



Hot Button Land Uses

A Division of the New York Department of State

Can a use be prohibited?

Exclusionary Zoning

- Regulations that singly or in concert tend to exclude low or moderate income housing municipal-wide, for example:
 - Large lot or high minimum square footage requirement
 - Excluding multiple dwellings or mobile home

Most non-residential uses may be zoned out if the exclusion is supported by the comprehensive plan



Spot zoning

- Parcel can be rezoned to allow use supported by comprehensive plan
- Zoning changes must be reasonably related to legitimate public purposes

“the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . .”

Rogers v. Tarrytown, 302 NY 115, 96 NE2d 731 (1951)

Inform and involve

- Unearth controversy early
 - Receptive to change
 - Before the public feels steamrolled
- Potentially controversial projects
 - Hold informational meetings with residents & stakeholders



Positive press for controversial issues

Bad press usually results from ignorance, not bias:

- Inaccurate, or wrong conclusions from facts
- Accurate, but unfavorable tone
- Overly selective or unbalanced reporting
- Blurred lines between fact and opinion



Remedy ignorance with non-confrontation

- Be prepared to correct false assumptions
- Response plan: phone, press release, news conference
- One spokesperson controls message

Community opposition



If already permitted by zoning, and requirements are met, then community opposition is generally not a valid basis for denying most applications

Comprehensive planning

- Reduces controversy
- Legal support
- Infrastructure investments
 - Identifies areas for municipal & private investment
- Public input on controversial issues

Municipalities with Comprehensive Plans	
• Cities	92%
• Towns	71%
• Villages	66%
• All	76%

Source: NYS Legislative Commission on Rural Resources (2008)

Moratoria

Adopt moratorium law to:

- Update comprehensive plan to consider new uses
- Update regulations to prevent:
 - hasty decision
 - unplanned & inefficient growth
 - construction inconsistent with comprehensive plan



Wrong reasons for moratoria:

- Slow development hoping developer will go away
- Halt development while municipality considers buying land

Examples

Barn special events & activities

- Catering
 - Weddings, parties, charity events
- Tasting rooms
 - Wineries, distilleries



On Farm Wineries and Distilleries

License issued by the State Liquor Authority (SLA) may or may not be considered a "farm operation" for purposes of AML §305-a protection



State Alcoholic Beverage Control Laws define:

- Farm Cidery
- Farm Distillery
- Farm Winery
- Farm Brewery

A Partnership to Review Impacts

Agriculture & Markets

- Farm operation?
- In an agricultural district
- Zoning definitions
- Is activity permitted
- Require a variance
- Cost and time, etc.

Municipal regulations

- Reasonable
- Public health & safety threatened
- Amendments needed
- Is an expedited review an option?

Barn Weddings without Ag District Protection

If the barn is not in a state ag district or barn rental revenue exceeds that of food production, municipalities can restrict



- Hours of operation
- Number of events per month
- Prohibit regular rentals of farm buildings for weddings



Manufactured homes

- Federal:
 - Construction & Safety
- State:
 - Uniform Code
 - Manufacturer’s Manual
 - NYS Dept. of Health:
 - Mobile home parks with 5 or more homes
 - Sanitary Code Part 17



Manufactured homes

- Health, safety & general welfare of the public
- Zoning
 - Lot size & setbacks
 - Special Use Permit
- Site Plan Review
- N.Y. Executive Law, Article 21-B, Title 2
 - Effective 11/20/15
 - Manufactured Home = Single Family Dwelling
 - “Identical Development Specification and Standards”

Farm worker housing

- Agriculture & Markets Law §25-AA
 - State Certified Agricultural Districts
- Address in zoning or adopt local law
 - Show proof of continuing employment on the farm
 - Do not allow the creation of new lots
 - Do not allow permanent additions to the home

Drones (Unmanned Aerial Vehicles)

- Federal Aviation Administration (FAA) regulates airspace
- All manned or unmanned aircraft requires need FAA approval
- Commercial use currently regulated on a case-by-case basis
- State and Local Laws attempting to regulate aircraft under the FAA's jurisdiction have been unsuccessful when challenged in court.



FAA proposed rules for commercial use

Commercial use	Recreational use
<ul style="list-style-type: none"> • Must be operated below 500 feet and under 100 miles per hour. • Small drone must be less than 55 lbs. • Must be within operator's eyesight. • Can only be operated during the day. • Prospective drone operators need to pass a test of aeronautical knowledge. 	<ul style="list-style-type: none"> • Should be operated below 400 ft. • Must be within the operator's eyesight. • Should not be flown within 5 mile radius of an airport. • Should not be operated recklessly

Mining

Regulate with zoning:

- Restrict to districts or municipal-wide
- SUP with conditions:
 - Ingress & egress
 - Truck routes



Regulate without zoning:

- Site Plan Review

DEC mining permit process

Municipalities submit recommendations to NYS DEC:

Setbacks from

- property boundaries
- public R-O-W
- Dust control
- Hours of operation
- Barriers restricting access



Cell towers as public utility

- Cell towers defined as a public utility
- Compelling reasons to grant use variance:
 - Necessary to provide safe & adequate service
 - Significant gaps in coverage if placed on alternative sites



Cellular Telephone Co. v. Rosenberg (NYS Court of Appeals, 1993)

Telecommunications Act of 1996

Municipality must not

- Prohibit personal wireless service
- Unreasonably discriminate among providers
- Regulate based on health effects from RF emissions

Municipality must

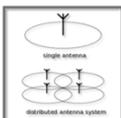
- Act on applications within "reasonable period of time"
 - 90 days for co-locations
 - 150 for new

