The streets and highways be of sufficient width and suitable grade and shall be suitably located to accommodate the prospective traffic, to afford adequate light and air, to facilitate fire protection, and to provide access of firefighting equipment to buildings.

3.) The streets and highways be coordinated to the official map or master plan, if there is any, to compose a convenient system of streets.

4.) Where a zoning ordinance or local law has been adopted, that the plots shown on the plat shall at least comply with the requirements thereof in respect to minimum area, frontage on the proposed streets and roads, and width.

5.) Block corners and other necessary points be marked with stone monuments to facilitate proper surveying and legal description.

154 Occasionally, a municipality may attempt to induce developers to install improvements (such as sewer or water trunk mains) that exceed the projected needs of subdivision residents to allow service or inter-connections with other areas of the community located outside the subdivision. Contributions would be made to the developer to ameliorate the cost of constructing the excess capacity.

6.) The plat show, if so required by the planning board, a park or parks suitably located for playground and other recreational purposes, such parks to be of reasonable size for neighborhood playgrounds or other recreational purpose.

7.) All streets or other public places shown on the plat be suitably graded and paved.

8.) Street signs, sidewalks, street lighting standards, curbs, gutters, street trees, water mains, sanitary sewers and storm drains, and fire alarm signal systems be installed in accordance with the procedures, specifications, and standards acceptable to appropriate departments.

Planning boards can ensure that new subdivisions result in safer, healthier, and more attractive neighborhoods that in turn enhance the surrounding community. When reviewing subdivision plats, planning boards should recognize that subdivisions often affect more than the single residential development under review but how the community will grow and develop over time. The quality and design of each new subdivision permanently affects its future occupants and may impact those in the surrounding area. The subdivision review process may well afford a community its only opportunity to ensure that a newly developed subdivision is properly designed, constructed, and integrated into the surrounding area.

Subdivision Standards

Properly conducting subdivision review is critical to any community interested in planning for its future. The planning board role is important in applying the criteria in the State subdivision standards, as well as any locally adopted subdivision regulations, in a manner that carries out the local comprehensive plan. The planning board's role is to consider the following features when reviewing applications for subdivision plat approval:

- Lot layout
- Physical character of the land
- Environmentally sensitive lands
- Street layout
- Interconnected network of streets
- Utilities
- Bicycle lanes
- Sidewalks and curbs
- Water supply and sewage disposal systems
- Stormwater runoff
- Building design
- Other improvements such as lighting

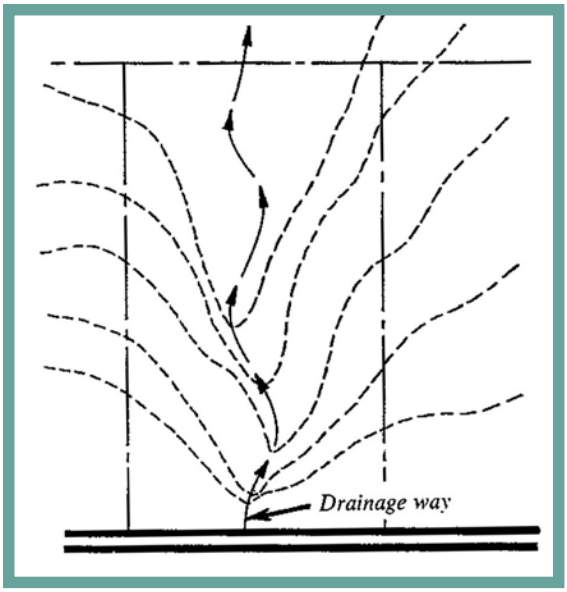
These subdivision standard features will be discussed in more detail below.

Lot Layout

Each lot on a proposed subdivision plat should provide a desirable building site allowing for adequate living space and outdoor activities. The planning board may disallow any proposed lots which, in its judgment, would not be buildable based upon site conditions and applicable regulations. As noted, the proposed lots must comply with the minimum requirements of the zoning district in which they are situated.

Lots in a proposed subdivision conform to the area requirements of the local zoning law or ordinance if one has been adopted[155] or alternatively, that where the lots in a proposed plat do not conform to the area requirements of zoning, the applicant has applied for and obtained an

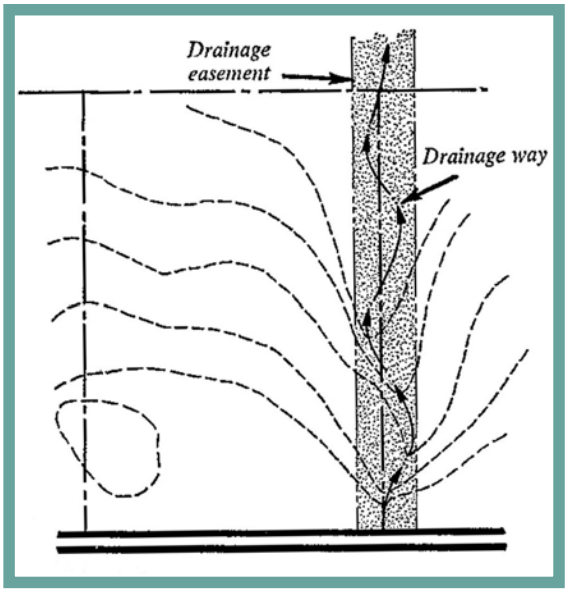
155 Town Law §277(3); Village Law §7-730(3); Gen. City Law §33(3).



Source: NYSDOS

Figure 5: DRAINAGEWAY IN CENTER OF LOT – UNDESIRABLE BUILDING SITE

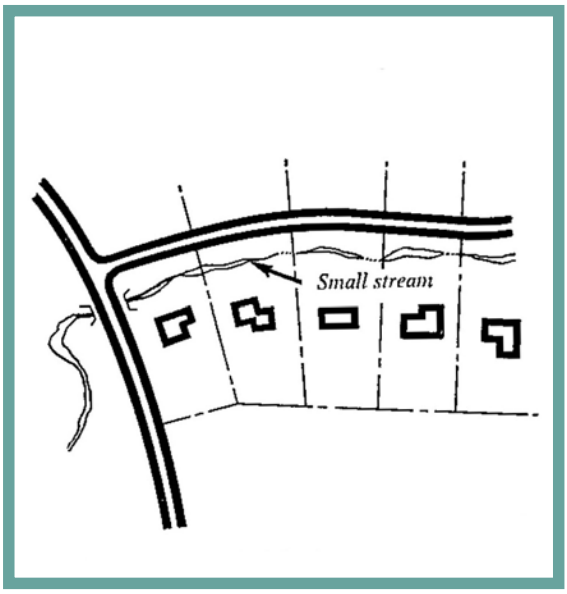
A small lot with a drainageway/small stream near the center of the property is not desirable for building. A building site such as this should not be extensively graded because it alters the water flow and runoff patterns and can impact neighboring properties and public streets.



Source: NYSDOS

Figure 6: DRAINAGEWAY EASEMENT – ON SIDE OF BUILDING LOT

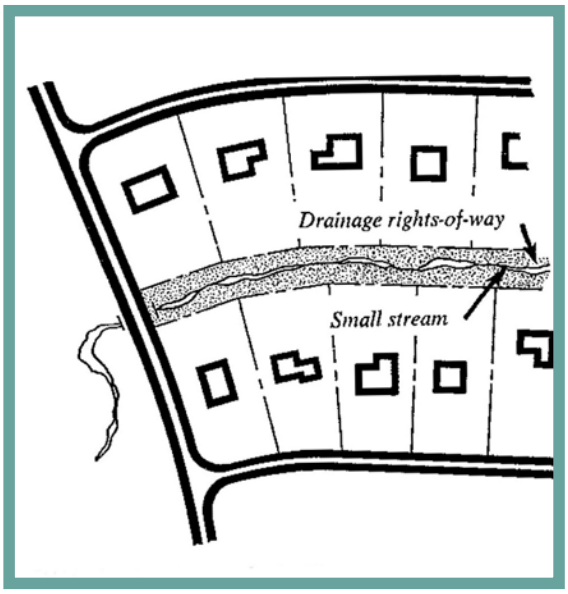
Safer building lots can be designed by establishing a drainage easement or right-of-way on each side of the drainageway/small stream and by locating buildings at safe distances from it.



Source: NYSDOS

Figure 7: DRAINAGEWAY ACROSS FRONT LAWNS - UNDESIRABLE BUILDING SITE

A lot with a drainageway/stream located between the building and the road is not a desirable building location. The site would require a costly and undesirable culvert for access to the building. The culvert or, in this case, series of culverts, disrupt the natural state of the drainageway/ stream, require maintenance and periodic replacement, and can present serious problems during larger storms.



Source: NYSDOS

Figure 8: DRAINAGEWAY EASEMENT/RIGHT-OF-WAY – AT BACK OF BUILDING LOT

Building lots are more functional if a drainageway is located at the back of the property, as opposed to the front. Another tool available to preserve the natural state of the drainageway is an easement/right-of-way.
A drainageway at the back of the property offers a more natural and sustainable stormwater management system for the property owner and the community, and the easement provides additional legal protection, which safeguards this environmentally sensitive area against disruption or encroachment.

area variance from the zoning board of appeals.[156] The eventual lot arrangement should ensure that construction of a building and related improvements will comply with the minimum area requirements of the zoning and there will be no foreseeable prohibitions to development based upon soils, topography or other natural conditions, including the presence of wetlands or floodplain areas.

A common complaint about new subdivisions is that they are often barren of trees. The planning board may require the planting of street trees as part of the improvements to be provided by the developer. The preservation of existing healthy and well-situated trees on site can increase the value of the lots and make new subdivisions more attractive. Many builders have found that mature trees increase the market price of the lot or house by more than whatever savings might be realized by clearing the land.

If the site under consideration has watercourses, ponds or other terrain features that can contribute to the beauty of its layout, the planning board and developer should be able to maximize the use of these natural resources while ensuring that buildings are sited an appropriate distance from watercourses and outside of flood plains.

A subdivision site with a drainage way or a small stream presents special problems. The lots should be laid out so that the drainage way will not be near the center of a lot. More desirable and usable lots can be created by letting the side lot line follow the center of the drainage way and by providing drainage easements on each side. The lot width can be increased to allow for the easement and still provide a suitable building site. This type of site should not be extensively graded if the water flow and runoff patterns as altered will be directed to neighboring properties or public streets. When a small stream traverses a subdivision site, desirable lots can be created by providing a drainage right-of-way or easement on each side of the stream and backing the lots up to it. This treatment tends to preserve the stream bed in its natural state, provide continuous public or private open space and eliminate the need for costly and undesirable driveway culverts that would be required if lots were fronted on the stream.

When developing an oddly shaped parcel of land that fronts on an existing road, creation of excessively deep lots should be avoided. Some municipalities allow for the creation of flag lots in order to access rear portions of a parcel. Such lots are characterized by long driveways and limited access on a main road. Other communities prohibit flag lots through width to depth ratios.

A local planning board should keep in mind that private deed restrictions or restrictive covenants that affect the manner in which a parcel of land, or a portion of it, is developed are a private matter and should not be considered by the planning board when reviewing a subdivision plat.[157]

Physical Character of the Land

Subdivision plat design is constrained by the physical characteristics of the site. When reviewing a subdivision plat, the planning board should give careful consideration to the topography of the site, including the slope, drainage and soils. Ultimately, the planning board must, when approving a subdivision plat, ensure that the land shown on the plat is of "such character that it can be used safely for building purposes without danger to health or peril from fire, flood, drainage or other menace to neighboring properties or the public health, safety and welfare."[158]

In many cases, the physical character of the land dictates the type of development that is practical. An example of this is where the property has a very steep slope, which makes high density single-family housing impractical because of the cost involved in making small lots usable. The natural constraints of the site being subdivided affect the number of lots that will be created in the subdivisions. Land subject to flooding, and land deemed by the planning board to be otherwise uninhabitable, should not be platted for residential or commercial occupancy or for any such other use that may increase danger to life, health, or property or aggravate the flood hazard.

Topographic maps are the basic tools in laying out streets at acceptable grades and for providing an adequate storm water drainage system. A topographic map shows the elevations of the site by

156 Town Law §277(6); Village Law §7-730(6); Gen. City Law §33(6).
157 Friends of the Shawangunks, Inc. v. Knowlton, 64 N.Y.2d 387 (1985).
158 Town Law §277(1); Village Law §7-730(1); Gen. City Law §33(1).

use of contour lines and usually includes information about watercourses, rock outcroppings and the other physical features of the site. Since developers need this type of map to create plans, the planning board may reasonably request it as part of the submission for planning board review. Many municipalities specify in their subdivision regulations that a topographic map be used as a basis for preparation of the developer's pre-application sketch and preliminary plat. The planning board can refer to the topographic map to determine the steepness of the slopes and where building roads would be difficult. Where land is flat, the topographic map will reveal where there is a need for careful design of a drainage system to avoid future flooding or stagnant water. Recent developments in satellite imagery permit much of this kind of data to be obtained with a minimum of ground survey work. Many developers and municipalities today use geographic information systems (GIS) to analyze land data to determine the best location for subdivisions and the infrastructure to support them.

