



STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

DAVID A. PATERSON
GOVERNOR

LORRAINE A. CORTÉS-VÁZQUEZ
SECRETARY OF STATE

July 17, 2009

By Email & Mail
Jerome Donovan, Chair
Town of New Hartford
Planning Board
111 New Hartford Street
New Hartford, NY 13413

Re: Site Plan Review Procedures

Mr. Donovan:

This letter replies to your email inquiries and our recent conversations surrounding a 1999 amendment to the Code of the Town of New Hartford (Town Code), entitled the "Business Park Zoning and Design Guidelines".¹

The enactment mentioned in your inquiries is local law number seven of 1999 (L.L. 7-1999) and, according to its filing documents, the changes made in that local law "pertain[] to property fronting New York State Route 5, a description of which is set forth in Section 2 [of L.L. 7-1999], and [the enactment also] chang[es] the designation of property from PDP (Planned Development District) to Business Park District..." The local law sought to not only create a new zoning district called the Business Park District (BP District), but to establish a developmental review process for projects to be located therein. Further, the law sought to require that all projects for new or existing occupants be conducted by a body comprised of "the Superintendent of Highways; the Codes Enforcement Officer; the Town Planner and/or Engineer and the Planning Board Chairperson or their designee" (hereafter "Staff Review Board"). This Staff Review Board is to have "final approval authority concerning proposed projects."

The above-described enactment, according to you, is akin to a site plan review law and based on that classification you asked whether the Town Board of the Town of New Hartford (Town Board) properly designated the Staff Review Board under Town Law §274-a or whether it properly delegated review under the Municipal Home Rule Law (MHRL). You also asked whether the district sought to be created is in effect an overlay district.

In addressing the issue of whether the Town Board properly vested review authority in the Staff Review Board, we must first consider the source of authority invoked by the board to enact L.L. 7-1999. In New

¹ To better address your inquiries, a copy of the local law filing that was made with the Secretary of State and created the "Business Park District" was obtained (referred herein as "L.L. 7-1999). The zoning section of the Code of the Town of New Hartford (referred herein as "Town Code"), as found at <http://www.ecode360.com/?custId=NE0673>, was also reviewed. In addition, portions of the zoning section of the Town Code, namely "Schedule of Use, Area and Bulk Regulations referenced in Section 118-10, was obtained from you via fax.

York, towns may use the specific legislative authority found in Article 16 of the Town Law (known as the zoning enabling laws for towns) or the separate and independent source of authority found in Article 2 and Article 3 of the MHRL (known as the home rule authority) to enact zoning and other land use regulations.

The zoning regulations for the Town of New Hartford are found in Chapter 118 of the Town Code (Zoning Code). Article I, §118-2 of the Zoning Code recites as its legislative authority Article 2 and Article 3 of the MHRL and Article 16 of the Town Law. It would be reasonable to conclude that the authority recited in Section 118-2 is applicable throughout the Zoning Code. Since the legislative authority for the adoption of L.L. 7-1999, if not the Town Law, would be the MHRL, the use of either statute would therefore form a proper basis for its enactment.

We next consider, in light of your description that L.L. 7-1999 is akin to a site plan review law, whether the Staff Review Board was properly vested with the power of review. Section 274-a(2)(a) of the Town Law (which is part of Article 16) specifically authorizes town boards to designate in their zoning ordinance or other local law the planning board or “such other administrative body” to review and approve site plans.² To the extent that L.L. 7-1999 is a site plan review law adopted under the authority of Town Law §274-a, the Town Board could validly designate the Staff Review Board because there is no requirement under New York State statutory law that site plan review be conducted by a town planning board.³ The delegation of review authority within the BP District to the Staff Review Board would also be permissible under the legislative authority of Section 10 of the MHRL.⁴ Therefore, the

² We note that Article VIIA of the New Hartford Code does not recite Town Law Section 274-a as its source of authority. However, in the Article V of the Zoning Code, entitled “Site Plan Review,” it is expressly stated that review and approval is to be done in accordance with Town Law §274-a and the requirements established in said article.

At the same time, Article VI entitled “Special Use Permits” does not reference Town Law §274-b, the state special use permit law. It however, states throughout the article that it is a special use permit provision.

³ It should be noted here that the Article V of the Zoning Code establishes procedures for site plan review in the Town. There is a question as to whether the review established under Article V excludes the Business Park District.

⁴ MHRL § 10 confers at least two separate types of authority on towns to enact land use regulations. **Error! Main Document Only.** First, MHRL §10(1)(ii)(a)(14) authorizes a towns to adopt local laws, which are not inconsistent with the constitution or any general law, with regard to “[t]he powers granted to it in the Statute of Local Governments.” The Statute of Local Governments §10(6) in turn gives towns the power to “adopt, amend and repeal zoning regulations” and Section 10(7) grants the “power to perform comprehensive or other planning work relating to its jurisdiction.”