Section 6409



Middle Class Tax Relief & Job Creation Act of 2012

- Applies to support structures and to transmission equipment used with any Commission-licensed or authorized wireless transmission
- Limits local control of co-location and replacement of equipment on existing towers
- Good news: increased use of DAS (distributed antenna system) technology



A diagram contrasting a single antenna configuration with DAS

Dish antenna (1m or less)

Over-the Air Reception Devices (OTARD) Rule

Municipality cannot:

- Delay or prevent signal use
- Unreasonably increase cost of installation

Municipality can:

- Regulate for safety
- Regulate in historic districts by least burdensome, clearly defined restrictions



www.fcc.gov/mb/facts/otard.html

Street vendors and food trucks



PROS

- Low cost for both owners and customers
- Convenient
- Variety of food choices
- Creation of dynamic "urban" environment

CONS

- Congestion, litter
- Complicated and inconsistent permitting
- Unfair advantage to bricks and mortar food establishments

*Vendors cannot comply with vending laws they do not understand, be clear!

Street Vendors and Food Trucks

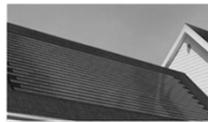


Consider Regulating

- Vending districts
- Distance from curb (don't crowd sidewalks), business entrances, crosswalk, bus stop, restaurant, etc.
- Amount of time vendors can remain in one location
- Permit fees
- Increase number of permits for fresh fruits/veggies
- Justify regulations by citing pedestrian congestion and other effects of street vending, not protection of other businesses

Solar systems

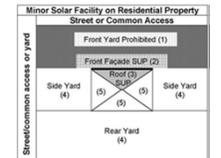
- Scale
- Solar access
- Comprehensive Plan
 - Policy statement
 - Resource map
- Potential adverse impacts
 - Glare
 - Neighborhood character



Residential/small solar

Regulations & review

- Street & lot layout
- Setbacks
 - Solar setback
 - "Solar fence"
- Height
 - Building Code or incentive zoning



Solar systems & historic resources

Design Guidelines for Solar Installations (National Trust for Historic Preservation)

- locate on non-historic buildings or additions
- minimize their visibility from the road
- avoid permanent loss of character-defining features



Commercial/ industrial solar

- Special Use Permit
- Site Plan Review
- Industrial & agricultural zones
- Adverse impacts
- Lot size
- Screening
- Safety
- Decommissioning
- Public Service Law Article 10



Wind turbines

Distinguish between residential, agricultural or commercial turbines

- Regulate with zoning:
 - Restrict to districts or municipal-wide
 - Setbacks
 - Sound
 - Special Use Permit (SUP)
- Regulate without zoning:
 - Site plan review
- Article 10



Pet facilities & uses

Commercial

- Veterinarians & animal hospitals
- Kennels, day care & boarders
- Groomers
- Breeders
- Trainers

Non-commercial

- Adoption centers
- Pounds
- Shelters
- Private pet ownership

Pet facilities & uses

Regulate or require

- Number of animals
- Minimum lot size & setbacks
- Parking requirements
- Hours outside on run
- Sound attenuation, buffering & screening
- Emergency response plan

Reviews

- With zoning:
 - Special Use Permit
 - Site Plan review
- Without zoning
 - Site plan
- Ability to impose condition on approval

Pet facilities & uses

Doggie day care

- Define use
 - Number of dogs per day
 - No overnights
- Potential impacts
 - Noise
 - Parking
 - spaces per dog/ staff
 - drop off area
 - Location



“Commercial facility for supervised dog care for less than 24 hours a day, not including facilities that provide boarding, breeding or selling of dogs, or facilities whose primary revenue is licensed veterinarian services.”

Backyard chickens

PROS

- Urban agriculture movement
- Inexpensive protein source
- Therapeutic and educational
- Little space needed

CONS

- Noisy roosters (not hens)
- Fowl odor?
- Decreased property value fears
- May attract pests (foxes, coyotes)



Consider regulating:

- ✓ Number of birds, gender
- ✓ Setbacks for coops/pens
- ✓ Feed storage location
- ✓ Fences
- ✓ Cage size, height, materials

Group homes for the disabled

- “A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances.”
 - Mental Hygiene Law § 41.34
- Will facility result in a concentration of similar homes to the extent that community character is altered?



Religious Land Use & Institutionalized Persons Act (RLUPA)

- Religious uses are not exempt from land use regulations
- Municipalities may not:
 - Place “substantial burden”
 - Zone out of residential districts
 - Prohibit if impact similar to other allowed uses



Regulate characteristics influencing physical environment: lot coverage, parking, signage

Nonretail uses in retail districts

Nonretail uses in “storefronts”

- Reduces critical mass of central business district

Zoning Tools:

- Exclude residential on first floor
- Minimum percentage street-level retail
- SUP for nonretail



Large-scale retail

- Maximum square footage
 - Absolute
 - SUP
- Economic Impact Study through SEQR
- Review criteria
 - Architectural style
 - Landscaping
 - Buffering & screening
 - Parking requirements



Short-term rental housing

- Precise definitions are essential:
 - Generally rented for less than 30 days
 - Permanent provision for living, sleeping, eating, cooking, and sanitation
 - Owner not necessarily on premises



Short-term rental housing

Pros	Cons
<ul style="list-style-type: none"> • Supplemental income to owners • Discounted lodging and interesting tourist experience for guests 	<ul style="list-style-type: none"> • Transient guests • Excessive noise • Increased traffic • Commercial use in residential district • Unfair competition to hotels • Lost lodging tax revenue • Inflated housing costs