Environmentally Sensitive Lands

Environmentally sensitive lands may be unsuitable locations to build homes. Planning boards should bear in mind that they are charged with protecting the public against such circumstances by "requir[ing] that the land shown on the plat be of such character that it can be used safely for building purposes without danger to health or peril from fire, flood, drainage or other menace to neighboring properties or the public health, safety and welfare."[159] Ensuring that the developer designs the subdivision layout in a manner that minimizes land disturbance (tree clearing, land grading), avoids steep slopes, flood-prone areas and wetlands, protects important natural areas and habitats, limits impervious surfaces, and provides effective storm water control is a wise, best management practice.

Building homes on a steep slope or in a drainage swale may be unsafe to persons and property, due to such factors as subsidence or periodic flooding. If so, such construction may additionally expose the developer, and perhaps the municipality, to civil liability.[160]

The question of whether environmentally sensitive lands can be deducted from the gross area of the property before calculating permitted density has come before New York courts. In the absence of a local or State regulation which, as applied, prohibits development of environmentally sensitive lands, a planning board has no authority to exclude them from lot count computations or the buildable area on the site. This doesn't mean that sensitive land can be built upon; rather, it can't be excluded from computing density or buildable area. In *Pagnozzi v. Planning Board of Village of Piermont*,[161] the Appellate Division held that a planning board was required to count the area of the land underwater in the calculation of minimum lot size for a two lot subdivision. In another case, where a large portion of a proposed cluster subdivision was subject to a private conservation easement and couldn't be built upon, the New York Court of Appeals held that the planning board could not deduct the land area encompassed by the conservation easement when computing lot count under cluster zoning.[162]

Other cases have reached a similar conclusion. *Done Holding Co. v. State of New York*[163] was a State condemnation proceeding involving private property comprised largely of wetlands. The Appellate Division held that the portion of a property comprised of wetlands was improperly included in calculating the total permitted residential density. No State or local law prohibited building there and a cluster subdivision of dwellings could be built. The court stated: "In the absence of any regulation or ordinance to the contrary, open land may be used in determining appropriate density, even if the open land itself cannot be built upon."

159 Id..

160 Catalanotto v. Abraham, 27 Misc.3d 1205(A) (Sup. Ct. Suffolk Co., 2010); Davis v. County of Onondaga, 31 A.D.3d 1156 (4th Dept. 2006); and Whitman v. Minucci, N.Y.L.J. Dec. 21, 1992, p. 26 col. 4 (Sup. Ct. Nassau County).

161 292 A.D.2d 613 (2nd Dept. 2002). *See* also Vezza v. Bauman, 192 A.D.2d 712 (2nd Dept. 1993).

162 Friends of the Shawangunks v. Knowlton, 64 N.Y.2d 387 (1985).

163 144 A.D.2d 528 (2nd Dept. 1988).

In *Forte v Village of Warwick*,[164] a developer sought to build a large housing development on his property, a portion of which contained State designated freshwater wetlands. He appealed to the ZBA for an interpretation after being advised that the land within the wetland buffers were not suitable for building purposes and could not be included in the calculation of net acreage. The ZBA concluded, albeit mistakenly, that the State Freshwater Wetlands Act totally bars construction activities in wetlands buffer areas. The Court held that this was error because under the State Freshwater Wetlands Act, certain regulated activities, including the erection of structures and building of roads, could take place in the wetland buffer areas if a wetlands permit is granted. Since Forte could have built structures in the wetlands buffer area upon granting of a permit, the land could not be excluded from computation of "net acreage."

Therefore, if a landowner can lawfully obtain a permit to undertake construction activities in an environmentally sensitive area, then the land cannot be excluded from the computation of net acreage. The contrary may also be true. A municipality can, in its subdivision regulation, require a developer to first obtain and submit to the planning board a permit to build in a State or locally regulated environmentally sensitive area. The lawful exclusion of environmentally sensitive land from the lot size or density computation requires the municipality to have in place a local law or ordinance, or the State to have a law, regulating construction in the environmentally sensitive areas and a discretionary decision made under that local or state law to deny the proposed construction. If the permit to build in the environmentally sensitive area is denied or not submitted, the planning board may be in a better position, based on the court decisions, to deduct the environmentally sensitive areas for which a permit to build cannot be obtained when computing density for subdivisions.

The design of a subdivision can impact the surrounding area. Street layout and tree placement within a subdivision are important factors to the quality of life of residents and the community. Poorly situated streets can create or exacerbate stormwater runoff problems, while the presence of well-placed street trees can improve the environment. The federal government points out:

> *Street design … affects environmental factors, including the volume of stormwater runoff, the water quality of that runoff, and the magnitude of the urban heat island effect. Street trees are particularly important: they remove carbon dioxide and certain pollutants from the air; they intercept and absorb rain before it reaches the street; they shade the landscape, reducing ambient air temperatures in warm months; they add aesthetic value to neighborhoods; and they slow traffic, improving public safety.*

The planning board should keep these environmental considerations in mind when working with developer on the streetscape and landscape aspects of the proposed subdivision plat.

Street Layout

One of the primary functions of a planning board in reviewing a subdivision plat is ensuring the adequacy and sufficiency of the streets shown on the plat. The State Subdivision Enabling Statutes direct that a planning board require that "the streets and highways be of sufficient width and suitable grade and shall be suitably located to accommodate the prospective traffic, to afford adequate light and air, to facilitate fire protection, and to provide access of firefighting equipment to buildings."[165]

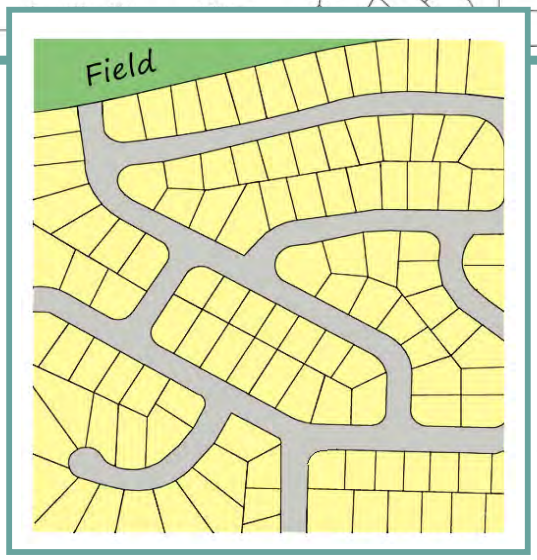
Residential streets in a subdivision serve many needs. They provide access to individual properties, accommodate various modes of transportation and allow the convenient entry of emergency services and road maintenance vehicles. A primary purpose of the streets in residential subdivision is to provide a safe and pleasant environment for residents and pedestrians, where children play, neighbors meet, and residents go for walks and for bicycle rides. In particular, the State Subdivision Enabling Statutes require that planning boards take into account the "prospective character of the development" – whether dense residence, open residence, business or industrial – when making

164 150 A.D.2d 339 (2nd Dept. 1989).
165 Town Law §277, Village Law §7-730; Gen. City Law §33.



Source: Ethan Spoo

Figure 9: RECTILINEAR GRID STREET LAYOUT
Rectilinear grid street layouts are ideal for creating short, walkable blocks. This sample subdivision has provisions for an environmentally sensitive area on site. Land was set aside for a wetland and park. This development is connected to surrounding neighborhoods by multiple access roads and trails. The longer blocks are broken up by trails to improve walking and recreational opportunities. Variations in the grid pattern add visual interest and reduce cut through traffic and speed. Common in the 19th and 20th centuries in American cities, this rectilinear grid pattern of street layout is making a comeback because it creates compact, pedestrian-friendly neighborhoods reminiscent of older urban human –scaled neighborhood that encourage interaction, give pedestrians and drivers many choices for travel, and are ideal for the incorporation of mixed uses.



Source: Ethan Spoo

Figure 10: CURVILINEAR GRID STREET LAYOUT
The curvilinear grid development pattern began in the 1930s and slowly evolved over decades to include more cul-de-sacs. Curvilinear grids often use cues from nature by following curves found along physical features such as bodies of water, wetlands, or steep slopes. Lots in a curvilinear development come in many shapes and sizes, so care must be taken to guarantee all lots meet local zoning regulations for lot size and setbacks as well as requirements for adequate frontage and access for emergency and public safety vehicles.

determinations regarding streets and highways, and other required improvements.[166]

The lot layout and street arrangement in a subdivision are interrelated. Once the general lot size and dimension requirements have been determined, a street system can then be designed. This will help the developer and planning board decide on the most appropriate type of road construction system, since surface or subsurface rock can add greatly to the cost of road building, the laying of pipe and building foundation construction. The planning board should ensure that proposed streets and roads in the subdivision satisfy maximum grade requirements. The inclusion of sidewalks and trails in the subdivision design can protect residents from traffic hazards and increase the attractiveness and value of the subdivision to prospective buyers.

The planning board has great latitude in working with subdividers in designing the layout of

166 Town Law §277(5); Village Law §7-730(5); Gen. City Law §33(5).

streets in a subdivision. Over the years, citizens, planners, and public officials have expressed interest in the development of compact, pedestrian-friendly neighborhoods. The design of neighborhood streets is a key component in that effort.

The pattern of street design has evolved over time. Much recent interest has been shown in the traditional rectilinear grid street pattern common in 19th and early 20th century American cities. The grid design provides maximum connectivity. Grid patterns promote pedestrian use and provide many choices for travel routes. Variations within the grid structure can add visual interest while discouraging cut-through traffic. The "rectilinear grid" results in short, walkable blocks, a variety of lot sizes, and human-scaled neighborhoods. The "loop grid" street design provides access to each lot without encouraging through traffic but creates isolated subdivisions with little relation to other housing developments. The "curvilinear grid" is guided by natural features – streams, wetlands, edges of old fields, etc. – that are to be preserved and incorporated into the overall subdivision. Proper layout of the streets in new subdivision can result in less street surface area and reduce overall street maintenance costs, such as paving, snow plowing, street cleaning, catch basin cleaning and hydrant and street light service. Trips for delivery vehicles and collection of garbage will also be more efficient.

Adequate vehicular and pedestrian access should be provided to all lots. In towns, a building permit cannot be issued unless the lot has access to and directly abuts on a street or highway that has been planned or exists and has sufficient frontage thereon to allow the ingress and egress of fire trucks, ambulances, police cars and other emergency vehicles. A frontage of at least fifteen (15) feet is statutorily required.[167] The purpose of frontage requirements is to provide access to property for public safety purposes (i.e., firefighting equipment, emergency vehicles).[168] Prior to the issuance of a permit, the street or highway must be improved in accordance with the standards and specifications established by the town board.

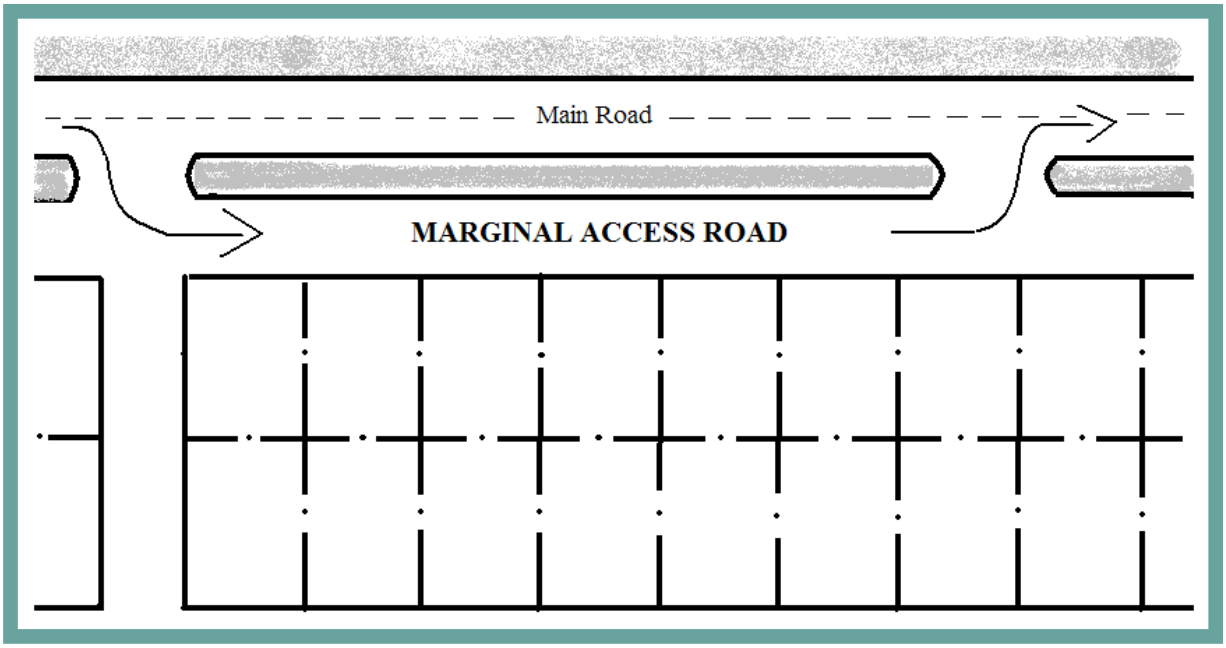
The street system within a subdivision should be designed with the safety of residents and pedestrians in mind. The Environmental Protection Agency (EPA) recognizes that this has not always been the case.