A limitation in the use of this authority is that the specific enactment not be in conflict with a “general law.” A general law is a state law that applies in terms and in effect to all municipalities of a particular type. MHRL §2(5). The Town Law is a general law. Therefore, under this MHRL section, zoning regulations must not be inconsistent with the zoning enabling provisions of the Article 16 of the Town Law.

A second section of the Municipal Home Rule Law, §10(1)(ii)(d), authorizes towns to supersede or modify certain provisions of the Town Law, in their application to the particular town. This means that even though the Town Law is a general law, towns are authorized to supersede its provisions when acting within the scope of its home rule powers.

Specifically, MHRL §10(1)(ii)(d)(3) permits a town to amend or supersede, in its local application:

“any provision of the Town Law relating to its property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law.”

Staff Review Board could receive its authority of review detailed in L.L. 7-1999 based upon the authority of either the MHRL or Section 274-a of the Town Law.

However, there is no express language in L.L. 7-1999 that it is a site plan review law. The law instead makes clear from its title that it is a “zoning and design guidelines” law. Typical zoning enactments create districts and set regulations of the uses allowed, the area allowed for such use, and the density and intensity of development.⁵ L.L. 7-1999 is no different since it establishes the BP District and sets forth the uses, area, and density of development to be permitted therein. The local law also permits the Staff Review Board to set “Site Area Standards” from among three choices, a feature not seen in typical site plan review laws.⁶

At the same time, the title also states that L.L. 7-1999 is a “design guidelines” law. Site plan regulations are commonly considered as those that regulate the design and layout of development on a single lot, block, site or plot. Communities that have adopted site plan review do not have to have zoning in effect and it is not uncommon for site plan laws to be titled “design guidelines”. But, while a review of the L.L. 7-1999 may lead one to conclude that it does regulate the design and layout of development, it also does more.⁷ As established above the law is a zoning law. In addition, Section 3.1.18.1.6 of L.L. 7-1999, entitled “Development and Performance Standards”, sets forth less typical site plan review provisions that focus on air quality and promotes solar efficiency. Because this law goes beyond site plan review and has typical zoning characteristics, the authority for its enactment must be the separate and the entirely permissible source of authority found in Article 2 and 3 in the Municipal Home Rule Law.

It should be also noted that Article V of the Zoning Code already provides for site plan review and, interestingly, one of the factors that trigger site plan review under that article is development of all commercial uses throughout the Town.⁸ Reading Article V together with Article VIIA⁹ would indicate

We note that there is no indication in the text of L.L. 7-1999 that it was intended to supersede any provisions of the Town Law.

⁵ Please note that more information on zoning generally may be found in *Adopting Zoning for the First Time*, a James A. Coon Local Government Technical Series publication located on the Department of State website at <http://www.dos.state.ny.us>.

⁶ L.L. 7-1999, Section 3.1.18.1.5.3, entitled “Site Area Standards” states:

“The following standards shall apply to and be uniform throughout the District:

1. Site Area – Development shall require a minimum site area of three (3) acres.
2. Undersized Site Areas – Development may be established on a site of less than three (3) acres if approved by [the Staff Review Board].
3. Site Area Partitions and Subdivisions – [the Staff Review Board] approval of an overall development plan for the site area, including circulation, parking, landscaping, and proposed building elevations, shall be required prior to the approval of any partition or subdivision of a site area.”

⁷ Section 3.1.18.1 of L.L. 7-1999, the “Purpose” section states:

“The Town of New Hartford has an opportunity to create a high-tech business park along Seneca Turnpike. This area of the Town is home to PAR Technology which is a significant employer in the community. The area offers a unique opportunity for the Town of New Hartford to expand its existing industrial base with coordinated, well-planned industrial projects as outlined in the PAR Technology Park Feasibility Study completed in 1995. This industrial development will help to stabilize the economy of New Hartford while providing jobs for residents in the region.”

⁸ Section 118-13 of the Town Code states as follows:

that commercial uses which fall within the BP District must undertake not only review as set forth in L.L. 7-1999 but site plan review before the Town Planning Board. "Commercial use" does not appear to be a use category allowed in the BP District. Uses that are typically associated in commercial districts are, although they do not seem to trigger the two-tier review before both the Staff Review Board and the Planning Board. A reasonable interpretation of the "Primary Uses and Structures" section of L.L. 7-1999¹⁰ might conclude that commercial type uses or developments are provided for thereby triggering the two-tiered review before both boards. In the event of such interpretation, developmental review for those projects should be before both the Staff Review Board and the Planning Board.