Quantitative Restrictions

- Restrict by zoning district
- Cap number of permits
- Proximity restrictions
- Maintain ratio of long-term dwelling units to short-term units



Operational Restrictions

- Maximum occupancy limits
- Rental period and frequency
- Parking
- Noise
- Emergency access
- Mandatory designated representatives
- Trash and refuse



Adult uses

- Cannot prohibit
 - 1st Amendment Protection
- Regulate with zoning
 - Must provide viable locations
 - Definitions must be clear
- Aim regulations at secondary effects



Billboards

- Can't regulate content
 - 1st Amendment protection
- Regulate size & location:
 - State Uniform Code
 - Zoning
 - Site Plan Review
 - Local Permit
- NYS DOT regulates signs along interstate & primary highways
 - Municipality may be more restrictive than DOT



Temporary signs

- Regulate physical characteristics:
 - traffic safety, aesthetics, property values
- Regulation should be content neutral:
 - size, height & location:
 - ban all signs on public property
 - Permits: apply to all signs
 - Duration: apply evenly
 - Fees: relate to administrative costs



Medical Marijuana: Legislation

- Federal Controlled Substances Act (CSA)
- NYS Compassionate Care Act 2014
 - S7923/A6357-E
- NYS Medical Marijuana Program
 - Administered by the NYS Department of Health
 - Rolled out 1/7/16



Dispensary in Manhattan
Credit: Benjamin Norman for The NY Times

Local regulation of Medical Marijuana

- Police power: enact regulations regarding dispensaries necessary to protect public welfare of people in community
- Nuisance law: file public nuisance actions against dispensaries to abate "conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all"
- Currently no case law to suggest local bans of dispensaries would be invalidated
 - Concerned municipalities should commission health impact assessments

Registered organizations by county

Dispensaries

- Albany
- Bronx
- Broome
- Clinton
- Erie
- Fulton
- Monroe
- Nassau
- Manhattan
- Onondaga
- Orange
- Queens
- Suffolk
- Ulster
- Warren
- Westchester

Manufacturing

- Fulton
- Monroe
- Orange
- Queens
- Warren

Home day care

Comprehensive plan should recognize need for residential day care and identify appropriate areas; zoning should follow suit

Enforceable:

fire, building and health regulations

Not enforceable:

anything beyond the underlying residential use, i.e.:

- minimum lot size
- minimum floor-space per child
- off-street parking
- off-street pickup/drop-off areas
- no outdoor play area after ___ P.M.

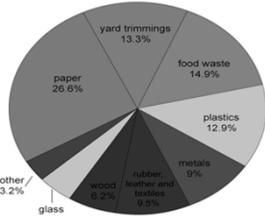
Definitions are important:

- "Family home day care" and "Group family home day care" allowed by right in single-family and multi-family dwellings
- "Child day care center" and "school age child care" are different, and fully subject to zoning

Composting



Total MSW generation in the United States by type of waste, 2014
Total = 258 million tons



Commercial/municipal food composting

With zoning

- define: principal or accessory use
- compost source: generated on or offsite
- materials: plant-based food scraps; unharvested crops; animal waste
- setbacks: location of bins, piles, rows and distance from streets/buildings
- size: maximum square footage/cubic yards on parcel

Without zoning

- Nuisance controls to thwart odors and vermin/pests; access to water/moisture minimums

DEC requires permit/registration depending upon the operation's size; regardless, local approvals are still needed.

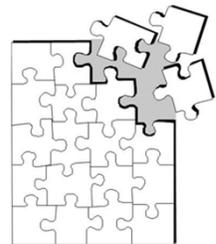


Defending Your Decisions

The Record

Materials in the record tell the story of the application & typically include:

- Application & supporting documentation
- Newspaper notices
- Meeting minutes
- SEQR materials
- Public hearing testimony
- Written submissions from public
- Expert opinion
- Decision, conditions, findings



Findings

- Describe application's reasons for denial or approval & may support:
 - Why a condition was imposed
 - Decision if challenged in court
- Conclusory statements are not "Findings"
 - "The standards were not met."
- A decision based on conclusory statements is:
 - Not supported by factual information in the record
 - Will be struck down in the courts

NYS Department of State Local Government Division

- Training Unit: (518) 473-3355
- Counsel's Office: (518) 474-6740
- Toll Free: (800) 367-8488
- Email: localgov@dos.ny.gov
- Website: www.dos.ny.gov
- www.dos.ny.gov/lq/lut/index.html

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EDITED EXCERPTS FROM THE FEDERAL COMMUNICATIONS COMMISSION (FCC)
INFORMATION SHEET

Over-the-Air Reception Devices Rule (OTARD)

Preemption of Restrictions on Placement of Direct Broadcast Satellite, Broadband Radio Service, and
Television Broadcast Antennas

December 2007

This Information Sheet, available the FCC website: <http://www.fcc.gov/mb/facts/otard.html>, provides general answers to questions concerning implementation of the rule, but is not a substitute for the actual rule. For further information or a copy of the rule, contact the FCC at 888-CALLFCC (toll free) or (202) 418-7096.

As directed by Congress in Section 207 of the Telecommunications Act of 1996, the FCC adopted the Over-the-Air Reception Devices ("OTARD") rule concerning governmental and nongovernmental restrictions on viewers' ability to receive video programming signals from direct broadcast satellites ("DBS"), broadband radio service providers (formerly multichannel multipoint distribution service or MMDS), and television broadcast stations ("TVBS"). The OTARD rule (47 C. F. R. Section 1.4000) became effective in October 1996 and prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming.