> *For several decades, municipal decisions about the size and design of streets have been based primarily on traffic capacity considerations. This narrow focus overlooks the fundamental role that streets play in shaping neighborhoods and communities. Streets are an important use of land. The design of streets influences the character, value, and use of abutting properties, as well as the health and vitality of surrounding neighborhoods. Street design also determines whether the area will be walkable, whether certain types of retail will be viable, and whether the urban landscape will be attractive and comfortable or stark and utilitarian. These impacts, in turn, affect land values (and associated tax receipts) and overall economic strength and resiliency. The character of streets can discourage or encourage redevelopment, hasten or reverse urban flight, and add or subtract value from abutting property. These are obviously important policy considerations for any municipality.*
>
> * * *
>
> *The issues around street design and network connectivity have been further compounded by oversimplified and unsupported theories about traffic safety. In recent years, transportation engineering analysis has shown that street width, the size, proximity, and orientation of buildings and street trees, the configuration of intersections, and the presence of on-street parking all have significant effects on the speed and attentiveness of drivers. Designed properly, these elements can reduce both accident frequency and accident severity.*[169]

167 Town Law §280-a.

168 These public safety considerations were discussed by the Court of Appeals in Matter of Brous v Smith, 304 NY 164, 170 (1952): "In a time of emergency, such as sickness, accident, fire or other catastrophe,' … 'a road over which automobiles and fire apparatus can travel safely must always be available, otherwise great suffering, property damage and even loss of life may result.' Nor is it only in time of peril that such roads are essential; in this era of automobile, modern living as we know it is impossible without improved highways linking people with their jobs, their sources of food and other necessities, their children's schools and their amusements and entertainments. Unimproved or defective roads can cause a complete breakdown of services in a community. The state has a legitimate and real interest in requiring that the means of access to the new construction be properly improved and sufficient for the purpose' (cite omitted).

169 "Essential Smart Growth Fixes for Urban and Suburban Zoning Codes"(EPA) p. 29.



Source: NYSDOS

Figure 11: MARGINAL ACCESS STREET
A marginal access street adds protection to residential developments built along a main road. It allows drivers to get out of the major flow of traffic before slowing down to turn into their driveways and also makes the main road safer with a smaller number of access points into the development. This design benefits pedestrians and children in the development by providing an additional buffer from the main road. This buffer can be landscaped in a way to reduce traffic noise and increase privacy. Special design consideration must be taken to provide safe traffic flow and avoid traffic conflicts at entrances and exits.

Planning boards should be aware that the volume and speed of vehicular traffic on a street can be influenced by its design. According to the EPA: "One of the most important characteristics of public streets affecting pedestrian environments is the speed of vehicular traffic. Speeds above 30 mph make sidewalks less pleasant and street crossings more dangerous and difficult."[170] On-street parking is an important pedestrian feature that protects walkers by separating sidewalks from moving traffic. It also makes it easier for people to walk to their destinations.

In residential subdivisions, the streets should be designed for a relatively uniform low volume of traffic and to discourage high speeds. Municipalities often require that residential streets be designed to minimize through traffic. Clearly, there is a need for communities to update their approach to planning, designing, and building streets and street networks.[171]

When a residential development is built along highly traveled traffic arteries, special consideration must be given to its design. Lots should not front directly on, or have direct access to, such streets if traffic on those major arteries would be slowed. New points of entry from residential lots onto busy roads increases the risk of vehicular accidents. These problems can be avoided by either building a marginal access street or backing the lots up to the major street. The marginal access street provides frontage for the individual lots and greatly reduces the number of points of access to the major street. When a landscaped buffer strip is provided between the marginal access street and the major street, the traffic noise will be reduced and a more private environment created. Care must be taken in designing the marginal access street to avoid traffic conflicts at entrances and exits. By maintaining a minimum safe distance between entrances, exits and other intersections, most of this traffic conflict can be avoided. In cases where lots are backed onto a major street, a landscaped buffer zone between the major street and the rear property lines can increase residents' privacy and reduce noise and light disturbance from the street.

170 Id.
171 "Essential Smart Growth Fixes for Urban and Suburban Zoning Codes"(EPA) p. 22.

The width of streets affects livability. Wider streets are thought to contribute to increased vehicular speeds. Where streets are wide and traffic moves fast, residents often complain and request municipalities to install traffic calming devices, such as stop signs or speed bumps. Narrow streets are said to reduce the speed of vehicles, provide extra space for sidewalks and afford a planting area for shade trees and vegetation. Not only do narrower pavement widths, reduced rights of way, shorter curve radii and steeper gradients lessen vehicular speeds but they are less expensive to develop and have a lesser environmental impact. If wider roads are necessary, the planning board could ensure that the developer makes them visually appealing by installing sidewalks, planting native ground cover in buffer strips, using graded gravel and adding parallel parking spaces. However, street width also affects the ability of emergency service vehicles to quickly reach a fire or medical emergency. Emergency service providers and residents alike have an expectation that neighborhood streets provide adequate space for emergency vehicles to promptly reach their destination and for firefighters to efficiently set up and use their equipment. The *Uniform Fire Code*, which is used by most local governments to establish standards for the prevention of and protection from fires, includes standards which affect the width and design of streets. To accommodate the need to move the vehicles and equipment on them quickly, the *Uniform Fire Code* calls for a 20-foot wide clear passage.

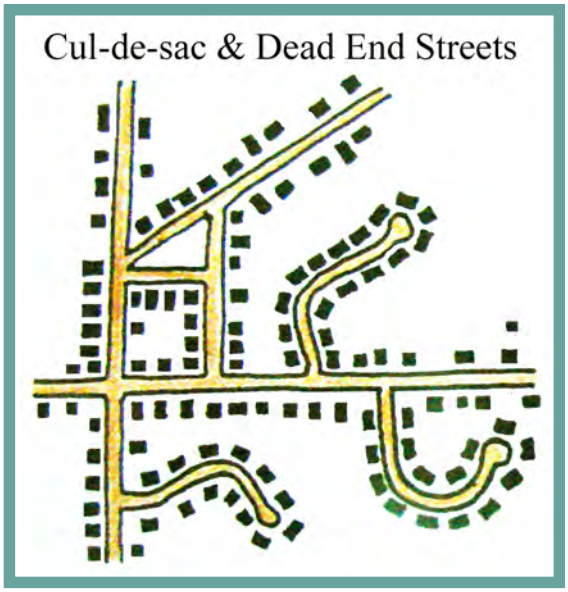
Careful consideration must be given to streets intersections. Angled intersections in which traffic tends to travel diagonally across center lines increases the chances of traffic accidents. Streets should intersect at right angles and not at acute angles. The centerlines of offset street intersections should be far enough apart so that traffic is deterred from cutting diagonally across them. To increase driver visibility, intersections should be located on straight portions of street instead of on curves, and on gentle grades rather than steep slopes.

The blocks within a subdivision are inherently related to the street patterns. Block length should be kept from being excessively long in order to permit adequate vehicular and pedestrian circulation within the subdivision. In situations in which long block lengths are unavoidable, as a result of unusual topographic or drainage conditions, a sidewalk for pedestrians should be provided across the block, making the community more walkable and interconnected. The planning board should ensure that suitable monuments will be placed at block corners and other necessary points and the location thereof is shown on the plat. Typically, corner lots are laid out in dimensions so that any structure placed on the lot will conform to the building setback line on both streets, as well as side yard requirements, for the zoning district in which the lot is located.

An Interconnected Network of Streets, Utilities and Bicycle Lanes

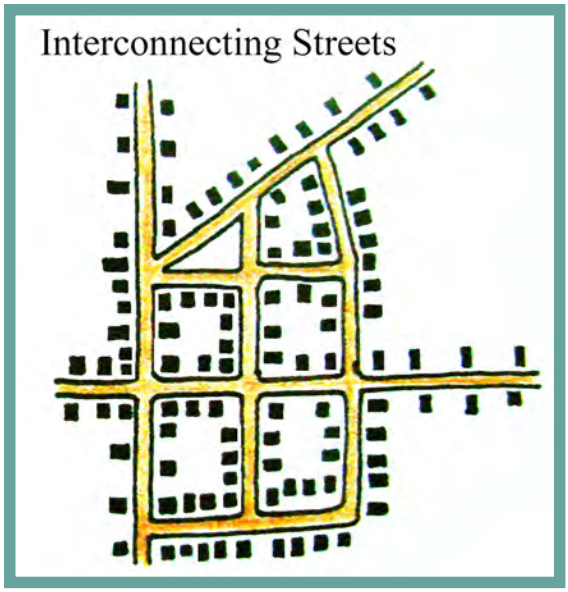
How new roads and other infrastructure fit into the municipality's existing network should be a prime concern of planning boards. This has not always been an important issue in the past, with unfortunate consequences. The federal government warns:

> *Cities and towns have tended to make planning and design decisions about streets one project at a time and based on a limited perspective of specific sections of specific streets. This narrow perspective ignores the fact that transportation systems are comprised of networks of facilities. The macro-scale characteristics of networks are more important than the micro-scale design of specific street sections in determining how well a local transportation system functions (including how much capacity the system has).*
>
> *This conventional project-by-project perspective has resulted in poorly connected networks of oversized streets, rather than well-connected networks of smaller streets. The resulting connectivity problems have been exacerbated by the national trend, beginning in the 1920s, of letting developers make network layout and connectivity decisions for streets built as part of their subdivisions and commercial sites. The inevitable outcomes have been poor connectivity, inconvenient circulation, and over-crowded arterials. These outcomes, in turn,*



Source: Image by Elizabeth Thompson, from Rural by Design by Randall Arendt. Reprinted with permission of the American Planning Association

Figure 12: CUL-DE-SAC and DEAD END STREETS
Cul-de-sac and dead end streets, popular beginning in the 1950's, are generally discouraged because they reduce connectivity within the subdivision and with surrounding neighborhoods and tend to increase traffic on collector streets. Many communities have a goal to increase the vibrancy, interconnectivity, and walkability of their communities. Cul-de-sac and dead end street layouts run contrary to this vision.



Source: Image by Elizabeth Thompson, from Rural by Design by Randall Arendt. Reprinted with permission of the American Planning Association

Figure 13: INTERCONNECTING STREETS
A street design that incorporates short blocks and a grid pattern increases the travel options available for pedestrians and vehicles. This pattern tends to increase pedestrian activity in the neighborhood, especially when combined with the availability of recreational and retail opportunities nearby.

have been detrimental to emergency service response, access to existing businesses, and neighborhood walkability.[172]

One obvious effect of new subdivisions on the existing community results from the need to provide for the extension of roads from existing neighborhoods into new ones. In some cases, new developments will need to use the streets in older ones as the primary means of access; in others, the streets of existing subdivisions will provide a second means of access to the new one.

Some basic principles should not be violated when new streets are laid out adjacent to existing ones. Whenever possible, new roads in subdivisions should be connected to existing roads and be designed to allow continuous connections as additional development occurs. Good subdivision design requires that there be sufficient street interconnectivity between the proposed subdivision and the rest of the community to allow access for emergency vehicles and to prevent isolation of the development. Reserve strips should no longer be permitted at the end of a street because they prevent future access to land beyond it. Unless there is an existing or proposed street to be extended, it is generally undesirable to terminate a street at a property line. When the subdivision design requires that a proposed street be continued to the edge of a presently undeveloped area to make provision for its future extension, a temporary turn-around at the end of the street should be required to allow for convenient vehicular movement. Extra land taken for the temporary turn-around can revert to the abutting lots when the street is extended. The dead-end or cul-de-sac street, once popular, is generally discouraged because it prevents connections with other neighborhoods. In subdivisions with little street connectivity, traffic on collector streets can become high during rush hour periods.