The question remains whether L.L. 7-1999 created an overlay district within the Town, especially since as you stated, the Town Board intended to create an overlay district through enactment of the law.¹¹ An overlay district is a mapped district superimposed over one or more established zoning districts. Within the boundaries of an overlay district, additional requirements supplement the underlying zoning standards and other regulations. In my opinion, no overlay district was created. The filing documents for L.L. 7-1999 expressly describes the law as "changing the designation of property from PDP (Planned Development District) to Business Park District..." Since the text of the local law does not state otherwise, it appears that the underlying zoning district, the PDP, did not remain upon enactment of L.L. 7-1999 and to create an overlay district the newly created district should be superimposed over one or more established zoning districts.

During our conversations you expressed concern that at least one project, sited outside the boundaries of the BP District, might have undergone developmental review pursuant to the process detailed in L.L. 7-1999. You asked for guidance dealing with what might be an error in developmental review.

"All land use activities which meet one or more of the criteria below shall, prior to the issuance of a building permit, receive site plan approval from the Planning Board, pursuant to the procedures and standards of this article of this chapter:

- A. All special uses listed in the Schedule of Use, Area and Bulk Regulations and all those special uses identified elsewhere in this chapter.
- B. All land use activities proposed within the boundaries of any overlay district, described in Article VIII of this chapter, and shown on the Town of New Hartford Zoning Map.
- C. All planned developments, after approval by the Town Board according to the procedures in Article VII.
- D. All uses requiring site plan review listed in Schedule of Use, Area and Bulk Regulations and elsewhere in this chapter
- E. All commercial uses."

⁹ L.L. 7-1999 amended the Zoning Code and added a new Article VIIA.

¹⁰ L.L. 7-1999, Section 3.1.18.1.4.5, entitled "Primary Uses and Structures" states in relevant part:

"The following uses may be established when they satisfy the purpose of Business Park District, uniformity requirements of the District and development standards of the Business Park District as determined by [the Staff Review Board]:

1. Research – Research offices and laboratories, including testing, provided such testing complies with the environmental standards contained herein for the Business Park District.
2. Offices – Corporate headquarters, regional headquarters and administrative offices within twenty-five (25) or more employees. Local service offices such as real estate sales, insurance agencies, doctor's offices, or other offices typically found in commercial districts may only be included in a structure or integrated complex of at least 50,000 square feet of developed gross floor area."

¹¹ Town of New Hartford Town Board Meeting Minutes, dated October 6, 1999, p. 5, stated:

"This 197 acres of proposed park district is what constitutes the proposed overlay district within the existing zoning and is entitled Business Park District. It includes land to the north of Seneca Turnpike and on both the east and west side of Woods Highway."

As a general rule, a municipal board can exercise only those powers delegated to it under statute, local law or other regulation and such board is not prevented from discharging with an administrative error that was made in violation of law. (*Parkview Associates v. City of New York*, 71 N.Y.2d 274, 519 N.E.2d 1372 (N.Y. 1988).) The Court of Appeals, in *Parkview Associates v. City of New York*, held that New York City could not be estopped or prohibited from revoking a permit issued in clear violation of its zoning provisions even though the building for which the permit was issued was under construction and already several stories higher than the zoning provided. This case is consistent with the view in New York that “[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error” (*Morley v. Arricale*, 66 N.Y.2d 665, 667, 495 N.Y.S.2d 966, 486 N.E.2d 824). If improper review procedures were followed in the situation as you have described, there is enough basis in law to subject the property owners to the proper review procedures. Steps should also be taken to ensure that future developments in the town are subject to proper developmental review procedures as set forth in the Town Code.

Finally, you asked whether the Staff Review Board is subject to the requirements of the Open Meetings Law.¹² This question should more rightly be directed to the Committee on Open Government, the body that issues advisory opinions related to the Open Meetings Law. You might also find helpful past advisory opinions of the Committee on Open Government located on the Department of State website at <http://www.dos.state.ny.us/coog>. Direct inquiries to the Committee on Open Government may be done by contacting (518) 474-2518.

The Secretary of State through the Department of State is authorized to provide advice to the local governments pursuant to *Executive Law, Article 6-B*. This information is provided pursuant to that authorization, but is informal only and should not be construed as giving legal advice for which you should consult with counsel. Further, this advice is not binding on any person or municipality.

Sincerely,



Natasha E. Phillip
Senior Attorney

¹² Article 7 of the Public Officers Law is entitled the Open Meetings Law.