Q: What types of antennas are covered by the rule?

A: The rule applies to the following types of antennas:

- (1) A "dish" antenna that is one meter (39.37") or less in diameter (or any size dish if located in Alaska) and is designed to receive direct broadcast satellite service, including direct-to-home satellite (dishes) service, or to receive or transmit fixed wireless signals via satellite.
- (2) An antenna that is one meter or less in diameter or diagonal measurement and is designed to receive video programming services via broadband radio service (wireless cable) or to receive or transmit fixed wireless signals other than via satellite. "Fixed wireless signals" are any commercial non-broadcast communications signals transmitted via wireless technology to and/or from a fixed customer location, which include wireless signals used to provide telephone service or high-speed Internet access to a fixed location.
- (3) An antenna that is designed to receive local television broadcast signals (TV antennas).

Q: What restrictions are permitted if the antenna must be on a very tall mast to get a signal?

A: If you have an exclusive use area that is covered by the rule and need to put your antenna on a mast, the local government, community association or landlord may require you to apply for a permit for safety reasons if the mast extends more than 12 feet above the roofline. If you meet the safety requirements, the permit should be granted.

Note that the rule only applies to antennas and masts installed wholly within the antenna user's exclusive use area. "Exclusive use" means an area of the property that only you, and persons you permit, may enter and use to the exclusion of other residents. Masts that extend beyond the exclusive use area are outside the scope of the rule. For installations on single family homes, the "exclusive use area" generally would be anywhere on the home or lot and the mast height provision is usually most relevant in these situations.

For example, if a homeowner needs to install an antenna on a mast that is more than 12 feet taller than the roof of the home, the homeowners' association or local zoning authority may require a permit to ensure the safety of such an installation, but may not prohibit the installation unless there is no way to install it safely.

On the other hand, if the owner of a condominium in a building with multiple dwelling units needs to put the antenna on a mast that extends beyond the balcony boundaries, such installation would generally be outside the

scope and protection of the rule, and the condominium association may impose any restrictions it wishes (including an outright prohibition) because the Commission rule does not apply in this situation.

In addition, antennas covered by the rule may be mounted on "masts" to reach the height needed to receive or transmit an acceptable quality signal (e.g. maintain line-of-sight contact with the transmitter or view the satellite). Masts higher than 12 feet above the roofline may be subject to local permitting requirements for safety purposes. Further, masts that extend beyond an exclusive use area may not be covered by this rule.

Q: Does the rule apply to commercial property or only residential property?

A: Nothing in the rule excludes antennas installed on commercial property. The rule applies to property used for commercial purposes in the same way it applies to residential property.

Q: Does the rule apply to hub or relay antennas?

A: Effective May 25, 2001, the FCC amended the rule to apply to "customer-end antennas" that receive and transmit fixed wireless signals. "Customer-end antennas" are antennas placed at a customer location for the purpose of providing service to customers at that location. The rule does not cover antennas used to transmit signals to and/or receive signals from multiple customer locations.

Q: What types of restrictions are prohibited?

A: The rule prohibits restrictions that impair a person's ability to install, maintain, or use an antenna covered by the rule. The rule applies to state or local laws or regulations, including zoning, land-use or building regulations, private covenants, homeowners' association rules, condominium or cooperative association restrictions, lease restrictions, or similar restrictions on property within the exclusive use or control of the antenna user where the user has an ownership or leasehold interest in the property. A restriction impairs if it: (1) unreasonably delays or prevents installation, maintenance or use of; (2) unreasonably increases the cost of installation, maintenance or use; or (3) precludes a person from receiving or transmitting an acceptable quality signal from an antenna covered under the rule. The rule does not prohibit legitimate safety restrictions or restrictions designed to preserve designated or eligible historic or prehistoric properties, provided the restriction is no more burdensome than necessary to accomplish the safety or preservation purpose.

Q: What types of restrictions unreasonably delay or prevent viewers from using an antenna? Can an antenna user be required to obtain prior approval before installing his antenna?

A: A local restriction that prohibits all antennas would prevent viewers from receiving signals, and is prohibited by the Commission's rule. Procedural requirements can also unreasonably delay installation, maintenance or use of an antenna covered by this rule. For example, local regulations that require a person to obtain a permit or approval prior to installation create unreasonable delay and are generally prohibited.

Permits or prior approval necessary to serve a legitimate safety or historic preservation purpose may be permissible. Although a simple notification process might be permissible, such a process cannot be used as a prior approval requirement and may not delay or increase the cost of installation. The burden is on the association to show that a notification process does not violate our rule.

Q: What is an unreasonable expense?

A: Any requirement to pay a fee to the local authority for a permit to be allowed to install an antenna would be unreasonable because such permits are generally prohibited. It may also be unreasonable for a local government, community association or landlord to require a viewer to incur additional costs associated with installation. Things to consider in determining the reasonableness of any costs imposed include: (1) the cost of the equipment and services, and (2) whether there are similar requirements for comparable objects, such as air conditioning units or trash receptacles. For example, restrictions cannot require that expensive landscaping screen relatively unobtrusive DBS antennas. A requirement to paint an antenna so that it blends into the

background against which it is mounted would likely be acceptable, provided it will not interfere with reception or impose unreasonable costs.

Q: What restrictions prevent a viewer from receiving an acceptable quality signal? Can a homeowners association or other restricting entity establish enforceable preferences for antenna locations?