172 Id. at p. 29.

When the new subdivision lies next to an area that already has public services and utilities, the extension of this infrastructure becomes an important factor in the layout. Water mains and hydrants usually follow streets without serious problems, unless there is a significant increase in elevation in the new subdivision, which may call for some adjustment in water pressure. Pressure is rarely a problem for the transport of natural gas into a new subdivision. Sanitary sewers, however, normally rely on gravity flow, and the grades of streets will affect the adequacy and cost of this service. In many cases, it is necessary to provide a sanitary sewer easement across lots to make the system workable. (Easements should follow the lot lines where possible.) Pumping sewage should be avoided and in some areas will not be approved by health authorities. Stormwater drainage also requires careful analysis to relate its flow to the street system, the slope of the individual lot, and the location of buildings.

Bicycle circulation should be accommodated on streets and/or on dedicated bicycle paths. Where feasible, the planning board should work with the developer to ensure any existing bicycle routes through the site are preserved and enhanced. Facilities for bicycle travel may include off-street bicycle paths (generally shared with pedestrians and other non-motorized users) and separate, striped, 4-foot bicycle lanes on streets.

Sidewalks and Curbs

Planning boards often require developers to construct convenient pedestrian circulation systems throughout the subdivision. Continuous sidewalks on both sides of streets in residential subdivisions are considered appropriate to prevent unnecessary pedestrian crossings.[173] Where buildings exist on only one side of the street, sidewalks are generally only be required on that side of the street.

A planning board can require a subdivider to build sidewalks and curbs to municipal standards or alternatively, to post a performance bond or other security with the municipality to ensure sidewalks and curbs are constructed.[174] The planning board's authority to require the installation of sidewalks and curbs as a condition for the approval of a subdivision is limited to those benefiting residents of the subdivision. Local governments can compel the owner to construct sidewalks on their property adjacent to local roads at the owner's expense.[175] However, one lower court held that a planning board cannot require a subdivider to construct sidewalks along public roads as a condition of plat approval where it was clear that subdivision residents would not use the sidewalk.[176]

Sidewalk width is important. Generally speaking, the wider the sidewalk, the more room there is for pedestrians. If the subdivision developer plans to convey the streets and sidewalks to the municipality, these improvements should be built to legal standards, including those imposed by the Americans with Disabilities Act (ADA). Local governments must make pedestrian facilities accessible to persons with all kinds of disabilities. ADA Accessibility Guidelines set the minimum passing width on a sidewalk at 5 feet, exclusive of the curb, which will accommodate continuous, two-way pedestrian traffic. If a planted strip is provided to buffer the sidewalk from the street, it should be at least four (4) feet wide to allow for maintenance activities. ADA regulations require that sidewalk curb ramps must be constructed to meet current standards, at intersections where sidewalks lead to street crossings.

Sidewalk construction materials vary. Porous construction materials are environmentally friendly as they allow rainwater to pass through the sidewalk and soak back into the ground naturally. Sidewalks may be made of porous modular masonry materials, such as brick, slate, and concrete pavers, or concrete with brick borders or cast-in-place materials such as exposed aggregate concrete slabs. Asphalt sidewalks, being impervious, are generally discouraged.

173 *See* NYS Department of Transportation Highway Design Manual §18.6.4 "Pedestrian Facility Design" pp. 18-23.

174 Town Law §277(2)(c); Village Law §7-730(2)(c); Gen. City Law §33(2)(c).

175 Town Law §200-a; Village Law 6-622; Gen. City Law §20(11). They may also enact a local law providing for the improvement of sidewalks at the expense of adjoining property owners. (Municipal Home Rule Law, §§10[1][i] and [ii][a][8], [9-a]). See Op. Attorney General No. 90-68.

176 *See* Valmont Homes, Inc. v Huntington, 89 Misc 2d 702 (Sup. Ct. Suff. Co. 1977).

Water Supply and Sewage Disposal Systems

In its subdivision regulations, municipalities can direct real estate developers to the type of water and sewer infrastructure that best serves the interests of new residents and the municipality. Developers must demonstrate how sewage and water services will be provided to subdivision residents. There are three options for providing potable water and sanitary sewage disposal to lots in a subdivision:

1.) Municipal systems
2.) Individual private systems
3.) Non-municipal private shared systems

The New York State Public Health Law (PHL) grants the State Public Health and Health Planning Council (State Council) authority to enact sanitary regulations, known as the State Sanitary Code. (PHL §225(4)). The Public Health Law sets up a hierarchy of authority where the State Council establishes baseline sanitary regulations applicable statewide. Each county can, if it chooses, create county or part-county boards of health to set district-wide sanitary regulations not inconsistent with the state sanitary regulations (PHL§347(a)), and towns and villages can establish local boards of health to promulgate regulations not inconsistent with either the state or the county sanitary regulations (PHL §§302(2), 308 and 347(c)). Special provisions apply to sanitary codes in cities based on population (PHL §371): in New York City, the city charter provides for a city sanitary code. The Department of Health enforces water supply standards and the Department of Environmental Conservation enforces sewage treatment standards. Both departments, through the use of aid programs, strongly encourage intermunicipal approaches to water and sewage services.

State or county approval of the sewerage disposal and drinking water systems is required for certain kinds of subdivisions, termed "realty subdivisions." Notably, the State or county review is separate from the subdivision review conducted by the local planning board.[177] Generally, approval of the sewerage disposal and drinking water systems serving residential subdivisions of five or more lots along an existing or proposed road or right-of-way in which each lot is less than five acres in size is required from the NYS Department of Environmental Conservation or NYS Department of Health or county health department.[178] These state statutes provide that "[a] tract of land shall constitute a subdivision upon the sale, rental or offer for sale or lease of the fifth residential lot or residential building plot therefrom within any consecutive three year period, and at this time [the state statutes] shall apply to all such parcels thereof, including the first four parcels, regardless of whether said parcels have been sold, rented or offered for sale or lease singly or collectively".[179] Realty subdivisions may not be accepted for filing by the county clerk or register without the State's or county's approval endorsed on the plat. Once received, the county clerk must notify the municipal planning board within three days of the date a final plat is filed.[180] If subdivisions of fewer than five lots are being created or developed, city, village or town governing bodies may adopt local legislation controlling water services and the design of individual sewerage facilities.

177 §1115 through §1120 of the Public Health Law and regulations of the State Department of Health adopted pursuant thereto, and §17-1501 through §17-1515 of the Environmental Conservation Law, and regulations of the State Department of Environmental Conservation adopted pursuant thereto.

178 *See* Envtl. Conserv. Law Article 17, Title 15; Pub. Health Law Art. 11, Title II; 6 N.Y.C.R.R. Part 653. Several counties have their own health departments and these agencies will be involved with each new subdivision, assessing adequacy of water supply and sewerage if they have adopted their own rules for the review of subdivision plats.

179 ECL §17-1501; Public Health Law §1115.

180 Town Law §279(2); Village Law §7-732(2); Gen. City Law §34(2).

Municipal Systems - Municipal water and sewerage services have long been available in urbanized areas and are also available in many suburban areas. As noted in Part I, the extension of these facilities has major impacts on the extent and direction of development. Localities utilize several organizational mechanisms to provide sewerage and water services. The most prevalent are the municipal water or sewer departments in cities and villages and the water or sewer districts in towns. Most cities and many villages have developed their own sources of water supply and have constructed sewage treatment plants. While some town districts have developed these capital facilities, many purchase the services from adjoining localities. Local governments have occasionally established authorities to provide water or sewage service over a wide area. An example is the Monroe County Water Authority, which serves a large area around the city of Rochester.

Individual private systems - Individual private well and septic systems are prevalent for minor subdivisions that occur in sparsely populated rural areas. NYS Department of Health regulations provide that in areas where individual sewer and water systems are utilized, lots may not be smaller than 20,000 square feet (approximately one half of an acre).[181] Individual private systems are generally not advisable in areas with poor soils and other resource constraints.

Non-municipal private shared systems - If a subdivision is large enough to involve the possible provision of its own water supply and distribution system or a water supply company, the approval of the NYS Department of Environmental Conservation[182] and possibly the NYS Public Service Commission will be necessary. Shared (or communal) private systems must be incorporated as water-works corporations or sewage-works corporations under the Transportation Corporations Law. The formation of private shared water and sewer services provided under the Transportation Corporations Law is subject to approval by the local legislative body, and in cases of large waterworks corporations with gross revenues over $250,000, by the NYS Public Service Commission.[183] The Transportation Corporations Law does not contain particular standards to guide municipal approval. The municipality should require the developer to provide sufficient information upon which to base its decision that the needs of subdivision residents will be adequately served. One State Comptroller opinion has held that a town, as a condition of its consent to incorporation of a water-works corporation to serve a proposed condominium project, could require an agreement by the parties to provide safeguards concerning the continued function of the water supply system.[184] The rates that private companies charge for sewage service are controlled by towns and villages. The NYS Public Service Commission regulates the price that private water firms charge for their services.

Stormwater Runoff

In many instances, the creation of a subdivision alters the flow of stormwater owing to changes in the topography on the construction site. Stormwater that runs off during and after land development can result in flooding and erosion, as well as significant pollution of lakes, streams, rivers and estuaries.

The planning board should ensure that stormwater run-off is either kept on-site or directed over crushed stone to allow for on-site drainage to reduce non-point source pollution. Preserving natural vegetation can also promote good drainage and on-site water retention. Minimizing the use of impervious surfaces and retaining natural areas can reduce water runoff, decrease flooding and allow for the absorption of rain water naturally, reducing the need for engineered landscaped to control stormwater.

Unless properly constructed, storm water runoff can surge along subdivision roads into adjacent streams and waterways, causing nonpoint source pollution and flooding. Development increases stormwater run-off because new lawns, roofs, driveways and paved streets are less absorbent than

181 10 NYCRR §§74.4 and 74.5..
182 *See* 6 NYCRR Part 601.
183 *See* Pub. Serv. Law Art. 4-B; 16 N.Y.C.R.R. Part 500.
184 Op. State Compt. 79-884.

vacant, forested or farm land. The result is increased loads on stormwater infrastructure and streams and rivers. Comprehensive plans should provide guidance for managing stormwater throughout the municipality on a long-term and coordinated basis and thus provide planning boards and developers with a guide to how to address stormwater issues as they arise with each new development.

In New York, the Department of Environmental Conservation (DEC) administers a federal program to regulate stormwater runoff, a program that also affects the local subdivision review process.[185] Two DEC State Pollutant Discharge Elimination System (SPDES) General Permits govern how and when stormwater run-off from subdivisions is managed.

General Permit for Construction Activity

In New York, developers must manage stormwater runoff during and after construction of a subdivision where an acre or more of land will be disturbed[186] and runoff from the site can reach the surface waters of the State.[187] Prior to commencing construction, developers must obtain coverage under the SPDES ***"General Permit for Construction Activity."***[188] This General Permit authorizes eligible[189] stormwater discharges associated with construction activities.

Certain cities, towns, villages, counties and other types of public and quasi-public government units that own or operate small-scale storm sewer systems that discharge into surface waters in New York have been designated by DEC as Municipal Separate Storm Sewer Systems (referred to as "MS4 communities").[190] If the subdivision is located in a small MS4 community that exercises traditional land use controls, the developer must first submit a Stormwater Pollution Prevention Plan (SWPPP) for approval to the community. If the SWPPP is approved, the developer must provide a Notice of Intent to the DEC in order to obtain a General Permit for Construction Activity.

The Notice of Intent must indicate that a SWPPP has been prepared and will be adhered to by the developer during and after construction of the subdivision. Each SWPPP is site specific and prescribes how stormwater will be managed during construction and post-construction.[191] Some stormwater management techniques involve installation of absorption fields and detention ponds, preservation of natural features, retention of natural drainage swales and reduction of impervious surfaces. DEC conducts a completeness review of the Notice of Intent before issuing an Acknowledgement Letter verifying coverage under the General Permit. Once permit coverage is obtained, subdivision construction may begin, provided all other approvals have been received. When the work is complete and the site is stabilized, the developer is required to file a Notice of Termination with the DEC.

185 New York's State Pollutant Discharge Elimination System is a federally-approved program with permits issued in accordance with Article 17 (Titles 7 and 8) and Article 70 of the Environmental Conservation Law ("ECL").

186 This includes disturbances of less than one acre that are part of a larger common plan of development or sale that will ultimately disturb one or more acres of land.