A: For antennas designed to receive analog signals, such as TVBS, a requirement that an antenna be located where reception would be impossible or substantially degraded is prohibited by the rule. However, a regulation requiring that antennas be placed where they are not visible from the street would be permissible if this placement does not prevent reception of an acceptable quality signal or impose unreasonable expense or delay. For example, if installing an antenna in the rear of the house costs significantly more than installation on the side of the house, then such a requirement would be prohibited. If, however, installation in the rear of the house does not impose unreasonable expense or delay or preclude reception of an acceptable quality signal, then the restriction is permissible and the viewer must comply.

The acceptable quality signal standard is different for devices designed to receive digital signals, such as DBS antennas, digital broadband radio service antennas, digital television ("DTV") antennas, and digital fixed wireless antennas. For a digital antenna to receive or transmit an acceptable quality signal, the antenna must be installed where it has an unobstructed, direct view of the satellite or other device from which signals are received or to which signals are to be transmitted. Unlike analog antennas, digital antennas, even in the presence of sufficient over-the-air signal strength, will at times provide no picture or sound unless they are placed and oriented properly.

Q: Can a restriction limit the number of antennas that may be installed at a particular location?

The Commission's rule covers the antennas necessary to receive service. Therefore, a local rule may not, for example, allow only one antenna if more than one antenna is necessary to receive the desired service.

Q: Are all restrictions prohibited?

A: No. Clearly-defined, legitimate safety restrictions are permitted even if they impair installation, maintenance or use provided they are necessary to protect public safety and are no more burdensome than necessary to ensure safety. Examples of valid safety restrictions include fire codes preventing people from installing antennas on fire escapes; restrictions requiring that a person not place an antenna within a certain distance from a power line; and installation requirements that describe the proper method to secure an antenna. The safety reason for the restriction must be written in the text, preamble or legislative history of the restriction, or in a document that is readily available to antenna users, so that a person who wishes to install an antenna knows what restrictions apply. Safety restrictions cannot discriminate between objects that are comparable in size and weight and pose the same or a similar safety risk as the antenna that is being restricted.

Restrictions necessary for historic preservation also may be permitted even if they impair installation, maintenance or use of the antenna. To qualify for this exemption, the property may be any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places. In addition, restrictions necessary for historic preservation must be no more burdensome than necessary to accomplish the historic preservation goal. They also must be imposed and enforced in a non-discriminatory manner, as compared to other modern structures that are comparable in size and weight and to which local regulation would normally apply.

Q: Whose antenna restrictions are prohibited?

A: The rule applies to restrictions imposed by local governments, including zoning, land-use or building regulations; by homeowner, townhome, condominium or cooperative association rules, including deed restrictions, covenants, by-laws and similar restrictions; and by manufactured housing (mobile home) park owners and landlords, including lease restrictions. The rule only applies to restrictions on property where the viewer has an ownership or leasehold interest and exclusive use or control.

Q: Does the rule apply to residents of rental property?

A: Yes. Effective January 22, 1999, the FCC amended the rule to apply to renters who install antennas within their leasehold, which means inside the dwelling or on outdoor areas that are part of the tenant's leased space and which are under the exclusive use or control of the tenant. "Exclusive use" means an area of the property that only you, and persons you permit, may enter and use to the exclusion of other residents. For example, your apartment may include a balcony, terrace, deck or patio that only you can use, and the rule applies to these areas. For rented single family homes or manufactured homes which sit on rented property, these areas include the home itself and patios, yards, gardens or other similar areas. If renters do not have access to these outside areas, the tenant may install the antenna inside the rental unit.

Q: If I live in a condominium, does this rule apply to me?

A: The rule applies to owners of condominiums, cooperatives, townhomes, manufactured homes, and single family homes who place antennas that meet size limitations on property that they own or rent and that is within their exclusive use or control as described above.

The rule does not apply to common areas that are owned by a landlord, a community association, or jointly by condominium or cooperative owners where the antenna user does not have an exclusive use area. Such common areas may include the roof, the hallways, the walkways or the exterior wall of a multiple dwelling unit. For example, restrictions that prevents drilling through the exterior wall of a condominium or rental unit, which may prohibit installation that requires such drilling, could be enforced.

Q: Are there restrictions that may be placed on residents of rental property?

A: Yes. A restriction necessary to prevent damage to leased property may be reasonable, such as, prohibiting the drilling of holes through an exterior wall. In addition, rental property is subject to the same protection and exceptions to the rule as owned property. Thus, a landlord may impose other types of restrictions that do not impair installation, maintenance or use under the rule. The landlord may also impose restrictions necessary for safety or historic preservation.

Q: Does the rule apply to condominiums or apartment buildings if the antenna is installed so that it hangs over or protrudes beyond the balcony railing or patio wall?

A: No. The rule does not prohibit restrictions on antennas installed beyond the balcony or patio of a condominium or apartment unit if such installation is in, on, or over a common area. An antenna that extends out beyond the balcony or patio is usually considered to be in a common area that is not within the scope of the rule. Therefore, the rule does not apply to a condominium or rental apartment unit unless the antenna is installed wholly within the exclusive use area, such as the balcony or patio.

Q: If my association, building management, landlord, or property owner provides a central antenna, may I install an individual antenna?

A: Generally, the availability of a central antenna may allow the association, landlord, property owner, or other management entity to restrict the installation by individuals of antennas otherwise protected by the rule. Restrictions based on the availability of a central antenna will generally be permissible provided that: (1) the person receives the particular video programming or fixed wireless service that the person desires and could receive with an individual antenna covered under the rule (*e.g.*, the person would be entitled to receive service from a specific provider, not simply a provider selected by the association); (2) the signal quality of transmission to and from the person's home using the central antenna is as good as, or better than, the quality the person could receive or transmit with an individual antenna covered by the rule; (3) the costs associated with the use of the central antenna are not greater than the costs of installation, maintenance and use of an individual antenna covered under the rule; and (4) the requirement to use the central antenna instead of an individual antenna does not unreasonably delay the viewer's ability to receive video programming or fixed wireless services.

Q: I want a conventional "stick" antenna to receive a distant over-the air television signal. Does the rule apply to me?

A: No. The rule does not apply to television antennas used to receive a distant signal.

Q: I want to install an antenna for broadcast radio or amateur radio. Does the rule apply to me?

A: No. The rule does not apply to antennas used for AM/FM radio, amateur ("ham") radio (see 47 C.F.R. §97.15), Citizen's Band ("CB") radio or Digital Audio Radio Services ("DARS").

Q: I want to install an antenna to access the Internet. Does the rule apply to me?

A: Yes. Antennas designed to receive and/or transmit data services, including Internet access, are included in the rule.

Q: Does this mean that I can install an antenna that will be used for voice and data services even though it does not provide video transmissions?

A: Yes. The most recent amendment expands the rule and permits you to install an antenna that will be used to transmit and/or receive voice and data services, except as noted above. The rule will also continue to cover antennas used to receive video programming.

Q: What can a local government, association, or consumer do if there is a dispute over whether a particular restriction is valid?

A: Restrictions that impair installation, maintenance or use of the antennas covered by the rule are preempted (unenforceable) unless they are needed for safety or historic preservation and are no more burdensome than necessary to accomplish the articulated legitimate safety purpose or for preservation of a designated or eligible historic site or district. If a person believes a restriction is preempted, but the local government, community association, or landlord disagrees, either the person or the restricting entity may file a Petition for Declaratory Ruling with the FCC or a court of competent jurisdiction. We encourage parties to attempt to resolve disputes prior to filing a petition. Often contacting the FCC for information about how the rule works and applies in a particular situation can help to resolve the dispute. If a local government, community association, or landlord acknowledges that its restriction impairs installation, maintenance, or use and is preempted under the rule but believes it can demonstrate "highly specialized or unusual" concerns, the restricting entity may apply to the Commission for a waiver of the rule.

SEQRA, ZONING REGULATION AND THE NORTH ELBA WAL-MART DECISION

Wal-Mart Stores, Inc. applied for a conditional use permit and site plan approval from the Town of North Elba to construct a store in the Adirondacks just outside the resort village of Lake Placid in a Scenic Preservation Overlay District with views of Whiteface Mountain. The Town's Planning Board denied the permits and Wal-Mart challenged the decision. The court held that a municipality may use the potential adverse economic and community-character impacts of a proposed "big-box" development on existing, small retail businesses as bases for the denials. A town's conditional (special) use permit regulation, however, must contain properly-worded explicit standards. In addition, the potential negative economic impact of the "big-box store" on smaller retail businesses and the visual, aesthetic, community-character and other socio-economic impacts must be explained in the State Environmental Quality Review Act (SEQRA) documents, local resolutions and findings.

The North Elba Planning Board had adopted a final environmental impact statement (EIS) that addressed the project's potential visual impact on scenic values and its effects on the community's general character and ambience. The EIS also analyzed secondary growth effects from increased competition and potential store closings on the adjacent Town and nearby Lake Placid Village areas. The SEQRA findings noted these significant adverse socio-economic and community character impacts.

The court also found, however,

[h]ere, it must be borne in mind that respondent concluded not only that the proposal did not meet the requirements of SEQRA, but also that it did not satisfy the relevant criteria set forth in the Town Land Use Code, including two of the three specific conditions for obtaining a conditional use permit (namely, those providing that a permit will only be granted if the proposed use "will not have a materially adverse impact upon adjoining and nearby properties," and "will not result in a clearly adverse aesthetic impact"). Additionally, respondent found that several "general development considerations," which it was constrained to evaluate and which have as their aim the avoidance of "any undue adverse impact on the natural, physical, social and economic resources of the Town," were not met. In making these findings, respondent was entitled to consider factors outside the scope of the environmental review mandated by SEQRA, insofar as they bear on matters legitimately within the purview of the Town Land Use Code.

The decision underscores that a municipality should conduct comprehensive planning and

- identify areas requiring special visual, aesthetic, community character and socio-economic protection;
- include specific standards for review in the zoning code;
- develop a strong record;
- derive conclusions from a thorough analysis of the impacts on the affected community; and
- articulate the reasons for denials.

It is important to remember, however, that permit denials based upon generalized opposition or sentiment unsupported by the written record are not likely to be upheld by the court.

Excerpt from an article entitled: *Store Size Cap - North Elba, NY*, published by The New Rules Project of the Institute for Local Self-Reliance on the New Rules website: <http://www.newrules.org>

Residents of North Elba, New York spent five years trying to stop Wal-Mart from erecting an 80,000-square-foot store within their town. The town's planning board rejected the retailer's plans in January 1996, citing several reasons including the fact that "the project will likely result in a large amount of impacted retail space (83,000 to 114,000 square feet), which could take up to 14 years to refill, over 20,000 square feet of which could become chronically vacant. These potential impacts would have a significant unmitigatable adverse impact on the character and culture of the community by resulting in vacant storefronts, a loss of 'critical mass' in existing downtown areas, and an adverse psychological, visual and economic climate."