187 The disturbance threshold changes for certain construction activities involving soil disturbances of less than one (1) acre: (a) in the New York City Watershed East of the Hudson, where the threshold is five thousand (5000) square feet and (b) where DEC has determined that a SPDES permit is required for stormwater discharges based on the potential for contribution to a violation of a water quality standard or for significant contribution of pollutants to surface waters of the State.

188 General Permit GP-0-10-001. *See* https://www.dec.ny.gov/docs/water_pdf/constgp020001.pdf

189 All stormwater discharges from construction activities are eligible for permit coverage except for those discharges listed as "ineligible" under Part 1, Subpart D of the General Permit.

190 DEC has established a list of municipalities that are regulated under Phase II of the Environmental Protection Agency's MS4 regulatory program which is available at https://www.dec.ny.gov/chemical/92258.html. Certain projects will be ineligible for review under the DEC General Permit and must apply for individual stormwater construction permits especially those projects in steep slope areas that are tributary to unfiltered drinking waters and construction activities that adversely affect archeologically sensitive areas or property listed or eligible for listing on the State or National Register of Historic Places.

191 DEC publishes an "Instruction Manual for Stormwater Construction Permit" to assist developers in preparing SWPPPs and Notices of Intent. https://www.dec.ny.gov/chemical/43133.html Post-construction controls must also be described in the SWPPP for single-family residential construction disturbing five acres or more, or commercial or multi-family projects disturbing one acre or more, or for any construction disturbing one acre or more on a site that discharges to a polluted water body.

General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems

MS4 communities and certain covered entities wishing to discharge stormwater from their sewer systems[192] must obtain coverage under the DEC SPDES **"General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s)."**[193] They do so by submitting a Notice of Intent and indicating that they have developed and implemented a stormwater management program (SWMP).[194]

Under the General Permit, MS4 communities that have traditional land use regulations must enact a local law or ordinance requiring developers to prepare a SWPPP. The community must also adopt or amend existing subdivision, site plan and/or zoning regulations to control stormwater runoff (including erosion, sedimentation and potential post-construction controls) to the small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre, or 5,000 square feet or less in the New York City East of the Hudson River watershed,[195] ensure inspection of such sites during and after construction, and strictly enforce the terms of any SWPPP submitted by the developer to, and accepted by, the municipality.[196] In the subdivision regulations, planning boards can be directed to review any SWPPP submitted in connection with a subdivision application and to include the SWPPP in its public review process.

Building Design

Subdivision contemplates the laying out of building lots and various site improvements. Many developers market their lots by building houses on them. In some large scale subdivisions, entire suburban neighborhoods have been established. Architectural styles can be important to the overall character of subdivisions as well as to the surrounding community.

Planning boards are authorized by statute to review the design of buildings in a "clustered subdivision." If the subdivision plat is "clustered," the planning board can examine "the layout, configuration and **design of lots, buildings and structures,** roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands."

In contrast, the State Subdivision Enabling Statutes do not specifically empower planning boards to evaluate the exterior appearance of buildings in "conventional subdivisions." Building designs in conventional subdivisions may nonetheless be examined under the authority of other state laws.

The most common technique used by local governments to regulate architectural features of new buildings is through site plan review, as authorized under Town Law §274-a, Village Law §7-725-a, and General City Law §27-a. Site plan review is a land use technique in which a local board evaluates the design and layout of a structure on a lot. Architectural or exterior appearance must be specifically listed as a factor for review in the site plan local law or ordinance; otherwise the board cannot consider it.[197] As a timing matter, site plan review can only be conducted after subdivision plat review has taken place.[198] To ensure that construction doesn't occur without architectural review, the site plan local law or ordinance may be written to preclude the issuance of a building permit until site plan review has been completed.

192 The General Permit exempt certain non-Stormwater Discharges unless the DEC has determined them to be substantial contributors of pollutants to a particular small MS4.

193 General Permit GP-0-15-003. *See* https://www.dec.ny.gov/docs/water_pdf/ms4permit.pdf and https://www.dec.ny.gov/chemical/43133.html

194 The protection afforded by the local regulations must be at least equivalent to that provided by the SPDES General Permit for Construction.

195 Control of stormwater discharges from construction activity disturbing less than one acre must be included in the program if (a) that construction activity is part of a larger common plan of development or sale that would disturb one acre or more; or (b) if controlling such activities in a particular watershed is required by DEC. New York City Watershed East of Hudson River Map. *See* Appendix 3, page 109 https://www.dec.ny.gov/docs/water_pdf/ms4permit.pdf

196 When the SWPPP is accepted, an MS4 SWPPP Acceptance form is signed by municipality's executive officer, ranking elected official or duly authorized representative and returned to the developer who may then submit to the DEC with their Notice of Intent.

197 Moriarty v. Planning Bd. of Village of Sloatsburg, 119 A.D.2d 188 (2nd Dept. 1986). As an example of architectural controls in a site plan law, see Town of Bolton Code §200-53.

198 Town Law §274-a(1); Village Law §7-725-a(1); General City Law §27-a (1). Pomona Pointe Associates, Ltd. v. Incorporated Village of Pomona, 185 Misc.2d 131 (Sup. Ct. Rockland Co. 2000).

Local governments can also review the exterior architectural appearance of prospective buildings in a subdivision by establishing an independent architectural review board. Architectural review laws can focus on the building form, materials, texture, colors, mass, scale and other exterior features. Many New York municipalities have established architectural review boards using the local law powers granted in Municipal Home Rule Law §10 (1)(ii)(a). In particular, one of the specifically enumerated local law powers authorizes counties, cities, towns and villages to adopt local laws "relating to the protection and enhancement of their physical and visual environment."[199] This authority has been held sufficient to support the creation of the Architecture and Community Appearance Board of Review of the Town of Orangetown.[200] The Municipal Home Rule Law may also provide a source of authority for the adoption of subdivision regulations that address the review and approval of the architectural design and construction of houses or buildings on individual lots. For instance, the City of New Rochelle provides the planning board with the assistance of professional architects to examine the architectural features and physical details of proposed buildings in major subdivisions.[201] The Village of Florida, New York regulates the exterior appearance of proposed homes in major subdivisions "to promote architectural beauty and harmony of building design; to avoid monotony of residential housing; and to prevent buildings or structures from being improperly designed, located or modified in relation to existing buildings and structures, prominent site features, lot lines and street lines."[202] Architectural regulations can be written to ensure that new residential homes reflect the styles and design of existing buildings in the community. Conversely, the community wishing to change its appearance can enact regulations that encourage innovation in building designs.

The State Environmental Quality Review Act (SEQRA) can be used to analyze aesthetic impacts of proposed structures in a new subdivision development and to attach appropriate conditions to approvals to lessen such impacts. In the case of *Macchio v. Planning Board of the Town of East Hampton*,[203] a court upheld a condition attached to the approval of a subdivision waiver requiring proposed buildings to be sheathed with natural wood shingle siding, and painted or stained only with muted natural colors, such as gray, brown, tan or black. Based on the impacts to visual resources revealed in the environmental assessment, the court held that the planning board's condition was reasonable since "[i]t did not prohibit construction - it only tried to soften the aesthetic or visual impact by requiring muted natural colors in construction."

Other Improvements

The local planning board is authorized to require, or to waive the requirement, that the subdivider install street signs, street lighting, street trees, water mains, fire alarm signal devices,[204] sanitary sewers and storm drains, among other improvements, in accordance with municipal standards, specifications, and procedures acceptable to the planning board.[205] As an alternative to the installation of infrastructure and improvements, as provided, prior to planning board approval, a performance bond or other security sufficient to cover the full cost of the same, as estimated by the planning board or a department designated by the planning board, shall be furnished to the municipality by the owner.[206]

Planning boards have the authority to require the installation of adequate water mains, hydrants[207] and fire alarm devices as a condition of plat approval. Fire alarm cables and boxes can be

199 Municipal Home Rule Law, §10(1)(a)(11).
200 Torsoe Brothers Construction Corp., v. Architecture and Community Appearance Board of Review, 120 A.D.2d 738 (2nd Dept, 1986).
201 See City of New Rochelle Code §331-117.1.
202 Village of Florida Code §119-12.
203 152 Misc.2d 622, 578 N.Y.S.2d 355 (Sup. Ct. Suff. Co 1991).
204 The installation of fire alarm devices including necessary connecting facilities in towns and villages is further addressed in Town Law §277(8) and Village Law §7-730 (8).
205 Town Law §277(2)(c), Village Law §7-730(2)(c) and General City Law §33(2)(c).
206 Town Law §277(9); Village Law §7-730(9); and General City Law §33(8).
207 1990 N.Y. Atty. Gen. (Inf.) 90-74 (November 7, 1990).

required but only after receiving approval from the local fire department or authority agency charged with fire protection.

Waiver of Improvements

When approving a final plat, the planning board may waive requirements that, in the opinion of the board, are not reasonably necessary to the public health, safety or general welfare or are otherwise inappropriate. The State Subdivision Enabling Statutes[208] provide:

> *The planning board may waive, when reasonable, any requirements or improvements for the approval, approval with modifications or disapproval of subdivisions submitted for its approval. Any such waiver, which shall be subject to appropriate conditions, may be exercised in the event any such requirements or improvements are found not to be requisite in the interest of the public health, safety, and general welfare or inappropriate because of inadequacy or lack of connecting facilities adjacent or in proximity to the subdivision.*

On its own initiative or at the request of the developer, a planning board may determine that the specific standards for land development adopted as part of the subdivision regulations are not applicable to a given development and waive them. The waiver provision relates only to the applicability of certain requirements to a specific subdivision and not to the approval procedures. For instance, a common type of waiver might involve construction details on subdivision roads where the plat fronts on a public road giving each lot direct access. Similarly, a planning board might waive the requirement for water mains, even if the local subdivision regulations required them, where the area was not served by public water. Each waiver must be site-specific. The reason for granting the waiver should be stated in the records of the planning board.

Once a planning board determines that certain improvements, such as water mains, must be installed in a subdivision, it may not waive the requirement. The developer must install, or post security to ensure installation of, the improvements, unless the municipality voluntarily undertakes that expense.[209]

208 Town Law §277(7); Village Law §7-730(7); Gen. City Law §33(7).
209 Christie v. Phoenicia Water Dist., 194 A.D.2d 912 (3rd Dept. 1993).



Part VI: Conditions of Approval

Planning boards are authorized to impose reasonable conditions when approving a subdivision plat to address the foreseeable impacts from the development. The conditions imposed must be within the framework of the State and Federal Constitutions[210] and not otherwise be preempted by State law. There must always be a close connection between conditions imposed by the planning board and the development impacts they seek to ameliorate.[211] For example, requiring a subdivision developer to provide parks or recreation areas inside a large residential subdivision to serve new residents who would otherwise burden nearby town parks may well be considered reasonable.[212] When a planning board, acting within its jurisdiction, imposes a reasonable condition on plat approval accompanied by written findings supported by substantial evidence, its judgment will generally not be upset by a reviewing court.[213]

Parks and Recreation Areas

The subdivision of land for new home development may create a demand for neighborhood playgrounds and other types of recreational lands. The State Subdivision Enabling Statutes provide a means for planning boards to begin to satisfy the demand within any new subdivision. The General City Law,[214] Town Law[215] and the Village Law[216] authorize, as a condition of a residential plat approval, the set aside of land, suitably located, for park, playground or other recreational purposes on the subdivision plat, when appropriate. The statutes set forth a constitutionally acceptable process for municipalities to exercise this power so there is a "rough proportionality" between the projected demand created by the new residents of the subdivision and the amount of recreational space to serve their needs and those of municipal residents.[217]

The State Subdivision Enabling Statutes first require planning boards to consider whether or not a new park or recreation area should be included in a new subdivision. Second, the planning board must review the subdivision and determine whether it contains adequate and appropriate space for recreational facilities. If it does not, the planning board must then consider whether to require a payment in lieu of parkland, discussed below.

In the first instance, the planning board must make a finding that a "proper case" exists for requiring that land for parks, playgrounds or other recreational purposes, be set aside within the subdivision. This determination must be supported with findings based on a study of recreational needs that includes an evaluation of the present and anticipated future needs for park and recreational facilities in the municipality based on projected population growth to which the particular subdivision will contribute. This establishes the rough proportionality between the subdivision's impact on the community's facilities and the set-aside of parkland required. There are rules limiting the reservation of park or recreational lands. For example, while there is no upper limit on the amount of land that may be required to be set aside, if the planning board requires an unreasonably large percentage of land to be reserved for parkland, a reviewing court may rule in favor of the aggrieved applicant if the matter is challenged.[218] It is the developer's choice to dedicate

210 Twin Lakes Development Co. v. Town of Monroe, 1 N.Y.3d 98 (2003), cert. denied by 124 S.Ct. 1883, 158 L.Ed.2d 469 (2004).
211 Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
212 See Bayswater Realty & Capital Corp. v. Planning Bd. of Town of Lewisboro,76 N.Y.2d 460, 468 (1990): "The park and recreational needs which [Town Law] section 277(1) is designed to meet are those of the town or the community at large--not the isolated needs within the subdivision, itself."
213 M&M Partnership v. Sweenor, 210 A.D.2d 575 (3rd Dept. 1994).
214 Gen. City Law §33(4).
215 Town Law §277(4).
216 Village Law §7-730(4).
217 Twin Lakes Development Corp. v. Town of Monroe, 1 N.Y.3d 98 (2003). See Dolan v. City of Tigard, 512 U.S. 374 (1994).
218 East Neck Estates, Ltd. v. Luchsinger, 61 Misc.2d 619 (Sup. Ct. Suffolk Co., 1969) (The Court held that the Planning Board's requirement for dedication of beachfront property amounting to almost half of the market value of the proposed subdivision was confiscatory).

the parkland to the municipality or maintain the land as private parkland for the benefit of the inhabitants of the subdivision. The planning board cannot require an uncompensated grant of land to the municipality for use by the general public.[219]

The planning board may require as a condition of subdivision approval that the parkland in the subdivision be kept undeveloped. This restriction should be noted on the final plat. When the approved subdivision containing the notation is subsequently recorded with the Office of the County Clerk,[220] the open land restriction becomes enforceable against subsequent purchasers of the parkland and prevents any construction on the parkland.[221]

Money In Lieu of Parkland

The State Subdivision Enabling Statutes provide that if a planning board finds that the proposed subdivision "presents a proper case for requiring a park or parks suitably located for playgrounds or other recreational purposes" but it also finds that a park, of adequate size cannot be properly located in the subdivision, the planning board is empowered to require the developer to remit a sum of money to pay for off-plat parkland. The amount of money is set by the local governing body.[222] Statute requires that any monies received for park purposes be held in a trust fund[223] "to be used [by the municipality] exclusively for park, playground or other recreational purposes, including the acquisition of property."[224] These payments are available for purchase land for park and recreational use or to make capital improvements to existing parks in the municipality in accordance with the overall needs of the area. The amount of payment is keyed to either the number of lots, the value of the land, or a combination of both. The subdivision regulations should state what the board's policy is with respect to park and recreation areas so that the subdivider knows in advance what may be required.

In *Twin Lakes Development Corp. v. Town of Monroe*,[225] the Town of Monroe Town Board established a $1,500 per lot recreational fee as a condition of approval for subdivisions of five or more lots, based on land costs in that community. The New York Court of Appeals held that it was lawful for the Town Board to legislatively set a fee in this manner rather than the fee being set based on an individualized assessment of the particular subdivision. The Court noted that the Town made explicit findings that there was a relationship between the need for additional recreational facilities in light of continued subdivision development, the "upward spiraling land costs" would worsen the problem, and the statute authorized the fees and required them to be placed in a trust fund for recreational purposes.[226]

It is important to recognize that the park and recreational areas set aside as part of the subdivision plat approval process are concerned with "the present and anticipated future requirements of the town or broader community, not the subdivision alone."[227] By contrast, the open space created from the exercise of the planning board's cluster subdivision authority is intended to be permanently preserved "*within the subdivision* and not with meeting the present and future requirements of the broader community."[228]

If a developer presents a clustered subdivision plat showing the dedication of significant amounts of open space, it does not necessarily mean that a municipality's park or recreational lands requirement has been met. Open space created through the clustering process is different from the recreational land shown on a plat and in some cases, both can be required. This was the holding in *Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*.[229] In the *Bayswater* case, 60 acres

219 See Kamhi v. Planning Bd of the Town of Yorktown, 59 N.Y.2d 385, 391 (1983).
220 Real Property Law §334.
221 O'Mara v. Town Of Wappinger, 9 N.Y.3d 303 (2007).
222 Town Law §277(4)(c); Village Law §730(4)(c); Gen. City Law §33(4)(c).
223 Gen. Mun. Law §11.
224 Town Law §277(4)(c); Village Law §730(4)(c); Gen. City Law §33(4)(c).
225 Twin Lakes Development Co. v. Town of Monroe, 1 N.Y.3d 98 (2003), cert. denied by 124 S.Ct. 1883, 158 L.Ed.2d 469 (2004).
226 For more information on this case please see the Department of State's Legal Memorandum available at https://dos.ny.gov/legal-memoranda
227 Bayswater Realty & Capital Corp. v. Planning Bd. of Town of Lewisboro, 76 N.Y.2d 460, 469 (1990).
228 Id.
229 Bayswater Realty & Capital Corp. v. Planning Bd. of Town of Lewisboro, 76 N.Y.2d 460 (1990).

of open space were created as a result of the proposed cluster development; the open space mainly consisted of wetlands and steep slopes and was unsuitable for park or recreational purposes. The Court of Appeals upheld the conditions imposed as part of the planning board's approval of the plat, requiring that the developer dedicate 60 acres of open space through the clustering process and also pay a recreational fee [230] in lieu of setting aside of land suitable for park land.

Commonly, the planning board will require the developer to show the park or recreation land on the plat or assess money in lieu thereof at the time of preliminary plat review during a two stage review. However, the Appellate Division has held that it was permissible for the planning board to wait until the final plat stage to impose the recreational fee, even though the board approved the preliminary plat without requiring such payment.[231]

Off-Site Improvements

Under the State Subdivision Enabling Statutes, planning boards have the authority to require owners to make various capital improvements *within* the subdivision. But when reviewing large subdivisions that might increase the intensity of traffic on adjoining public roads, increase storm water drainage offsite or create a need for more water and sewage facilities, the planning board cannot require the owner to make improvements *outside* the proposed subdivision. New York courts have held that subdivision plat approval cannot be conditioned on requiring an owner to make improvements to an existing public street or highway located outside the proposed subdivision.[232]

The Court of Appeals, in *Golden v. Planning Board of Ramapo*,[233] examined the constitutionality of a local ordinance prohibiting subdivision approval except where adequate public facilities or services were available. The Town of Ramapo developed a long term capital facilities plan for the provision of public services to the town, including sewers, drainage facilities, parks or recreation areas, public roads and firehouses. The plan was phased in over an 18-year period. The ordinance required that public facilities would first have to be provided to a site before a subdivision plat could be approved. The Court said that was "to prevent premature subdivision absent essential municipal facilities."[234] Developers wishing to obtain subdivision plat approval without waiting for the town approval had the option of providing the off-side improvements at their own expense and thus could obtain enough points sooner.[235]

The practical effect of this decision is that if a municipality has properly adopted a phased growth plan to provide public facilities, the implementation of which may consume a substantial period of time, the developer as a quid pro quo for accelerated project approval might be willing to voluntarily construct or install off-site improvements. A municipality considering such a plan would be well advised to study the *Ramapo* decision and the Town's ordinance. The power of planning boards to disapprove subdivisions based on inadequate municipal facilities – such as roads – is, however, not boundless and is qualified by the obligations of the municipality to maintain and repair its facilities. In *Charles v. Diamond*, a case that dealt with restrictions on sewer service connections, the Court of Appeals stated: "The municipality may not, by withholding the improvements that the municipality has made the necessary prerequisites for development, achieve the result of barring development."[236]

Although the municipality cannot require the owner to make off-site improvements, the owner

230 The Lewisboro Town Board fixed the amount of the fee for the type of land involved at $5,000 per lot. The total fee for Bayswater's subdivision of 114 lots was $570,000.

231 Joy Builders, Inc. v. Town of Clarkstown, 54 A.D.3d 761 (2nd Dept. 2008); Davies Farm, LLC v. Planning Board of Town of Clarkstown, 54 A.D.3d 757 (2nd Dept. 2008).

232 Coates v. Planning Bd. of Inc. Village of Bayville, 58 N.Y.2d 800 (1983). See also Sepco Ventures, Ltd. v. Planning Bd. of Town of Woodbury, 230 A.D.2d 913 (2nd Dept., 1996); Sanford v. Whearty, 216 A.D.2d 399 (2nd Dept., 1995); Valmont Homes v. Town of Huntington, 89 Misc. 2d 702 (Sup. Ct. Suffolk Co., 1972).

233 30 N.Y.2d 359, (1972).

234 Id. at 379.

235 Proposed residential subdivisions needed 15 development points, to be computed on a sliding scale of values assigned to specified improvements.

236 Charles v. Diamond, 41 N.Y.2d 318, 326 (1977).

may voluntarily agree through informal negotiations with the municipality to make such capital improvements to mitigate the problem and secure subdivision approval for the development. This type of agreement was discussed at length in the NYS Comptroller's Opinion 83-77. Before engaging in such arrangements, planning boards should consult their municipal attorney.

In certain circumstances, municipalities have been able to induce owners to *voluntarily* make off-site improvements in order to gain approval of the subdivision and proceed with development. Municipalities have acquired this leverage because the courts have, in certain cases, upheld the authority of planning boards to disapprove a subdivision based solely on its off-site impacts on public roads, traffic volume and on environmentally sensitive adjoining properties. In the 1971 case *Pearson Kent Corporation v. Bear*, the Court of Appeals held that a planning board may deny approval of an otherwise acceptable subdivision application on the ground that an existing road outside the subdivision was very narrow and inadequate to bear the additional traffic that would be generated by the subdivision.[237] The Court stated:

> *"In exercising its authority to grant or deny approval of a subdivision, [the planning commission] may consider the impact of the proposed development on adjacent territory and property within its jurisdiction . . . The commission is not limited, in disapproving the subdivision, to an intrinsic evaluation of the subdivision itself."*[238]

Other court decisions, following the reasoning of the *Pearson Kent*, have sustained decisions by planning boards to disapprove subdivision plats, even at the preliminary plat step,[239] because the public roads outside the development were unable to safely accommodate the additional traffic generated by the proposed subdivisions.[240]

Off-site impacts can include more than roads. In *Landing Estates Inc. v. Jones*, the court held that a planning board acted rationally in reducing the size of a subdivision from 13 to 8 lots because the higher density posed a serious risk of pollution to a unique salt water pond located just beyond the confines of the subdivision.[241]

Ownership of Streets and Parkland

Who owns the streets and parks shown on an approved subdivision plat? State Subdivision Enabling Statutes[242] provide that "[a]ll streets, highways or parks shown on a filed, or recorded plat are offered for dedication to the public unless the owner of the affected land, or the owner's agent, makes a notation on the plat to the contrary prior to final plat approval."[243] All subdivision streets and parks remain private, even after the improvements have been made and the security discharged, until the local legislative body takes its own action with respect to them.[244] Since the local legislative body is solely responsible for the acceptance of streets for public maintenance, the planning board cannot bind the municipality with respect to the acceptance of a street or a park. Most local regulations mirror this law by:

1). Asking the subdivider to note specifically on the plat all areas not to be offered for public use (or dedication) in the future

2). Requiring deeds to all areas to be offered for public use to be submitted before the plat is signed

237 28 N.Y.2d 396 (1971).
238 Id. at 398, emphasis added.
239 Stackhouse v. Planning Board of the Town of Cortlandt, 7 Misc.3d 1011(A) (Sup. Ct. West. Co. 2005).
240 See Oakwood Co. v. Planning Bd. of Town of Huntington, 89 A.D.2d 606 (2nd Dept., 1982); Ozols v. Henley, 81 A.D.2d 670 (2nd Dept., 1981); and Stackhouse v. Planning Board of the Town of Cortlandt, 7 Misc 3rd 1001 (Sup. Ct. West. Co. 2005).
241 Landing Estates, Inc. v. Jones, 67 Misc. 2d 354 (Sup. Ct. Suff. Co., 1971).
242 Town Law §279(4); Village Law §7-732(4); Gen. City Law §34(4).
243 Id.
244 Id.

3). Clearly stating the policy the municipality wishes to follow with respect to the streets and parks in the subdivision

Typically, subdividers wish to dedicate to the municipality the roads in their developments since dedication results in a transfer of a potentially substantial and ongoing liability from the developers to the public. Public ownership absolves the private owners of the future burdens of maintaining the roads and snowplowing. In the past, many municipalities readily accepted offers of dedication. Municipalities should carefully scrutinize whether it makes economic sense to accept an offer of dedication, taking into account such factors as: the municipality's budget and capital plan; its comprehensive plan; the number of residences to be served by a particular road; the extent to which the roads connect into the rest of the municipality's highway system; and whether the roads in the subdivision were constructed to municipal standards.

If the roads or parklands in a subdivision are to be kept in private ownership, the developer may create a homeowners' association composed of the future lot owners in the subdivision and transfer title of the these common areas to the association. A homeowners' association is a not-for-profit corporation created by a real estate developer for the purpose of holding title to and managing the common property of the development. It allows the developer to transfer financial and legal responsibility of the common property to the homeowners' association, typically by conveying ownership of the common property after selling a predetermined number of lots. By buying a lot and/or home, a homeowner in the subdivision automatically becomes a member of the homeowners' association and becomes responsible for paying a share of the expenses of maintaining and insuring the common property. As each lot is sold or resold, the new purchaser must become a member of the association. This requirement "runs with the land"- that is, it is written into the deed of each individual lot in perpetuity. The common property varies but can include open space, private roads, street lights and utilities, recreational amenities, commonly owned buildings, pools, and even open space. Some municipalities ensure that the open space plans for the development are properly carried out by requiring the developer to impose an "inspection easement," permitting the municipality to inspect the open spaces and check their maintenance.[245]

In such instances, the NYS Office of the Attorney General requires that the developer file an "offering plan" for the homeowners' association, pursuant to General Business Law §352-e and its implementing regulations before lots can be offered for sale. The offering plan functions as a consumer disclosure device regarding any expenses and liabilities associated with the common ownership of the roads and parklands. Property maintenance expenses, including snow plowing, road repair and liability insurance, would be privately borne by the members of the association.

A subdivision that contains a *de minimis* offering restricted to a common driveway or short roadway may qualify for an exemption from the offering plan requirement. Such exemptions are issued in the form of a "no action letter."[246] A no-action letter application contains a more limited disclosure commensurate with the *de minimis* nature of the driveway or short roadway.

Ownership and Maintenance of Open Space Created through the Cluster Process

Concern is oft expressed that the open space created through the cluster process might eventually be developed. There are a number of ways to deal with this problem and to legally ensure

245 In Matter of Smith v. Town of Mendon, 4 N.Y.3d 1 (2004), the Court of Appeals upheld a planning board's conditioning of site plan approval upon the owner's acceptance of a conservation easement which permitted the municipality on 30 days written notice to enter the property to safeguard the environmentally sensitive parcels.

246 See 13 N.Y.C.R.R. Part 22.1; https://ag.ny.gov/sites/default/files/cooperative_policy_statement_7.pdf.

that the open space will remain undeveloped and properly maintained.

The State cluster statutes provide that the planning board may "establish such conditions on the ownership, use, and maintenance of such open lands shown on the plat as it deems necessary to assure the preservation of the natural and scenic qualities of such open lands." The common open space left on a parcel of land after clustering development can be managed by a homeowners' association, the local government or other responsible entity.

When the planning board imposes restrictions on the final subdivision plat to ensure the open space remains undeveloped and the final plat is duly filed with the County Clerk, New York courts will enforce that restriction against subsequent purchasers.[247] The local legislative body also may require that conditions on ownership and maintenance of the open space be approved by it before the plat may be approved for filing. It is important to remember that the local government may not, as a condition of plat approval, compel dedication of the open land to the public without compensating the owner.[248]

The open space left on a parcel of land after clustering is often managed by a homeowners' association. Where subdivision lots are proposed to be offered to the public with a common interest in the open space, the NYS Office of the Attorney General requires that the developer file an "offering plan" for the homeowners' association, as discussed in the preceding section. The Attorney General's jurisdiction would be limited to ownership and maintenance of homeowners' association common property, and ensuring the sponsor honors commitments made in the offering plan.

Occasionally, the developer or the residents of the subdivision may request that the municipality take title to, and maintain, the open space. Having the municipality take title to the open land relieves the subdivision residents of the obligation to maintain, insure and pay taxes on it. Where the municipality takes title to donated park, the property cannot be limited to the residents of the subdivision but must be open to the general public.[249]

Performance Guarantees

The State Subdivision Enabling Statutes were written to ensure the provision of necessary improvements in a new development. Customary practice has shifted from infrastructure improvements being made at public expense to the cost of improvements being the developer's responsibility. This arrangement has several important community benefits: it reduces the municipal budget for the expansion of public infrastructure; it helps avoid unforeseen or emergency work to provide improvements to new developments; and it provides a method for inducing the developer to make improvements in a reasonable period of time.

Under State law, the subdivision improvements must be fully installed by the developer after the planning board passes a resolution approving the final subdivision plat but before the final subdivision plat is signed by the planning board chair or other duly authorized member. If the infrastructure is to be installed and if all required improvements are not completed within the period specified in the planning board resolution of approval, plat approval will expire unless the period is extended by resolution of the planning board.

As an alternative to the installation of infrastructure and improvements prior to signing of the final subdivision plat, the developer may submit a financial guarantee to underwrite the cost of fulfilling the conditions. If the planning board agrees and the guarantee is executed in a sufficient amount to cover such costs, the plat may be signed before the conditions have been met.[250]

Pursuant to State statute, several types of security arrangements may be utilized to assure that the required improvements are provided. These include: a performance bond issued by a bonding or surety company; funds placed on deposit or in a certificate of deposit with a bank or trust company; an irrevocable letter of credit issued by a bank located and authorized to do business in the United

247 O'Mara v. Town Of Wappinger, 9 N.Y.3d 303 (2007).
248 Kamhi v. Planning Board of the Town of Yorktown, 59 N.Y.2d 385 (1983).
249 Atlantic Beach Property Owners' Association v. Town of Hempstead, 3 N.Y.2d 434 (1957).
250 Town Law §277(9); Village Law §7-730(9); Gen. City Law §33(8).

States; or any obligations issued by, or fully guaranteed by, the United States government. The developer must enter into a written security agreement with the local legislative body, approved by the municipal attorney, running for a maximum of three years unless extended by mutual consent of the board and the developer.[251] The planning board determines the term of the security agreement. The principal considerations in deciding upon a security agreement are as follows:

1.) Determination, by the subdivider, of whether or not infrastructure improvements will be completed before plat is filed (in which no security is required), or after filing (in which security is required).

2.) Determination by the planning board of the probable cost of the infrastructure improvements to be covered and the time period within which work must be completed.

3.) Review of the adequacy of the security and the form of the agreement by the local legislative body and the municipal attorney.

4.) Appropriate reference to the terms of the security agreement in the resolution of the planning board approving the plat.

5.) Inspection of construction of the improvements for consistency with specifications.

6.) Release of the security upon satisfactory completion of work.

7.) Action to Foreclose the Security If the Owner Fails to Perform

If the infrastructure improvements are not installed within the term of the security agreement, the planning board may declare the agreement in default, collect the remainder of the security and, with the proceeds, install the needed improvements.

Modification of Security

For a variety of reasons, the developer may seek modification of the performance guarantee. The initial term for the completion of all required improvements as set forth in the performance guarantee may not exceed three years and may only be extended with the consent of all parties to the agreement.[252] Before consenting to an extension, the municipality should consider the amount of work that has been completed, the reasons for failure to complete the remainder of the work within the specified period, the maximum estimated time required to complete the remainder of the work and the time period extension which is requested. In the event that the security expires and is not renewed, the municipality bears no responsibility, unless a special relationship exists, to future lot purchasers for the improvements in the subdivision have not been completed by the developer.[253]

As improvements are installed, an applicant may request that the amount of the posted security be reduced. The local legislative body may, if it determines that sufficient required improvements have been installed, reduce the face amount of the security by an appropriate amount so that the new amount will cover the cost in full of all required improvements remaining to be completed. After all the improvements are completed, the security posted by the developer to guarantee construction of the improvements must be returned.

251 Id.

252 The Appellate Division in Mount Florence Group v. City of Peekskill, 235 A.D.2d 787 (3rd Dept. 1997) held that where a developer mistakenly kept performance bonds in force beyond the statutory three year period, they were enforceable as common law bonds by the municipality. The municipality however has no power to require the developer to post bonds beyond that period.

253 Diesenhouse v. Town of Wallkill, 184 A.D.2d 966 (3rd Dept. 1992).

Part VII: Enforcement

To effectively control the subdivision of land, a municipality must have the means to prevent the creation of unlawful subdivisions and the ability to punish violators. Planning and zoning officials in municipalities unable to enforce their subdivision regulations are sometimes under pressure to ease the hardships of unwary purchasers of improperly and unlawfully subdivided lands. These local officials must also make the best of haphazard and unlawful subdivision designs. Failure to enforce subdivision regulations can undermine a municipality's land use plans.

Who Enforces Subdivision Regulations?

While planning boards approve subdivision plats, they do not have any enforcement powers. Under State law, in municipalities that have adopted zoning, the subdivision regulations are generally enforced by the zoning enforcement officer.[254] In towns and villages without zoning, subdivision regulations are typically enforced by the building inspector or code enforcement officer.[255] In much of New York, the duties of a zoning enforcement officer and a building inspector or code enforcement officer are carried out by the same person.

Enforcement Tools

Municipalities have four basic enforcement tools against those who fail to comply with local subdivision regulations: fines and imprisonment; court-issued injunctions against the sale of lots and improvements; the withholding of building permits for unapproved lots; and the prohibition on the filing of unapproved subdivisions with the county clerk.

Criminal Fines and Imprisonment

Cities, towns and villages are authorized by Municipal Home Rule Law §10(4)(b) to provide for the criminal enforcement of their subdivision regulations by fine, imprisonment, or both. The Municipal Home Rule Law authority is not, however, self executing. Cities, towns and villages must enact local laws to impose criminal fines and other penalties for violations of the subdivision regulations.[256] Criminal fines must be consistent with the designation and classification of offenses under the Penal Law.[257] For towns, Town Law §268 provides a more specific source of authority and sets up a schedule for fines and/or imprisonment. However, while the Village Law provides specific authority for a village to enforce its subdivision regulations through actions for an injunction, it does not address fines or penalties for subdivision violations.[258] Villages must rely on their home rule powers to establish criminal fines and penalties.

Criminal remedies consisting of fines and imprisonment must be pursued in local criminal courts, which are the town or village justice courts and the city courts. Only courts can actually impose punishment. Even if they have prescribed fines and penalties for the violation of their subdivision regulations, municipalities cannot act as prosecutors and judges or juries of their own cases.

254 There are no State statutory provisions authorizing the creation of the office of zoning enforcement officer, in contrast to the office of the building inspector under Town Law §138. Nonetheless, Municipal Home Rule Law §10(1)(a) authorizes counties, cities, towns and villages to create municipal departments and establish the duties of the department.

255 See Town Law §138.

256 Earlier New York State statutes established a method of subdivision control adoption that is no longer permissible. Many older subdivision controls were adopted as administrative regulations of the planning board. These regulations were then adopted by the planning board upon public hearing by the planning board and a resolution of approval by the town or village board.

257 Op. Attorney General Inf. 2004-14.

258 See Village Law §7-714 (authorizing village authorities, "in addition to other remedies," to institute actions to prevent, correct or abate situations where "any land is divided into lots, blocks or sites in violation of this act.").

Civil Penalties and Injunctions

Municipal Home Rule Law §10(4)(b) allows cities, towns and villages to provide for civil penalties for subdivision violations. Town Law §268 provides a more specific source of authority for towns which allows for civil remedies. In the case of civil penalties, cities and villages can rely on Municipal Home Rule Law §10(4)(b).[259] Cities can also authorize or prescribe fines and penalties through their charters. As with criminal penalties, though municipalities can prescribe the forms of relief, they cannot act as prosecutor and also judge or jury. The court will determine the penalty.

Municipal Home Rule Law §10(4)(b) also allows cities, towns and villages to seek injunctions through the court system. An injunction is a court order requiring an individual to refrain from committing a violation or to remedy an existing violation. In the case of subdivision enforcement, an injunction may be sought, for example, to stop a repeated violation (such as installation of defective water wells or sanitary sewer systems) or the sale of lots in an unapproved subdivision. Failure to obey such an order may be punishable by civil and criminal contempt of court. An injunction may also be sought to remove a subdivision plat that was unlawfully filed in the county clerk's office without local planning board approval.

Towns possess specific authority to seek injunctions under the Town Law §268. With respect to injunctions, Village Law §7-714 provides a specific source of authority for villages. Injunctions are issued by the New York State Supreme Court. Town and village justice courts cannot issue injunctions. Based on an amendment to the City Court Act, city courts now have power to issue temporary restraining orders and preliminary injunctions.[260] A temporary restraining order maintains the status quo while a motion is brought for a preliminary injunction. A preliminary injunction is a form of injunction that maintains the status quo while the case is pending.

Withholding Building Permits

A municipality may use its local law powers to prohibit building permits from being issued for lots in unapproved subdivisions. This can induce developers to comply with subdivision requirements as a means of ensuring the future possibility of developing or of selling developable lots.

Prohibition on Filing With County Clerk

Town Law §279, Village Law §7-732 and General City Law §34 prohibit the filing of plats in the office of the county clerk without local planning board approval.[261] Real Property Law §333 prohibits the filing of individual deeds for subdivided lands without indicating on the Real Property Transfer Report Form, RP-5217, whether the lot is part of a subdivision, and, if so, whether the subdivision has been approved by the local planning board. While this procedure might seem to be a foolproof means of stopping deeds of unapproved lots from being filed, the county clerk may inadvertently file the deed if the Real Property Transfer Report Form does not accurately indicate that the parcel is a portion of a larger parcel and that subdivision approval was required. The report form must be signed by the seller and the purchaser. A certification at the bottom of the form reads:

> *"I certify that all of the items of information entered on this form are true and correct (to the best of my knowledge and belief) and I understand that the making of any willful false statement of material fact herein will subject me to the provisions of the Penal Law relative to the making and filing of false instruments."*

259 Village Law §20-2010 authorizes penalties for violations of the zoning and subdivision articles of the Village Law. This section, however, only pertains to village ordinances that were adopted prior to September 1, 1974. After that date, villages no longer had the authority to adopt ordinances. Instead, they were required to rely on their Municipal Home Rule Law authority as exercised through the adoption of local laws.

260 Uniform City Ct. Act §209(b)(2-a).

261 These statutes also require the county clerk to notify the planning board each time a plat has been filed within three days of filing.

The penalty for failure to file a subdivision plat was increased in 2006 from $25, to a minimum of $25 and a maximum $300 for every lot sold or conveyed prior to the filing being made. The resulting penalty funds collected are now equally divided three ways: between the State, the municipality in which the subdivision is located and the county.[262]

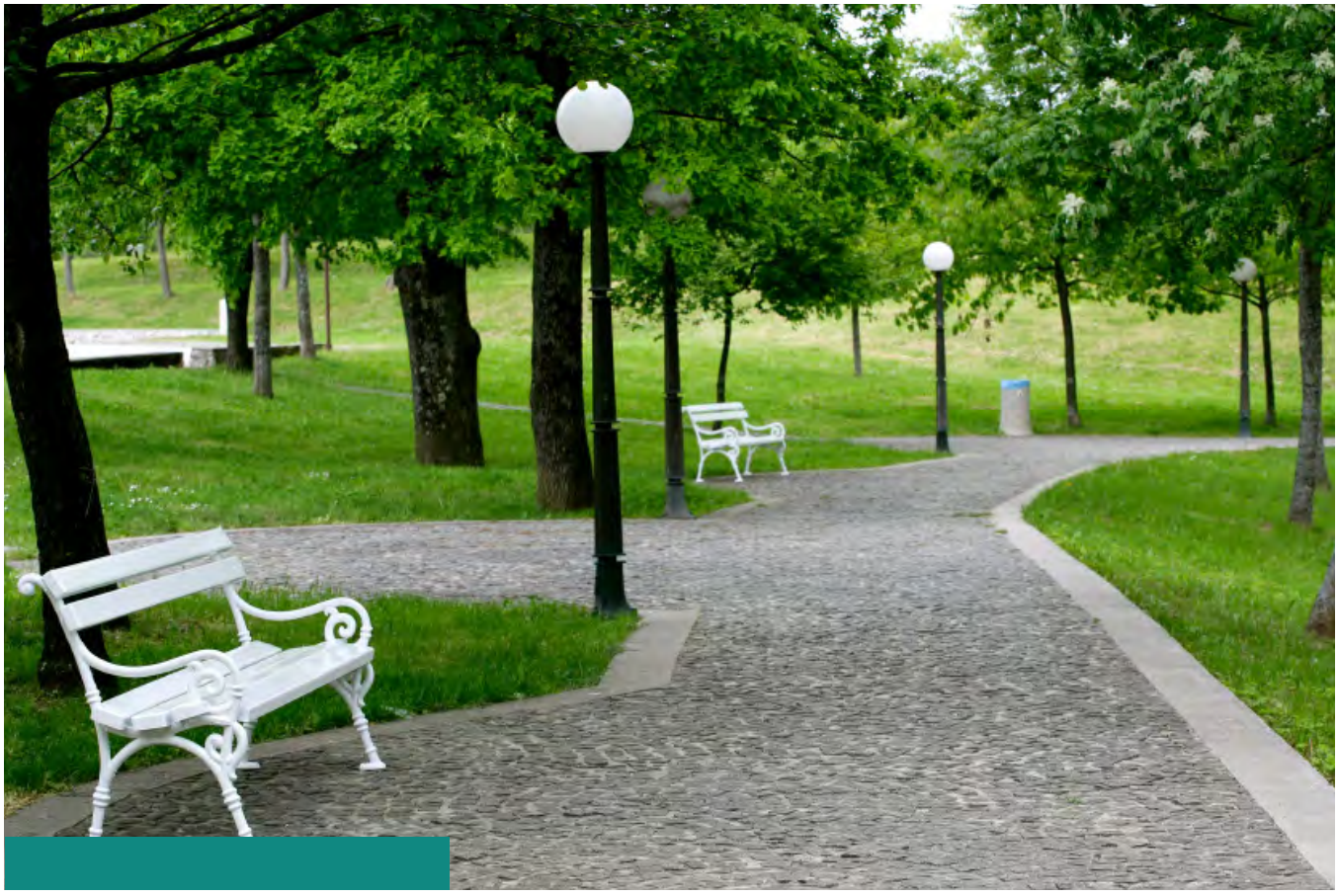
Other Aids to Subdivision Compliance

There are a number of other notifications that can assist enforcement efforts. First, it is mandatory under Town Law §276, Village Law §7-728 and General City Law §32 to notify the county clerk when plat approval authority is granted to the planning board. This will put the county clerk on notice to stop the filing of deeds and plats that have not received local planning board approval.

Copies of the subdivision regulations might be sent to local surveyors and engineers who routinely do work in the municipality. This will help them to properly advise clients who are considering subdivision. For the same reason, it may also be advisable to send notification letters to local attorneys, banks, real estate companies and title insurers that subdivision controls are in effect. One or more press releases explaining the regulations might also be useful. Some municipalities post signs at their boundaries notifying the public that land use controls are in effect.

Thorough record keeping is also essential to effective enforcement. The planning board needs to take complete minutes of meetings and keep records of findings and checklists of actions taken. These documents are necessary to bring actions against unlawful subdivision activities.

262 Real Property Law §334 as amended by Chapter 687 of the Laws of 2005.



Part VIII: Local Subdivision Regulations

The State Subdivision Enabling Statutes list the items to be considered by the planning board and the general procedures to be followed for submission and review of subdivision plats,[263] but each municipality may decide whether to enact its own subdivision regulations. Subdivision regulations can be customized to fit the character of the individual municipality with specific standards expressing the municipality's plan for the character of development it wishes to encourage. The regulations should contain a schedule of standards, procedures, and requirements that must be met by the developer to obtain subdivision approval from the planning board.

Procedure for Adoption of Regulations

The need for adopting local "subdivision regulations" was anticipated by the State in those sections of the statutes where the planning board is given the general authority to *recommend* "regulations relating to any subject matter over which the planning board has jurisdiction . . ."[264] Under State law, the planning board may propose the subdivision regulations, but the subdivision regulations only become effective upon adoption by the local legislative body by local law or ordinance. The planning board and the local legislative body play integral roles in creating subdivision regulations.

In adopting subdivision regulations, municipalities must follow the procedures common to the adoption of local laws and ordinances, including compliance with the State Environmental Quality Review (SEQR) and the Open Meetings Law. The adoption of local laws is discussed in detail in the Department of State publication, Adopting Local Laws in New York State.

A required step in this process is to hold a public hearing on the local law or ordinance enacting the subdivision regulations. See **Figure 14 – Notice of Public Hearing,** for a typical public hearing notice for newspaper publication by a town.

If, after comments received at the public hearing, the local legislative body determines that substantial changes in the proposed regulations are necessary, it may be necessary to hold a second public hearing on the changes, with additional newspaper notice. The guidance of the municipality's attorney should be obtained to determine if the changes are substantial enough to necessitate a second hearing.

Upon satisfying itself that the regulations are suitable, and after the hearing has been closed, the local legislative body may adopt the local law or ordinance to enact the subdivision regulations. See **Figure 15 – Town Board Action,** for a typical resolution adopting the regulations, for use by a town board.

Administrative Aids

The text of the subdivision regulations should inform subdividers of where to obtain application information along with other details about the application process to bring to their initial meeting with the planning board. Having a clear subdivision application process with aids such as application forms, affidavits of ownership, security agreements, board resolutions and letters explaining the process will smooth the course of plat approval for both developers and planning boards. Application forms should require information on the project (official name, owner of record, addresses of agents, tax lot descriptions, etc.) and serve as a partial record of the board's activity (date of application, fee required, etc.). Some planning board clerks provide a preliminary plat application and checklist to

263 Town Law §277, Village Law 7-730 and General City Law §33.
264 Town Law §271(13); Village Law §7-718(13); Gen. City Law §27(13).

applicants, listing the information needed at this stage.

The municipality's maps should be updated as each new subdivision is filed, since each subdivision, when approved, automatically becomes a part of these maps.

Notice of Public Hearing

PLEASE TAKE NOTICE, that the Town Board of the Town of _____ will hold a public hearing, pursuant to section 271 of the Town Law, on a local law to adopt subdivision regulation for the Town.

The Planning Board recommended these subdivision regulations to the Town Board and if approved by the Town Board shall thereafter regulate and control the subdivision of land in the Town of _____. The subdivision regulations include provisions relating to procedure, definitions, and standards for the subdivision of land, standards for preliminary plats and final plats, and miscellaneous provisions. Copies of the complete text of said regulations may be viewed at the Office of the Town Clerk during regular business hours or are available on the Town's website at [insert website].

The public hearing will be held on _____, at _____ o'clock P.M. at the Town Hall, at which times all interested persons shall be given an opportunity to be heard.

Source: NYSDOS

Figure 14: NOTICE OF PUBLIC HEARING

This example of a notice of public hearing concerns a town's adoption of subdivision regulations. In the notice, the contents of the new regulations are briefly described and the public is informed of where they can access the complete subdivision regulations document. The notice must state where and when the hearing will take place. For the adoption of local laws, according to statute, at least five days must lapse between the notice of public hearing and the public hearing itself. The local government may, however, adopt a local law setting its own hearing-notice requirement for all local laws adopted by that municipality.

Town Board Action

WHEREAS, the Town Board of the Town of _____ has determined that it is desirable that said Planning Board be provided with regulations for its use in carrying out subdivision control in this town, and

WHEREAS, the Planning Board has transmitted to this Board a copy of its resolution dated _____ recommending the text of Subdivision Regulations for the Town and

WHEREAS, a public hearing has been held and public comment received on the text of said regulation.

THEREFORE BE IT RESOLVED, that (1) pursuant to the authority of the Town Law, this Board does approve the local law establishing Subdivision Regulations for the use by the Planning Board of _____, (2) a copy of this resolution will be transmitted to the Planning Board for its record.

Dated: _____

Vote: _____

Source: NYSDOS

Figure 15: Town Board Action Resolution

The authority to enact subdivision controls is granted to towns by State Statute in Town Law. This town board resolution officially adopts the new subdivision regulations after a public hearing and gives the planning board the authority to carry out the subdivision review process.

Examples of Subdivision Regulations

No set of subdivision regulations neatly fits the circumstances of every New York community. Good subdivision regulations are uniquely tailored to suit local needs. For that reason, the Department of State avoids publishing model regulations and opts instead for examples of laws adopted by various municipalities.

With those warnings and for illustrative purposes only, internet links to subdivision regulations are attached for reference purposes. Others can be obtained by calling the staff of Department's Division of Local Government staff. The Department cannot and does not guarantee or endorse the legal efficacy of these regulations.

City of Saratoga Springs
https://ecode360.com/27985106

Town of Guilderland (Chapter 247)
http://www.ecode360.com/?custId=GU1600

NOTES:

NOTES:

NOTES:

SW NAVIGATOR LOOP
SW 24TH AVENUE
SITE
N87°46'25"W
74.30'
13
N87°45'53"W
130.01'
N87°50'29"W
90.17'
89.83'
22
35
90.12'
89.89'
23
34
90.00'
11
10
12
91.51'
R/C SET
3.0' OFFSET
21
36
65.00'
60.00'
20' PUBLIC PEDESTRIAN ACCESS ESMT & CITY UTILITY ESMT
10' UTILITY EASEMENT
EAST LINE NW 1/4, NW 1/4, SEC. 10
N61°21'56"W
84.08'
N26°18'06"E
111.43'
N89°29'47"E
PRIVATE STORMWATER TRACT
FACILITY
Crescent Lake
Bog

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