The planning board was sued by Wal-Mart, which claimed its decision was unsubstantiated, arbitrary and capricious. Wal-Mart argued that the rejection of its proposal was based on impermissible considerations, including the economic impact of the development. A New York appellate court upheld the planning board, finding that although its decision "refers to the economic effect the proposed store would be expected to have upon other local businesses, it does so in the context of assessing the probability and extent of the change it would work upon the overall character of the community, as a result of an increased vacancy rate among commercial properties in the downtown area---an entirely proper avenue of inquiry. . ."

The ordeal prompted the community to enact a size cap ordinance limiting single retail stores to 40,000 square feet and capping shopping centers at 68,000 square feet.

Enacted in February 1998, North Elba's retail size cap was part of a larger law that amended various parts of the Town Land Use Code. The relevant portion is excerpted here.

Section 12. Part V Section 17 (D) of said local law is hereby amended by adding a new subparagraph (22), to read as follows:

(22) Retail Trade Uses; Grouped Retail Business Uses.

A. An individual Retail Trade use shall not exceed 40,000 square feet of floor area, whether in one building or more than one building.

B. A Grouped Retail Business Use shall not exceed a total of 68,000 square feet of floor area, in all buildings which constitute the use.

C. For the purpose of the size limits set forth in clauses A and B, floor area shall include floor area or floor space of any sort within a building as well as exterior space used for sale or storage of merchandise.

New York

Environmental Conservation Law

Article 23

Title 27- NEW YORK STATE MINED LAND RECLAMATION LAW

§ 23-2711. Permits.

1. After September first, nineteen hundred ninety-one, any person who mines or proposes to mine from each mine site more than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months or who mines or proposes to mine over one hundred cubic yards of minerals from or adjacent to any body of water not subject to the jurisdiction of article fifteen of this chapter or to the public lands law shall not engage in such mining unless a permit for such mining operation has been obtained from the department. A separate permit shall be obtained for each mine site.

2. Applications for permits may be submitted for annual terms not to exceed five years. A complete application for a new mining permit shall contain the following:

- (a) completed application forms;
- (b) a mined land-use plan;
- (c) a statement by the applicant that mining is not prohibited at that location; and
- (d) such additional information as the department may require.

3. Upon receipt of a complete application for a mining permit, for a property not previously permitted pursuant to this title, a notice shall be sent by the department, by certified mail, to the chief administrative officer of the political subdivision in which the proposed mine is to be located (hereafter, "local government"). Such notice will be accompanied by copies of all documents which comprise the complete application and shall state whether the application is a major project or a minor project as described in article seventy of this chapter.

(a) The chief administrative officer may make a determination, and notify the department and applicant, in regard to:

- (i) appropriate setbacks from property boundaries or public thoroughfare rights-of-way,
- (ii) manmade or natural barriers designed to restrict access if needed, and, if affirmative, the type, length, height and location thereof,
- (iii) the control of dust,
- (iv) hours of operation, and
- (v) whether mining is prohibited at that location.

Any determination made by a local government hereunder shall be accompanied by supporting documentation justifying the particular determinations on an individual basis. The chief administrative officer must provide any determinations, notices and supporting documents according to the following schedule:

- (i) within thirty days after receipt for a major project,
- (ii) within thirty days after receipt for a minor project.

(b) If the department finds that the determinations made by the local government pursuant to paragraph (a) of this subdivision are reasonable and necessary, the department shall incorporate these into the permit, if one is issued. If the department does not agree that the determinations are justifiable, then the department shall provide a written statement to the local government and the applicant, as to the reason or reasons why the whole or a part of any of the determinations was not incorporated.

(c) A proposed mine of five acres or greater total acreage, regardless of length of the mining period, shall be a major project. The department shall, by regulation, provide a minimum thirty day public comment period on all permit applications for mined land reclamation permits classified as major projects.

4. Upon approval of the application by the department and receipt of financial security as provided in section 23-2715 of this title, a permit shall be issued by the department. Upon issuance of a permit by the department, the department shall forward a copy thereof by certified mail, to the chief executive officer of the county, town, village, or city in which the mining operation is located. The department may include in permits such conditions as may be required to achieve the purposes of this title.

5. A permit issued pursuant to this title or a certified copy thereof, must be publicly displayed by the permittee at the mine and must at all times be visible, legible, and protected from the elements.

6. The department may suspend or revoke a permit to mine for repeated or willful violation of any of the terms of the permit or provisions of this title or for repeated or willful deviation from those descriptions contained in the mined land-use plan. The department may refuse to renew a permit upon a finding that the permittee is in repeated or willful violation of any of the terms of the permit, this title or any rule, regulation, standard, or condition promulgated thereto.

7. Nothing in this title shall be construed as exempting any person from the provisions of any other law or regulation not otherwise superseded by this title.

8. Notwithstanding any other provision of law, counties, cities, towns and villages shall be exempted from the fees for the permit, application, amendment and renewal required by this article.

9. Counties, cities, towns and villages shall not be required to obtain a permit if such county, city, town or village mines or proposes to mine from any mine site less than one thousand tons or seven hundred fifty cubic yards, whichever is less, of minerals from the earth within twelve successive calendar months and which does not require a permit pursuant to title five of article fifteen of this chapter.

10. The applicant, permittee or, in the event no application has been made or permit issued, the person engaged in mining shall have the primary obligation to comply with the provisions of this title as well as the conditions of any permit issued thereunder.

11. Permits issued pursuant to this title shall be renewable. A complete application for renewal shall contain the following:

(a) completed application forms;

(b) an updated mining plan map consistent with paragraph (a) of subdivision one of section 23-2713 of this title and including an identification of the area to be mined during the proposed permit term; (c) a description of any changes to the mined land-use plan; and

(d) an identification of reclamation accomplished during the existing permit term.

12. The procedure for transfer of a permit issued pursuant to this title is the procedure for permit modification pursuant to article seventy of this chapter.

12-a. (a) Notwithstanding any provision of this section to the contrary, any person who engages in or proposes to engage in bluestone mining exploration shall not commence such exploration unless a written authorization for such exploration has been obtained from the department. The department may grant an

authorization for bluestone mining exploration for a period of at least one hundred eighty days and not to exceed one year where the land affected by mining will not exceed one acre, and is not adjacent to any body of water. Bluestone to be removed from the site may not exceed five hundred tons in twelve successive calendar months and any overburden shall remain on the one acre site at all times. As used in this subdivision, the term "bluestone" means quartz/feldspathic sandstone of Devonian age, which is easily separated along bedding planes.

(b) Only persons with five or fewer employees shall be eligible to apply for an authorization for bluestone mining exploration, provided, however that a small business shall be eligible to apply on behalf of such a person. A person may possess no more than five authorizations for bluestone mining exploration at any one time, and no such authorizations shall be for adjacent sites. As used in this paragraph, "small business" means any business which is resident in this state, independently owned and operated, not dominant in its field, and employing not more than one hundred individuals.

(c) An application for authorization must be submitted on a form prescribed by the department at least forty-five days before exploration and removal of bluestone is expected to commence. The requirements of such application shall include, but not be limited to, a description of the proposed activity, a map showing the area to be affected by mining, with the location of the one acre site on which mining activities are proposed and a statement that such mining activities conform with local zoning, copies of any local permits, and measures to control erosion of sediment and prevent contamination of groundwater or adverse impacts to aquifers. Upon receipt of a complete application for bluestone mining exploration authorization, for a property not previously authorized pursuant to this subdivision, a notice shall be sent by the department, by certified mail, to the chief administrative officer of the political subdivision in which the proposed bluestone mine is to be located. Such notice shall be accompanied by copies of all documents which comprise the complete application. The chief administrative officer may make a determination within thirty days after receipt accompanied by supporting documentation justifying the particular determinations on an individual basis pursuant to subparagraphs (i), (ii), (iii), (iv) and (v) of paragraph a of subdivision three of this section.

(d) An authorization for bluestone mining exploration issued pursuant to this subdivision must be publicly displayed by the holder at the one acre site and must at all times be visible, legible and protected from the elements.

(e) The person engaged in bluestone mining exploration shall complete reclamation, in accordance with requirements set forth by the department, no later than one year from the date of authorization by the department unless the person engaged in mining obtains a renewal of the authorization or a permit pursuant to this title. An authorization issued pursuant to this section may be renewed for an additional one year term upon application to the department at least thirty days prior to the expiration of the authorization. The total authorization period shall not exceed two years. Before the department may issue a bluestone mining exploration authorization, the applicant shall furnish acceptable financial security. Department review of acceptable financial security shall be governed by the provisions set forth in section 23-2715 of this title and the regulations promulgated pursuant to such section. There shall be no fee for such authorization.

(f) On or before March fifteenth, two thousand eight, the department shall submit a report to the governor and legislature regarding bluestone mining exploration in the state. Such report shall list the sites, including locations of sites, and detrimental environmental impacts, if any, an assessment as to the degree to which the adoption of this subdivision benefits the environment, as well as an assessment of the enforcement activities undertaken against individuals authorized pursuant to this subdivision.

13. The rules and regulations adopted by the department to implement this title and the provisions of article seventy and rules and regulations adopted thereunder shall govern permit applications, renewals, modifications, suspensions and revocations under this title.

Environmental Conservation Law

Article 23-Title 27- NEW YORK STATE MINED LAND RECLAMATION LAW

§ 23-2703. Declaration of policy.

1. The legislature hereby declares that it is the policy of this state to foster and encourage the development of an economically sound and stable mining industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices. The legislature further declares it to be the policy of this state to provide for the management and planning for the use of these non-renewable natural resources and to provide, in conjunction with such mining operations, for reclamation of affected lands; to encourage productive use including but not restricted to the planting of forests, the planting of crops for harvest, the seeding of grass and legumes for grazing purposes, the protection and enhancement of wildlife and aquatic resources, the establishment of recreational, home, commercial, and industrial sites; to provide for the conservation, development, utilization, management and appropriate use of all the natural resources of such areas for compatible multiple purposes; to prevent pollution; to protect and perpetuate the taxable value of property; to protect the health, safety and general welfare of the people, as well as the natural beauty and aesthetic values in the affected areas of the state.

2. For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from:

a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or

b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts. Where mining is designated a permissible use in a zoning district and allowed by special use permit, conditions placed on such special use permits shall be limited to the following:

(i) ingress and egress to public thoroughfares controlled by the local government;

(ii) routing of mineral transport vehicles on roads controlled by the local government;

(iii) requirements and conditions as specified in the permit issued by the department under this title concerning setback from property boundaries and public thoroughfare rights-of-way natural or man-made barriers to restrict access, if required, dust control and hours of operation, when such requirements and conditions are established pursuant to subdivision three of section 23-2711 of this title;

(iv) enforcement of reclamation requirements contained in mined land reclamation permits issued by the state; or c. enacting or enforcing local laws or ordinances regulating mining or the reclamation of mines not required to be permitted by the state.

3. No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within counties with a population of one million or more which draws its primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined.